Fundamentals of Software Licensing

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FUNDAMENTALS OF SOFTWARE LICENSING

Eighth Annual Advanced Licensing Institute
Franklin Pierce Law Center
Concord, New Hampshire

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General Counsel
CSC Intelicom, Inc.
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I. INTRODUCTION

This outline addresses some of the fundamental issues that both licensors and licensees may confront in the negotiation of a software license. It focuses primarily on non-mass market agreements, as most "retail" or mass market "off-the-shelf" software is governed by non-negotiable "shrinkwrap" licenses. Nonetheless, the principles of software licensing are the same for both shrinkwrapped and custom-developed software. For a brief overview of a few of the significant issues involved in software licensing, see Davidson, Avoiding Pitfalls and Allocating Risk in Major Software Development and Acquisition Contracts, 14 Computer Law. 12 (May 1997).

The structure and context of every software license is different depending on the needs of the parties. While this outline discusses some of the most important issues and includes several forms, D. C. Toedt III, Esq. in conjunction with the Computer Programs Committee of the Information Division of the Section of Intellectual Property Law of the American Bar Association created a model license which, although voluminous, is quite thorough and educational. It is available by contacting him at (713) 787-1408. For a detailed discussion of this model license, see Toedt, The Model Software License Provisions: Precursor to a Gap-Filling Uniform License Statute, 18 Rutgers Computer & Tech. L.J. 521 (1992).

II. LICENSE VS. SALE

A. The First Sale Doctrine

The theory of the First Sale Doctrine under the Copyright Act 17 U.S.C. 101 et. seq. is that an individual who *purchases* an authorized copy may use and resell that particular copy free of any restraint by the copyright owner. 17 U.S.C. §109(a) (emphasis supplied). See Bobbs Merrill Co. v. Straus, 210 U.S. 339 (1908). A copyright owner's authorized sale of an item "exhausts" his exclusive distribution and display rights, such that the purchaser may use, resell or display that item free of any claim of infringement. 17 U.S.C. §109(a).[2] In short, the First Sale Doctrine addresses a *copy owner's rights* as opposed to the *copyright owner's* rights.

The First Sale Doctrine does not apply, however, to the separate exclusive rights of

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[1] The author would like to thank Eric Terpening and Stacey Stepek for their insightful comments and help in preparing this outline. The opinions set forth in this outline are those of the author only and do not represent the opinions of Computer Sciences Corporation or CSC Intelicom, Inc.

[2] Section 109(a) codifies the First Sale Doctrine, which provides "Notwithstanding the provisions of Section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of that copy or phonorecord."

copying, derivative work preparation and public display or performance. See 17 U.S.C. §106 (which sets forth five separate and distinct rights); See, e.g., Red Baron-Franklin Park, Inc. v. Taito Corp., 883 F. 2d 275, 280 (4th Cir. 1989) and Columbia Pictures Industries, Inc., v. Aveco, Inc., 800 F. 2d 59, 64 (3d Cir. 1986). See also 17 U.S.C. §109(e), (which as a response to Red Baron, provides a video game performance and display exception to the First Sale Doctrine). The First Sale Doctrine only applies to the *copyright owner's* exclusive rights of distribution and public display in its copyrighted work which are "automatically" conveyed to the buyer or the copy owner. 17 U.S.C. §109(a) and (c). Section 106(3) provides that the copyright owner has the exclusive right to distribute and to authorize distribution of copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending. Section 106(4) and (5) give the copyright owner the exclusive right to perform or display the work publicly if it is literary, musical, dramatic, or choreographic or if it is a pantomime, motion picture, or other audiovisual work. Section 106(6) gives the copyright owner the exclusive right to perform the work publicly by means of a digital audio transmission if the work is a sound recording.

The First Sale Doctrine is limited, however, in its applicability to copyrighted works such as computer software when software is licensed. 17 U.S.C. §109(b). See Allen-Myland, Inc. v. International Business Mach. Corp., 746 F. Supp. 520 (E.D. Pa. 1990) (First Sale Doctrine does not apply to computer programs). For computer software, Section 109(b) limits the First Sale Doctrine and the rights of copy owners in three ways. First, adaptations may not be transferred without permission of the copyright owner. Second, copies authorized to be made under Section 117 may be transferred without permission of the copyright owner only as part of a transfer of all rights in the underlying program. The distribution right conveyed to the buyer does not, for example, include the right to make further copies for resale. Third, it provides that the owner of a copy of computer software cannot lend or rent that copy to third parties without permission from the copyright owner. See Microsoft v. Harmony Computers & Electronics, Inc., 846 F. Supp. 208 (E.D.N.Y. 1994) (unauthorized distributor of a copy of software not entitled to protection under First Sale Doctrine because owner licensed not sold software to distributor's supplier); Triad Systems Corp. v. Southeastern Express Co., 64 F. 3d 1330 (9th Cir. 1995), cert. denied, 516 U.S. 1145 (1996) (software sold to customers is subject to 17 U.S.C. §117 protection while copies that are licensed are not).

Known as The Computer Software Rentals Amendments Act of 1990, Section 109(b) also addresses computer software rentals. It provides that, unless authorized by the owner of the copyright in a software program (including any tape, disk, or other medium embodying such program), no person in possession of a particular copy of software program (including any tape, disk, or other medium embodying such program) may, for the purposes of direct or indirect commercial advantage, dispose of or authorize the disposal of the possession of that computer software (including any tape, disk, or other medium embodying such program) by rental, lease, or lending, or any similar act. The transfer of possession of a lawfully-made copy of computer software by a nonprofit educational institution to another nonprofit education institution, or to its faculty, staff, and students is not considered to constitute the rental, lease, or lending for direct or indirect commercial purposes under Section 109(b). See generally, Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F. 2d 91, 96 n. 7 (3d Cir. 1991).

Section 109(d) further limits the scope of application of the First Sale Doctrine by providing that, unless authorized by the copyright owner, the provisions of 17 U.S.C. §109 (a) and (c) do not extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan or otherwise, without also acquiring ownership of it.

B. Transfer of Intellectual Property Rights.

There are two means of conveying intellectual property rights: assignments (17 U.S.C. §101) and licenses (17 U.S.C. §201(d)(2)). Assignments and licenses apply to *intangible* property rights while a "sale" applies to the transfer of *tangible* property. 17 U.S.C. §202; see also Chamberlain v. Cocola Assoc., 958 F.2d 282 (9th Cir. 1992). The First Sale Doctrine, which applies to the sale of a *copy* of software, provides that such sale conveys certain rights to the buyer in the purchased software, namely the buyer's right to resell the software. 17 U.S.C. §109(a). This right is in derogation of the overall copyright and it is also "automatically" transferred to a new buyer if the software is resold. 17 U.S.C. §117. Typically, the sale of software is not a "sale" within the meaning of Section 109, but rather a license accompanied by a license agreement setting forth the rights that will or will not be conveyed to the buyer (which may be greater or lesser than would be conveyed under the sale of a copy).

An assignment is an absolute conveyance of the intangible rights and equates to a "sale," with the caveat that a sale typically only conveys the absolute right of distribution and, subject to certain exceptions, the right to display and use. MacLean Assoc., Inc. v. William M. Mercer-Meidinger-Hanson, Inc., 952 F.2d 769 (3d Cir. 1991). A "sale" does not include, for example, the rights of performance or preparation of derivative works rights.

Similar to an assignment, an exclusive license, even if limited in time or place of effect, is a "transfer of copyright ownership." 17 U.S.C. §201(d)(2). Under the Copyright Act, transfer of an exclusive license is considered to be a conveyance of copyright ownership to the extent granted in the license. 17 U.S.C. §201(d)(2).

In short, entering into a license agreement in which the licensor reserves title is not a "sale" for purposes of the Copyright Act. For example, a licensee cannot distribute the licensor's software without the licensor's authorization, because the licensor is still the owner of the intellectual property. Relational Design & Technology, Inc. v. Brock, 1993 WL 191323 (D. Kan. 1993).

III. GRANT OF LICENSE

Unless otherwise indicated, all Section references refer to the corresponding sections of the Annotated Master Software License and Services Agreement in Section IX.A

A. Terminology of the License Grant (§3.1)

A typical grant of a license contains the following wording:

"Subject to the provisions of this Agreement, Licensor grants to Licensee a perpetual, personal, non-assignable, non-transferable, non-exclusive object code license to use the Software solely for Licensee's internal business purposes in the United States."

Each of the terms set forth in the above license grant has a specific meaning which fundamentally impacts the rights of the licensor and licensee. Set forth below is a brief discussion of these terms.

1. Definition of the "Licensee"

The definition of the "Licensee" is important for both financial and legal reasons. Financially, the broader the definition of the "Licensee", the more entities or individuals who will have access to and use of the licensed software, thus reducing the potential license fees a licensor may receive. Some license agreements allow "affiliates" of the licensee to utilize the licensed software as well. Many such agreements define "affiliates" to include only the licensee's parent company and those subsidiaries at least 51% owned by the licensee or its parent in order to limit the use of the licensed software.

It is also important to distinguish between allowing the "use" of the licensed software by a third party and allowing the licensee to "assign" the license to another entity. With assignment, the assignor relinquishes its license and right to utilize the software. The assignor's right to use the licensed software is transferred to the assignee, preventing both entities from using the software at the same time. Allowing both the licensee and its affiliates to utilize the licensed software may allow numerous distinct legal entities to utilize the software simultaneously, subject to any restrictions on the number of users or other constraints in the license agreement. Having such multiple users for a set license fee will likely limit the licensor's revenues.

At the same time, legally, the definition of the "Licensee" should be restricted to ensure compliance with United States export laws. If a licensee and its affiliates are granted simultaneous use of the licensed software, or the licensee has the unencumbered right to assign the license, and/or use is not restricted to the United States, the licensee's or its affiliate's use of the software outside of the United States may violate the United States export laws if the appropriate export licenses have not been obtained. Furthermore, use of the licensed software outside of the United States may be governed by the laws of a foreign jurisdiction with which the licensor is unfamiliar, and which may not afford the licensor the same benefits and protections as the laws of the United States.

2. <u>**Term of License**</u> **(§5)**

The term of the license should begin on delivery of the licensed software, rather than acceptance of the licensed software, otherwise the licensee will be under no legal obligation or restriction as to the use of the software prior to acceptance. While many licensees are concerned with the concept of the license beginning upon delivery, the licensee is nevertheless protected as beginning the term of the license upon delivery does not indicate acceptance of the software or an obligation of the licensee to pay for the license prior to acceptance of the licensed software.

While shrinkwrapped software licenses traditionally have had a perpetual term, other software licenses have had a more limited term, i.e., five or ten years. Today, the distinction is less important as most software is obsolete within ten years, and licensors routinely grant perpetual licenses in recognition of the rapid obsolescence of software in general. <u>But see</u> <u>Apple Computer, Inc. v. Microsoft Corporation</u>, 35 F. 3d 1435 (9th Cir. 1994) (in 1985, Apple granted, in effect, a perpetual license of its Windows® visual displays to Microsoft).

If the license fails to state a term, under the Copyright Act, the term of the license will automatically be 35 years from the date of its execution. After the 35-year period expires, the license is terminable at will by the licensor for a period of five years. 17 U.S.C. §203(3). The licensor must give the licensee, however, advance written notice of at least two but not more than ten years before such termination. 17 U.S.C. §203(a)(4)(A). Material breach of the license will also give rise to a right of recission which allows the non-breaching party to terminate the license. <u>Costello Publishing Co. v. Potell</u>, 670 F. 2d. 1035 (D.C. Cir. 1981); 3 Melvin B. Nimmer and David Nimmer, <u>Nimmer on Copyright</u>, §10.15[A] at 112 (1990). If the license is not terminated, it will continue in effect for the remaining term of the copyright which protects the software being licensed (17 U.S.C. §203(b)(6)). Assuming it is an anonymous work or work made for hire, the term of the copyright will be either 75 years from the date of the software's first publication, or 100 years from the date of the software's creation, whichever expires first. 17 U.S.C. §302(c). Under §2-309(3) of the Uniform Commercial Code ("UCC"), however, a contract (license) without a fixed term is terminable at will with reasonable notice to the non-terminating party.

3. <u>**Use Restrictions**</u> **(§3.1)**

Most licensors place restrictions on the licensee as to how the licensed software may be used. The principle reason is financial, causing most restrictions to be strictly an element of price.

(a) Internal Use

Most license grants include the term "personal" and state that the licensed software may be used for the licensee's "internal business purposes only." The primary objective of this wording is to limit the licensee's use of the licensed software to the licensee's specific business needs, and to prevent the licensee from using the software to operate a service bureau or data processing center, or from using the software in outsourcing. It is prudent to state this clearly in the license agreement to avoid a subsequent dispute over the interpretation of the license grant. For a greater discussion of the issues involved, see Marenberg & Brown, "Scope of Use" Restrictions in Software Licenses, 10 Computer Law. 1 (Dec. 1993).

(b) Non-Exclusive/Exclusive Use

The term "non-exclusive" is necessary to indicate that the licensor reserves the right to license the same software to other licensees. This is important as some licensees request exclusive use of the licensed software if they believe the software provides them with a competitive advantage. This is especially likely if the licensee paid for the development of the software or educated the licensor about the need for such software in a particular industry. A non-exclusive licensee lacks the ability to sue or be joined in a suit. Ortho Pharmaceutical Corp. v. Genetics Institute, Inc. and Amgen, Inc., 52 F. 3d 1026 (Fed. Cir.), cert. denied, 516 U.S. 907 (1995) (citing Overman Cushion Tire Co. v. Goodyear Tire and Rubber Co., 59 F. 2d 998, cert. denied, 287 U.S. 651 (1932) (nonexclusive licensee has no right to sue or be jointed in a suit)); and Philadelphia Brief Case Co. v. Specialty Leather Products Co., Inc., 145 F. Supp. 425, 429-30 (D.N.J. 1956) (contract clause can not give right to sue where licensee would otherwise have no such right). Furthermore, the licensor can not grant such a right where one does not already exist.

On occasion a licensor may grant an exclusive license. The exclusivity may go to a geographic region, a specific industry, a set time period or the use of the entire product itself. Exclusive licenses are uncommon in that they prevent the licensor from relicensing the software and receiving additional license fees. Under the Copyright Act, exclusive licenses must be in writing. 17 U.S.C. §101; see generally I.A.E., Inc. v. Sharer, 74 F. 3d 768 (7th Cir. 1996) (a non-exclusive copyright license is granted when (1) the licensee requests creation of a work, (2) the creator/licensor delivers the work to the licensee, and (3) the licensor intends the licensee to copy and distribute the work). Also note that an oral exclusive license creates an implied non-exclusive license. 17 U.S.C. §204(a); Gracen v. Bradford Exchange, 698 F.2d 300, 303 (7th Cir. 1983).

(c) Creation of Derivative Works and the Prohibition of Reverse Engineering (§3.4)

"Disassembly" or "reverse engineering" software requires making copies of the software program itself and creating "derivative works" in the process based upon the original software. Section 101 of the Copyright Act defines a "derivative work" as

> a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaboration, or other modifications, which, as a whole, represent an original work of authorship is a "derivative work."

Section 106(2) of the Copyright Act prohibits the creation of derivative works without the copyright owner's permission.

In certain situations, the alteration of an original work may create a copyrightable derivative work. To receive copyright protection, a work must be sufficiently original, requiring more than a "modicum of originality." Waldman Pub. Corp. v. Landoll, Inc., 43 F. 3d 775, 782 (2d Cir. 1994); Simon v. Birraporetti's Restaurants, Inc., 720 F. Supp. 85 (S. D. Tex. 1989). A derivative work must be substantially different from the underlying work to be copyrightable, Cracen v. Bradford Exchange, 698 F. 2d 300 (7th Cir. 1983) but yet substantially copied from prior work. Apple Computer, Inc. v. Microsoft Corp., 759 F. Supp. 1444 (N. D. Cal. 1991), on reconsideration, 779 F. Supp. 133, aff'd, 35 F. 3d 1435 (9th Cir. 1994); Litchfield v. Spielberg, 736 F. 2d 1352 (9th Cir.), cert. denied 470 U.S. 1052 (1984). The copyright applies only to the new work contributed by the author and not the pre-existing material. The new copyright does not imply any exclusive rights to the pre-existing copyright. 17 U.S.C. §103(b); Moore Pub., Inc. v. Big Sky Marketing, Inc., 756 F. Supp. 1371 (D. Idaho 1990). Further, if a derivative work is created using pre-existing copyrighted material, copyright protection will not extend to any part of the work in which such pre-existing copyrighted material has been used unlawfully. 17 U.S.C. §103(a).

Most licensors are very concerned with the licensee reverse engineering the object code provided to the licensee under its license. To alleviate this concern, most licensors include a clause in their licenses stating that the licensee is prohibited from reverse engineering, decompiling or recompiling the licensed software. This prohibition is not absolute, however, as several courts have ruled that a licensee who makes an intermediate copy of software to the extent necessary to determine how such software works in order to interface the licensee's or another party's proprietary software to the licensor's software may fall under the "Fair Use" doctrine of the Copyright Act. See Sega Enterprises, Ltd. v. Accolade, Inc., 977 F. 2d 1510 (9th Cir. 1992); Atari Games Corp. v. Nintendo of America, Inc. 975 F. 2d 832 (Fed. Cir. 1992). Further, a licensee may modify a software program in order to make the program operate more efficiently for the licensee's internal use, including creating a derivative work. Aymes v. Bonelli, 47 F. 3d 23 (2d Cir. 1995). While these opinions have not been fully explored, it is clear they will not permit the wholesale disassembly of a software program. These holdings are similar to the European Community's ("EC") directive that licensees may reverse engineer software to the extent necessary to create interfaces to the licensor's software. See E.C. Directive 91/250.

The courts have justified these decisions under the "Fair Use" doctrine of copyright law. Under the Fair Use doctrine, use of a copyrighted work, including use by reproduction of copies for purposes such as criticism, comment, teaching, scholarship or research, is not an infringement of the owner's copyright. 17 U.S.C. §107 (1994). Factors to be used in determining fair use include the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the whole and the effect of the use upon the potential market for or value of the copyrighted work. Id.

At the same time, however, an entity is not allowed to reverse engineer software for the purpose of directly competing with the owners of the software. See Triad Systems Corp. v. Southeastern Express Co., 64 F. 3d 1330 (9th Cir. 1995), cert. denied, 516 U.S. 1145 (1996); MAI Systems Corp. v. Peak Computer, Inc., 991 F. 2d 511 (9th Cir. 1993), cert denied, 510 U.S. 1033 (1994).

It is important to note that a copyright does not provide the copyright holder rights similar to those held by patent owners. A copyright grants the holder the exclusive right to duplicate the copyrighted material and make derivative works. 17 U.S.C. §106(1), (2); CMAX/Cleveland, Inc. v. UCR, Inc., 804 F. Supp. 337 (M.D. Ga. 1992). A patent grants the holder the right to prevent others using, making or selling the patented subject matter. 35 U.S.C. § 154 (1994). A copyright does not protect against another entity creating similar or even identical software independent from the copyrighted work. For example, it does not protect against the creation of similar screen displays, icons, the method of operation of the software or the key commands. See e.g., Lotus Development Corporation v. Borland International, Inc., 49 F. 3d 807, 815-18 (1st Cir. 1995), aff'd per curiam, 516 U.S. 233 (1996) (menu-command hierarchy was an uncopyrightable method of operation) and Engineering Dynamics, Inc. v. Structural Software, Inc., 26 F. 3d 1335, 1342-43 (5th Cir. 1994) (user interface, input formats and output reports are protectable); but see Whelen v. Jaslow, 797

F. 2d 1222 (3d Cir. 1986) (concept of program's content not copyrightable but all functions used for implementing the program are protectable).

Although common law copyrights arise as a matter of law without registration, an author must affirmatively apply for federal copyright protection. Further, a U.S. copyright holder must register the work before bringing an infringement action. 17 U.S.C. § 411(a) (1994). Owners of copyrights registered within three months of publication are entitled to receive attorney's fees and statutory damages if they prevail in litigation. 17 U.S.C. § 412 (1994). Registering a work within five years of first publication constitutes prima facie evidence of the validity of the copyright and the facts stated in the certificate. 17 U.S.C. § 410 (c) (1994).

A copyright holder does not have to affirmatively prove actual copying. Evidence of copying can be inferred by establishing the defendant's access to the program and substantial similarities to the protectable expressions. Bateman v. Mnemonics, Inc., 79 F. 3d 1532, 1541 (11th Cir. 1996).

For a general discussion, see Zimmerman, Baystate: Technical Interfaces Not Copyrightable - On to the First Circuit, 14 Computer Law. 9 (April 1997).

(d) Other Restrictions

Other common limitations include limiting use of the software to a particular central processing unit ("CPU"), to one class of computer only, or to a specific geographic site (§§8.2, 8.3). This allows the licensor to charge the licensee a transfer or upgrade fee if the licensee wants to change the CPU, the class of machine, or the site where the software is utilized. See Equinox Software Sys., Inc. v. Airgas, Inc., 1996 WL 278841 (E.D. Pa. May 23, 1996) (soft copies made in violation of license restricting use on a particular CPU constituted copyright infringement).

One exception is the licensee's right to make one backup or archival copy or transfer the software to an alternative back up site for a limited period of time (60-90 days) in the case of a catastrophic failure. (§13.2). From the licensor's perspective, the license should clearly state that the licensee can not make more than one copy beyond a backup copy for archival purposes as Section 117 of the Copyright Act grants the purchaser of a copy of software the right to make archival copies and adapt the software to operate on its computer. Note, however, that if the licensee is not a purchaser of the software, such copying may constitute copyright infringement. See DSC Communications Corp. v. DGI Technologies, Inc., 81 F. 3d 597 (5th Cir. 1996) (downloading software to hard disk by licensee for compatibility modifications was infringement where licensee had not purchased software).

Some licensors (e.g., Oracle) base their license fee on the application involved (i.e., Oracle often grants a license for a specific software application/program only). Other licensors restrict the number of users who can access their software at any one time. This type of restriction is common in a client-server, network environment.

4. **Assignability/Transferability (§2.2)**

Depending on the type of license granted, a licensee may or may not be able to assign its license. In general, a nonexclusive software license is not assignable unless the license agreement expressly provides that it may be assigned (i.e., transfer rights must be specifically granted to the licensee). See, e.g., SQL Solutions, Inc. v. Oracle Corp., 1991 WL 626458 (N.D. Cal. 1991); Harris v. Emus Records Corp., 734 F.2d 1329 (9th Cir. 1984) (as to copyright license). See also, Verson Corp. v. Verson International Group PLC, 899 F. Supp. 358 (N.D. Ill. 1995) (as to patent license). A nonexclusive license is merely a contractual promise not to sue the licensee. The promise is personal to the licensee and cannot be transferred. Raymond T. Nimmer, The Law of Computer Technology §7.09 (revised ed.). Under general contract law, however, unless otherwise agreed, contract rights are freely assignable so long as such assignment does not materially change the duties of the parties. UCC §2-210.

On the other hand, if an exclusive license closely resembles an assignment of the underlying intellectual property, the license generally will be assignable by the exclusive licensee, unless the license agreement expressly provides otherwise. See In Re Sentry Data, Inc., 87 B.R. 943 (Bankr. N.D. Ill. 1988). An exclusive license that does not resemble an assignment, e.g., an exclusive license to market the software, is arguably a nonassignable license. Id. Therefore, an exclusive license may convey only certain rights to the licensee, which is similar to the buyer's rights to resell and use the software under the First Sale Doctrine. 17 U.S.C. §117. An exclusive licensee is considered to be a copyright owner only to the extent of the exclusive rights granted by the license. Id.

Regardless, from the licensor's standpoint, the license should contain language that the license is not transferable by merger, consolidation, operation of law or otherwise. This will allow the licensor to charge a transition fee if the licensee is acquired by another company or in the case of an outsourcing transaction. If the license agreement does not contain explicit language defining assignment to include mergers, consolidations and operation of law, a court may not consider such actions as constituting an assignment because the assignment arose through the operation of law and not a formal written agreement. (A related issue in outsourcing is allowing third party contractors to access and maintain the software. See Sections III.C.8 and IV. below for a discussion of this issue). Furthermore, language that makes any attempted assignment or an assignment without the licensor's consent void is necessary to prevent the transfer.

Without such language, a court may allow the assignment to be concluded and award the licensor monetary damages. See Restatement (Second) of Contracts §322(2) and comment b (1979). This area of the law is uncertain, however, as discussed above copyright law would appear to conflict with general contract law in this matter.

5. **Geographic Restrictions** (§3.1)

Most licensors limit the use of the licensed software to a specific country or site, i.e., the United States or "Licensee's Wilmington, Delaware site". Again, limiting location may allow the Licensor to charge an additional license fee for each additional foreign affiliate or user not at the authorized site. The failure to limit the use of the licensed software to a particular country may also give rise to a number of export issues. For example, licensing software to a Mexican company which has a subsidiary or affiliate in Cuba would violate the Trading with the Enemy Act if such software was used in Cuba. Furthermore, the use of such software outside of the United States may be governed by the laws of a foreign jurisdiction with which the licensor is unfamiliar and/or which does not grant the same protections to the licensor as the laws of the United States.

Limitation of geographic scope is closely tied to intellectual property rights indemnification. The intellectual property rights indemnification provision in the license agreement is another important concern. As discussed in Section III.B.3, a domestic licensor should limit the licensor's indemnification to intellectual property infringement of a United States intellectual property right and those of the country in which the licensed software will be used. Failure to include a geographic restriction as to the use of the software may expand the scope of indemnification granted by the licensor.

6. **Object Code and Source Code Licenses** (§3.1)

"Object code" is the binary, machine-readable version of the software. Object code allows the licensee to operate the software but does not enable the licensee to make enhancements or modifications to the software or create derivative works. "Source code" are those human-readable statements in a computer language which, when processed by a compiler, assembler or interpreter, become executable by a computer. Source code allows the licensee to maintain the software, to make modifications and enhancements to the software, and to create derivative works. If a licensee purchases a source code license it *theoretically* does not need further assistance from the licensor as the licensee itself has the ability to maintain, as well as to modify and enhance the software, or create derivative works from it. Consequently, most licensors refuse to sell source code licenses. Those that do sell source code licenses usually charge a significant premium for a source code license, over the cost of an object code license.

In granting a source code license, the licensor should restrict the licensee from licensing any derivative works, enhancements, or modifications the licensee creates. It is important to note that derivative works will generally be owned by the copyright owner unless conveyed. 17 U.S.C. §201(d)(2) and §103(a). Finally, the standard limitations on use of the software discussed in Section III.A.3 should be imposed on the licensee.

7. **Irrevocable License (§3.1)**

Licensees often want the term "irrevocable" included in the license grant to ensure that after they accept the software and pay for the license, the licensor has no basis to revoke the license. The term "irrevocable" implies permanency, however, causing concern for licensors. This concern is alleviated by prefacing the license grant with the phrase *"Subject to the provisions of this Agreement . . . ."* This wording conditions any permanency on the licensee meeting the terms of the license, thus eliminating the licensor's concerns.

B. Significant Clauses

1. **Representations and Warranties and Warranty Disclaimer**

(a) Representations and Warranties (**§18.1**)

(i) General

Representations and warranties are not always mutually inclusive and can have different consequences in terms of liability.

A "representation" creates a legal risk that the licensor's sales puffery may lead to a claim of fraud in the inducement. See Restatement (Second) of Torts §§525, 526, and 552C. An action for a fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact. Future promises are contractual and do not constitute fraud. Central On-Line Data Systems v. Filenet Corp., 1996 U.S. App. LEXIS 25261 (6th Cir. 1996).

Damages for such fraud may include the amount paid under the contract minus any benefits obtained; the cost of cover; extra labor expenses; the expense related to obtaining different computer services; the costs associated with installing and removing hardware; program conversion costs; and the costs of equipment maintenance, as well as the risk of the rescission of the license agreement without the necessary legal protections for the licensor. See Applied Data Processing, Inc. v. Burroughs Corp., 394 F. Supp. 504 (D. Conn. 1975) and Clements Auto Co. v. Service Bureau Co., 298 F. Supp. 115 (D. Minn. 1969), aff'd as modified, 444 F.2d 169 (8th Cir. 1971). In such cases the license agreement's merger clause may be voided allowing previously excluded statements to be considered. See Financial Times Publications, Inc. v. Compugraphic Corp., 873 F.2d 936, 943-44 (8th Cir. 1990). Furthermore, at least one court has held that a party may not escape liability for misrepresentation by invoking a contract's limitation of liability clause. Vmark Software, Inc. v. EMC Corp., 642 N.E. 2d 587 (Mass. App. Ct. 1994).

On the other hand, damages for breach of warranty may result in merely a reduction in price, i.e., the difference in value between what was warranted and what was delivered. UCC §2-714(2). A customer may also seek rejection under UCC §2-601 ("the perfect tender rule") or revocation of acceptance under UCC §2-608. In cases where the licensor fails to cure defects, the licensee may recover as much of the price as has been paid. UCC §2-711(1). If the licensor fails to deliver, the licensee may purchase reasonable substitute software and recover the difference between the cost of obtaining the substitute software and the contract price or, alternatively, the licensee may recover damages for non-delivery equal to the difference between the market price and the contract price of the software at the time when the licensee learned of the breach. UCC §§ 2-711(1), 2-713. As such, a licensor should never make representations, only warranties. Most licensees are willing to accept a warranty instead of a representation, and believe one is as good as the other.

A licensor must be careful as to any statement made about its software's performance or capabilities. In the extreme, a misrepresentation may void a contract's limitation of liability. Vmark Software, Inc. v. EMC Corp., 642 N.E. 2d 587 (Ct. App. Mass. 1994). Every breach of contract, however, does not give rise to a cause of action under tort law. A duty under tort law arises from circumstances extraneous to and not constituting elements of the contract, even though it may be related to and dependent on the contract. Bristol-Meyers Squibb, Industrial Division v. Delton-Star, Inc., 620 N.Y.S. 2d 196, 197 (N.Y.A.D. 1994). Consequently, a claim of fraud will not be allowed where the only alleged fraud arises from the breach of the contract. Jackson Heights Medical Group v. Complex Corp., 634 N.Y.S. 2d 721, 722 (1995). In the case of solely economic losses, recovery is limited to contract claims and not tort claims. Transport Corp. of Amer., Inc. v. Internat'l Business Machines Corp., 30 F. 3d 953, 957 (8th Cir. 1994); Huron Tool and Engineering Co. v. Precision Consulting Services, Inc., 532 N.W. 2d 541 (Mich. App. 1995) (fraudulent representations alleged by plaintiff were indistinguishable from terms of contract and warranties, thus plaintiff limited to contractual remedies). See also Word Management Corp. v. AT&T Information Systems, 525 N.Y.S. 2d 433

(1988).

For software licenses, there are a number of "standard" warranties which a licensor should make. A licensor should warrant that it has valid title to the software it is licensing, that it has the right to grant the license including the license to any third party software, and that the software will operate substantially in conformance with the functional specifications and current documentation, as well as that the software is Year 2000 compliant. Licensors should carefully consider any warranty they make as to the software's performance when operated in conjunction with any third party software.

It is also common to warrant that, except as documented, there are no trap doors, time bombs or disabling devices. The failure to do so may create significant problems for the licensee at a later date as some licenses specifically state that the licensor may disable the software in case of a breach. See American Computer Trust Leasing v. Jack Farrell Implement Co., 763 F. Supp. 1473 (D. Minn. 1991), aff'd, 967 F. 2d 1208 (8th Cir. 1992) (license permitted licensor to disable software for licensee's non payment). At the same time, however, a licensor who disables software without contractual authority may be guilty of intentional tort and be liable to punitive damages, see, e.g, Clayton X-Ray Co. v. Professional Systems Corp., 812 S.W. 2d 565 (Mo. Ct. App. 1991), or potentially in violation of the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. §1030. See North Texas Preventative Imaging, L.L.C. v. Eisenberg, 1996 U.S. Dist. LEXIS 19990 (C.D. Cal. 1996) (surreptitious inclusion of time bomb could lead to violation of CFAA).

Some licensors may also give a "no knowledge" warranty with respect to viruses. See generally, Robbins, Vendor Liability for Computer Viruses and Undisclosed Disabling Devices in Software, 10 Computer Law. 20 (July 1993).

The licensor may also warrant that all services will be rendered in a professional and workmanlike manner. This obligation also arises under the common law. See, e.g., Marcus v. Lee S. Wilbur & Co., 588 A.2d 757 (Me. 1991). For software to be used outside the United States, many licensees require the licensor to certify that the licensor is ISO 9000 compliant, or that the software will be developed in compliance with ISO 9000. It is also customary for the licensor to state that the operation of the licensed software will not be uninterrupted or error free. **(§18.2).**

Licensors should avoid making statements about future performance as they may unintentionally create an express warranty. In L.S. Heath & Son, Inc. v. AT&T Info. Sys., 9 F. 3d 561 (7th Cir. 1993), the court held that a statement that a computer system could meet the buyer's needs, induced the buyer to purchase the system, creating an express warranty and becoming part of the bargain. Id at 570.

For a general discussion of computer warranties, see Feldman, Warranties and Computer Services: Past, Present and Future, 10 Computer Law. 1 (1993).

(ii) Year 2000 Warranties

Smart licensees also require that licensor a warrant that there will be no Year 2000 problems with the licensor's software. While licensors will want to think carefully before granting any such warranties, the failure to give such a warranty would almost be commercially unreasonable. Licensees should be very cautious about any licensor unwilling to make such warranties.

w) General

The majority of software programs in use today were programmed to accept only the last two digits of the year in the date fields. In 2000, when users enter "00", most programs will be unable to assimilate this information, which could lead to a complete failure of any time-sensitive programs. This Year 2000 issue does not affect the majority of those programs that use relational databases, as relational databases automatically use a four-digit year. One source has estimated this issue to be a $300 to $600 billion problem. This issue is a major problem, not only for licensees but potentially a huge liability for licensors.

x) Potential Claims.

A licensee may bring a potential claim under contract and tort theories. Contract claims will be based most likely on the breach of an express representation or warranty, or the breach of an implied warranty. Implied warranties include the warranties of merchantability (fitness for an ordinary purpose) and fitness for a particular purpose (made known to the licensor).

While a claim may be brought under a tort theory, it is unlikely that a licensee would be able to prevail due to the

Economic Loss Doctrine. Under this doctrine, the majority of courts hold that in contractual contexts where there is no physical injury to persons or property, economic losses are not recoverable in tort. See, generally, East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986). See also, Alfred N. Koplin & Co. v. Chrysler Corp., 49 Ill. App. 3d 194, 364 N. E. 2d 100 (1977); Marcil v. John Deere Industrial Equip. Co., 9 Mass. App. Ct. 625, 403 N.E. 2d 430 (1980); Martin v. Julius Dierck Equip. Co., 43 N.Y. 2d 583, 403 N.Y.S. 2d 185, 374 N.E. 2d 97 (1978) (breach of warranty is appropriate cause of action for plaintiff seeking benefit of contractual bargain; negligence or products liability for violation of an obligation imposed by law, not by contract); Tort Theories in Computer Litigation, 38 Rec. Ass'n. Bar N.Y. 426, 430, 436-40 (1983). As to computer cases, see, S.A.I., Inc. v. General Electric Railcar Services Corp., 935 F. Supp 1150 (D. Kan. 1996); Chesapeake Petroleum & Supply Co., Inc. v. Burroughs Corp., 6 CLSR 768 (Md. Cir. Ct. Montgomery Co. 1977), aff'd, 384 A. 2d 734, (Md. App. 1978); Harry N. Abrams, Inc. v. Data General Corp., No. 79 Civ. 5617 (S.D.N.Y. Dec. 15, 1980). But see, Cova v. Harley Davidson Motor Co., 26 Mich. App. 602, 182 N.W. 2d 800 (1970); Air Products & Chemicals, Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 206 N.W. 2d 414 (1973).

y) Contractual Protection

A licensor may potentially expose itself to liability by making an inadvertent express warranty in a "turnkey system," a maintenance agreement or a modification, update, enhancement or extension of its existing license agreement. Such actions may also extend the statute of limitations or potentially contain an implied warranty.

The greatest protection for a licensor is to avoid making any express warranties. A general disclaimer, while providing protection, however, will not limit liability for breach of an express warranty. Furthermore, a disclaimer of an warranty is invalid if it is unconscionable or if the customer's remaining remedy fails of its essential purpose. UCC §2-719(2); UCC §2-302.

The applicable statute of limitations also offers potential protection to a licensor. Most statute of limitations run four or less years, thus, most licensors of software licensed prior to

1996 are protected for problems arising in the year 2000 or beyond. See, e.g., UCC §2-725 and Section III B 4(c) below.

z) Going Forward.

All licensees should include a Year 2000 warranty in their license agreements. Several examples are attached to this outline as Section IX G. Licensees should carefully review and, if possible, extend the statute of limitations contained in their license agreement. Finally, all licensees should review their existing licenses to determine their potential liability, if any. See the model licensor surveys attached hereto as Section IX H for an example of surveys undertaken by licensees to ascertain their potential liability.

Licensors should disclaim all Year 2000 warranties if their software is not compliant. To that end, licensors should ensure now that their software will not have a Year 2000 issue. In addition, they should carefully review limitation of liability and disclaimer provisions in their existing license agreements to ensure they are protected. Finally, all licensors should conduct an audit of their existing licenses to determine the extent of their liability, if any. This is especially important if the licensor has provided "turn key" solutions. See the model licensor surveys attached hereto as Section IX H for an example of a surveys undertaken by licensees to ascertain their potential liability.

For a more in depth discussion, see Honig and Grossman, The Cost of the Millenium, 12 *Corp. Couns. Q.* 41 (1996); Beware the Year 2000: Defusing a Software Time Bomb, 11 *Corp. Couns.* 1 (Oct. 1996); Jinnett, Legal Issues Concerning the "Millenium Bug," 13 Computer Law. 16 (Dec. 1996). See also the State of Minnesota's web page at http://www.state.mn.us/ebranch/admin/ipo/2000/2000.html and BNA's Year 2000 Law Report.

(b) Disclaimer of Warranties (§18.4)

(i) *In General*

As permitted under UCC §2-316, the licensor should disclaim all warranties except those expressly made in the license agreement. If the licensor does not disclaim all other warranties, under UCC §§2-313, 314 and 315 the licensor would be potentially liable for the failure of the licensed software to be merchantable or fit for the purpose for which it is intended by the licensee. Section 2-316(2) of the UCC requires that any warranty disclaimers related to merchantability must mention the word merchantability in writing and it must be conspicuous, while those relating to fitness for a particular purpose must be in writing and conspicuous.

In any license agreement, it is also important to include a provision granting the licensee a monetary refund if a "repair or replace" remedy fails of its essential purpose. Such remedies should be stated to be exclusive. Liability for special, incidental and consequential damages should also be excluded. See UCC § 2-719. If a court finds that the licensor's warranty "failed of its essential purpose" (i.e., the licensor did not provide the licensee with a viable remedy), some courts will void the licensee's contractually agreed-to exclusion of consequential damages, potentially creating unlimited liability on the licensor's behalf. See UCC §2-719(2) and Section III.B.4.(b) below.

(ii) *Magnuson-Moss*

If the software is to be supplied to consumers who will utilize the software for personal, family or household purposes, and the license contains any written warranties, the supplier will have to comply with the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (the "Act"). 15 U.S.C. §2301 et seq; 16 C.F.R. §701. The Act does not apply if the supplier does not make any express warranties.

The Act broadly defines warranties to include any written affirmations of fact or written promises made in connection with the sale which relate to the nature of the workmanship and which affirm or promise that the material or workmanship is defect free or will meet a specified level of performance over a specified period of time. 15 U.S.C. §2301(6)(A). It also includes any written undertakings to repair, replace, refund the license or take other corrective actions if the software fails to meet certain stated functionality. 15 U.S.C. §2301(6)(B). Functional specifications or a right to return the software are not considered warranties under the Act. The Act requires full and conspicuous disclosure of a warranty's terms and conditions in simple and readily-understood language. Furthermore, the Act lists thirteen items whose inclusion may be required by Federal Trade Commission rules. 15 U.S.C. §2302 (1996).

Under the Act, certain consumer product warranties made in writing must clearly and conspicuously designate the warranty as either a "limited warranty," i.e., one that does not meet federal minimum standards set forth in Section 2304 of the Act, or a "full warranty," i.e., one that meets minimum federal standards set forth in Section 2304 of the Act. 15 U.S.C. §2303 (1996). If a full warranty is made, the supplier must correct defects within a reasonable time and without charge and may not limit the duration of implied warranties. Further, after a reasonable number of attempts to remedy a defect, the consumer may elect to receive a refund or replacement. 15 U.S.C. §2304 (1996).

In any case, the Act prohibits a supplier from disclaiming or modifying the warranties of merchantability and fitness for the purpose intended if the supplier makes a written warranty as defined under the Act, or the supplier enters into a service contract with the consumer within 90 days of the date of sale. 15 U.S.C. §2308 (1996). In addition, the Act only allows the supplier to limit the duration of these implied warranties to "the duration of a written warranty of reasonable duration." 15 U.S.C. §2308(b) (1996).

It is believed the Act applies only to the physical media on which software resides, as opposed to the software program itself, although there has been no judicial decision on this issue as of this writing. Nevertheless, written warranties as to the workings of the software itself may be covered and thus should be avoided. Moreover, warranties as to turnkey systems may fall under the Act, in which case both hardware and software would be covered as a single product. Thus, the careful licensor of software to be licensed to consumers should make no written warranties and should not provide service contracts which become effective less than 91 days from the date of sale.

For a more detailed discussion on the effects of representations and warranties on software licensing, see Dutton, Warranties, Time-Bombs and Other Risk Allocation Issues, 69 Com. L. Adviser 69-102 (Sept. 1993); Friedman and Hildebrand, Computer Litigation: A Buyer's Theories of Liability, 4 Computer Law. 34 (Dec. 1987); Philips, When Software Fails: Emerging Standards of Vendor Liability Under the Uniform Commercial Code, 50 Bus. Law. 151 (1994). See also, Hammond, Limiting and Dealing with Liability in Software Controls, 9 Computer Law. 22 (June 1992).

(c) Length of Warranty **(§18.1)**

The length of the warranty period for the licensed software is an element of price. Industry standard is to provide a 60- or 90-day warranty effective on the date of delivery or date of acceptance of the software. It is important to recognize when the warranty begins. Many licensors state that the warranty begins on the date of installation or shipment. This is potentially troublesome for the licensee as the warranty may expire prior to acceptance and thus should not be agreed to by the licensee. The equitable solution is to have the warranty run from the date of acceptance. If the licensee requires a warranty longer than the standard warranty offered by the licensor, the licensor can provide one for an increased price. Generally, 12 months of maintenance is priced at an amount equal to 15% to 18% of the license fee. Some licensors include the first year's maintenance in the initial license fee.

Licensors must be careful to limit the length of any warranty they give. Many licensees request a one-year warranty. This creates a hidden risk for the licensor as, during the warranty period, the licensee may terminate the license agreement and seek a refund if the licensor is in material breach. During a maintenance period provided under a properly-worded and separate maintenance agreement, however, the licensee would only receive a refund of the maintenance fee if the licensor was in material breach. Thus, a prudent solution is for the licensor to grant, e.g., a 60-day warranty and ten months free maintenance under a separate maintenance agreement. At least one major software company provides no warranty period and instead gives the licensee a 90-day period in which to evaluate and test the software prior to acceptance. At the end of the 90-day period, the potential licensee can either accept the software "as is" without a warranty, or reject the software without obligation.

2. **General Indemnification** (§15)

General indemnification clauses usually address liability for personal bodily injury and/or property damage caused by one of the parties to a third party, including the other party's employees or agents. Although the right of indemnification may arise under common law, the inclusion of indemnification clauses contractually allocates risk between the parties with respect to such liability. Novak v. BASF Corporation, 869 F. Supp. 113 (N.D.N.Y 1994). Moreover, the failure to include an indemnification provision may limit an injured party's recovery under the laws of those states that have not adopted the doctrine of comparative negligence and still recognize the doctrine of contributory negligence. A correctly-worded indemnification clause will also allow for the recovery of attorney's fees which traditionally are not recoverable in a legal action. The indemnification provisions contained in a license agreement are often mutual for the protection of both parties. The interaction between the license's indemnification clause and the indemnifying party's insurance policies should be closely scrutinized as the waiver of its insurance company's right of subrogation may raise the indemnifying party's insurance rates.

Traditionally, there has been no dollar limit on indemnification for personal bodily injury or personal property damages. In consumer transactions, such limits may be held to be against public policy. UCC§ 2-719(3). As such, the limitation of liability clause discussed in Section III.B.4. below often contains "carve out provisions" excluding the license agreement's indemnification provisions.

3. **Intellectual Property Indemnification (§14)**

Intellectual property indemnification protects a licensee if a third party brings a claim that the licensee's use of the licensed software violates such third party's intellectual property rights. Usually these intellectual property rights are copyright, patent, trademark and trade secrets. Trade secrets create the greatest risk for the licensor as they are not usually recorded in any location where the licensor would be able to determine whether the intellectual property in question infringed upon a third party's trade secrets. Similarly, many licensors are hesitant to provide patent indemnification for software given the unsettled nature of the validity of software patents, and also given the fact that licensors are unable to know what inventions are disclosed in competitors' patent applications that can take two years or more to issue and become publicly available. Trademark infringement is not as serious a concern in licensing as only infrequently will the licensee be using the licensor's trademarks.

Upon granting a license to the licensee, the licensor is assumed to have made an implied warranty of title under Section 2-312(3) of the UCC. Section 2-312(3) of the UCC provides that unless otherwise agreed, a seller who is a merchant regularly dealing in goods of the kind sold, warrants that the goods delivered will be free of any rightful, claim of infringement by any third party. It also provides that a buyer who furnishes the specifications, must likewise indemnify the seller for any claim arising from the seller complying with the buyer's specifications. UCC §2-312(3); Bonneau Co. v. AG Industries, Inc., 116 F. 3d 155 (5th Cir. 1997). This indemnity is limited to third party rights existing at the time of delivery. Yttro Corporation v. X. Ray Imaging Assoc., Inc., 223 N. J. Super. 347, 351, 559 A. 2d. 3, 5 (1989).

A patent license, however, does not usually contain an implied warranty of non-infringement. Deller, Deller's Walker on Patents 406 (1981). See Motorola, Inc. v. Varo, Inc., 656 F. Supp. 716 (N. D. Tex. 1986) and Chevron, Inc. v. Aqua Products, 830 F. Supp. 314 (E. D. Va. 1993) (under the doctrine of federal preemption, UCC §2-312(3) does not impose an indemnity obligation on a party that would not otherwise bear infringement liability under federal patent law). But see Cover v. Hydramatic Packing Co., 83 F. 3d 1390 (7th Cir. 1996) (UCC §2-312(3) is not preempted by federal law.)

The defense of intellectual property indemnification suits can be costly even if the licensor eventually prevails, and during their pendency the licensee may be prohibited from using the software it needs to operate its business. As such the licensor/indemnifying party should carefully limit the indemnity it offers, while the licensee should make sure it obtains the protection it needs to operate its business.

From the licensor's perspective, the indemnification clause should be limited to *existing* United States intellectual property rights at the time the license agreement is executed. This eliminates any right to indemnification for intellectual property rights created subsequent to the grant of the license. At the same time, it limits indemnification only to those United States intellectual property rights, significantly limiting the licensor's risk. With foreign transactions, indemnification should be limited to the United States and the country in which the software will be used. At the same time, any foreign indemnification should be granted only after sufficient due diligence has been performed with respect to the product market in the particular foreign country, and even then it should be limited solely to patent and copyright indemnification, since a number of foreign jurisdictions have "first to file" trademark laws that encourage manipulation of the rights of foreign trademark owners. Including the phrase "finally awarded" limits the licensor's obligation to make payments to the licensee until all appeals have been exhausted. The licensor should also be careful to limit indemnification to a specific licensee and not a broad class of entities such as "the licensee and its affiliates" or "the licensee and its customers." The licensee should insist, however, that indemnification for copyright infringement should not be limited solely to U.S. copyrights, as under the Berne Convention a foreign copyright holder may enforce its copyrights in the United States. Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, S Treaty Doc. No. 99-27, AT 39 (1986) Art. 4.

Indemnification by the licensor should be predicated on several requirements. First, the licensee must promptly notify the licensor of any claim; second, the license must assist and cooperate in the claim's defense. Third, the licensor must control the defense of the suit as the licensor ultimately bears the financial responsibility. Fourth, upon notice of a claim, the licensor may, at its option, either make the licensed software non-infringing, obtain a license to use such software from the party trying to enforce its rights, or provide functionally equivalent software. Alternatively, if none of these options is practicable, at the licensor's option, the licensor may refund the license fee to the licensee. Usually this refund is reduced by the benefit the licensee received prior to the software's removal, based on a five-year amortization. This remedy is usually in full satisfaction of the licensor's liability to the licensee.

All agreements should exclude indemnification where the licensor acts on the licensee's direct instructions, the licensee utilizes superseded software, or if the claim arises from the licensee's use of the software in conjunction with commercially-available, third-party software. A licensee will want to ensure that the licensor warrants that the software will be non-infringing, whether standing alone or in conjunction with the hardware or software with which it was designed to operate. The failure to obtain such a warranty, in practicality, leaves the licensee without a real remedy, in the event an integrated system fails to perform properly.

A licensee must make sure it is comfortable with language that allows a licensor to refund the licensee's license fee, especially if the software is important to the operation of its business, as the licensee may receive only a refund of its license fee in the event of a claim of infringement. Similarly, if the licensee insists on removing the licensor's option to refund the license fee in full satisfaction of an infringement claim, the licensor must be comfortable with the concept that it could be forced to expend its entire net worth obtaining a work around or a license for a functionally-similar software package. The solution will usually be an element of price as the licensor will usually expand its indemnification for an increased license fee.

For a more in depth discussion of the issues surrounding intellectual property indemnification and model clauses, see Ocampo, Curtin & Moss, Infringement Indemnity, 14 ACCA Docket 64 (July/August 1996).

4. **Limitation of Liability**

(a) Cap on Monetary Liability **(§16.3)**

Every software license should have a limitation of liability clause. The failure to include a limitation of liability clause potentially subjects the licensor to unlimited liability. Although the licensee may not want to accept limits on the licensor's liability, it is unreasonable for a licensor to risk its entire company on a single license. A smart licensee will also limit its own liability, a point many licensees forget to make, and refuse to accept any limit on the licensor's liability for the licensor's intentional breach. In at least one case, a court has upheld a limit of liability where the licensor intentionally failed to perform. See, Metropolitan Life Insurance Co. v. Noble Lowndes Int'l., Inc., 84 N. Y. 2d. 430, 618 N.Y.S. 2d. 882 (1994); but see, Hosiery Corp. of America, Inc. v. International Data Processing, Inc., 1991 U.S. Dist. LEXIS 2501 (D.N.J. 1991) (court failed to dismiss breach claim due to factual issue of whether licensor breached agreement by willfully failing to install latest software). A smart licensor will carve out breach of the license grant and violation of the agreement's confidentiality provisions from this limitation of the licensee's liability. Depending on the type of license agreement, the licensor's liability is usually limited to either the total dollar amount of the license agreement, the amount of money received by the licensor from the licensee in a set time period (i.e., in the previous twelve month period), or a predetermined amount.

Like many of the already-mentioned issues, the amount of the cap is an element of price. While most licensors limit their liability to the amount received from the licensee, many are willing to increase the limit of their liability in return for an increased license fee from the licensee. The traditional tradeoffs for increasing the limit of liability are that the licensor's price must rise in response to the increased risk because the licensor's original price was based on the initially-stated cap. In trying to justify the increased price, some licensor's argue that they must purchase additional errors and omissions insurance.

Consequential damages for personal bodily injury cannot be limited in some circumstances (see UCC §2-719 (3) and comments 1 and 3), and a limitation of liability may not be valid for tort claims of gross negligence, willful or intentional acts, misrepresentation or fraud. See Boss and Woodward, Scope of the Uniform Commercial Code, Survey of Computer Contracting Cases, 43 Bus. Law. 1513 (1988). Further, there is usually no limitation of liability for intellectual property infringement, and often none for personal property damage or violations of the license agreement's confidentiality provisions.

Any cap must be reasonable and not be so low as to be considered unconscionable, or it may not be upheld as failing of its essential purpose. See, Wayne Memorial Hospital, Inc. v. Electronic Data Systems Corp., N. 87-905-CIV-S-D (E.D.N.C. filed October 5, 1990) ($4,000 limit of liability on a $2 million contract is unconscionable). See also, UCC §2-719 comment 1. If the limited warranty is deemed to have failed its essential purpose, the limit on consequential damages may be removed. See e.g., McKernon v. United Technologies Corp., 717 F. Supp. 60 (D. Conn. 1989) and Section III.B.4.(b) below for a more detailed discussion. In commercial contracts, there is a presumption of conscionability. Siemens Credit Corp. v. Marvik Colour, Inc., 859 F. Supp. 686, 695 (S.D.N.Y. 1995). In determining whether a contract is unconscionable, a court will look at the bargaining power of the parties, whether the terms were actively negotiated and the terms themselves. Id. At the same time, however, a contract between merchants is rarely found to be unconscionable. D. S. Am. (E.), Inc. v. Chromagraph Imaging Sys., Inc., 873 F. Supp. 786 (E.D.N.Y. 1995).

A court seeks to ensure that the innocent party is made whole. See, Ragen Corp. v. Kearney & Trecker Corp., 912 F. 2d 619 (3d Cir. 1990). Thus, the smart licensor always includes in the license a back up remedy, such as refunding the purchase price, to avoid a specified remedy failing of its essential purpose. See, Ritchie Enterprises v. Honeywell Bull, Inc., 730 F. Supp. 1041, 1047 (D. Kan. 1990).

In accordance with UCC §2-316(2), most jurisdictions require that a limitation of liability be conspicuous. See e.g, Estey v. Mackenzie Eng'g., Inc., 902 P.2d 1220 (Or. 1995). While "conspicuous" is defined under UCC §1-201(10), whether or not a particular disclaimer is conspicuous is subject to the interpretation of the court. Printing any disclaimer in block letters has been held to be sufficient. Window Headquarters, Inc. v. MAI Basic Four, Inc., 1994 WL 673519 (S.D.N.Y. 1994); but see Sierra Diesel Inj. Service v. Burroughs Corp., 656 F. Supp. 426 (D. Nev. 1987), aff'd, 874 F. 2d 653 (9th Cir. 1989) (disclaimer in bold type not conspicuous when it appeared on reverse of contract). The failure to make a limitation of consequential damages conspicuous is one factor in determining whether a limitation is unconscionable.

D.S. Am. (E), Inc. v. Chronografix Imaging Sys., Inc., 873 F. Supp. 786 (E. D. N. Y. 1995).

Finally, every limitation of liability clause should clearly provide that the stated limit applies regardless of whether the licensee brings a claim based on contract, tort or another theory. The failure to do so may result in the licensee potentially circumventing the cap by bringing a claim under tort theory if the licensor's liability is limited only in contract. See generally Committee Reports Tort Theories in Computer Litigation, 38 Rec. Ass'n. Bar N.Y. 426 (1983); Budget Rent A Car v. Genesys Software System, 1996 U.S. Dist. LEXIS 12123 (D. N. Ill. 1996) (claims for fraud, fraudulent inducement and negligent misrepresentation allowed even though contract claims were disallowed under the license's integration clause).

At least one court has held that a licensor may not limit its liability for misrepresentations based on a contract's limitation of liability clause. Vmark Software, Inc. v. EMC Corp., 642 N.E. 2d 587 (Mass. App. 1994). See Section III.B.1 for a discussion of a licensor's potential liability under tort and contract law theories.

For a detailed discussion of the validity of limitation of liability clauses see Katz, Caveat Vendor: Limitation Clauses in Software Agreements May Not Withstand Judicial Scrutiny, 9 Computer L. Ass'n. Bull. 12 (No. 2 1994) and Hammond, Limiting and Dealing with Liability in Software Contracts, 9 Computer Law. 22 (June 1992).

(b) Disclaimer of Consequential Damages (**§16.2**)

Under Section 2-719(3) of the UCC, the parties to a contract may exclude consequential and incidental damages, provided such exclusions are not unconscionable and there are no other explicit exceptions. An issue exists, however, as to whether exclusion of consequential damages are valid when a remedy fails of its essential purpose. Compare Bishop Logging Co. v. John Deere Indus. Equip. Co., 455 S.E.2d 183 (S.C. Ct. App. 1995) (permitting consequential damages even when remedy failed of its essential purpose) and McNally Wellman Co. v. New York State Elec. & Gas Corp., 63 F.3d 1188 (2d Cir 1995) (allowing consequential damages despite contractual exclusion when remedy failed of its essential purpose) with Int'l. Fin. Serv. v. Franz, 534 N.W. 2d 261 (Minn. 1995) (consequential damage exclusion enforceable notwithstanding failure of remedy's essential purpose). One court has found that a limitation of consequential damages applies only to a breach of warranty and not for non-performance. PC COM, Inc. v. Proteon, Inc., 906 F. Supp. 894 (S. D. N. Y. 1995).

Unlike Section 2-316 of the UCC, which imposes a conspicuousness requirement for disclaimers of warranty related to merchantability and fitness, Section 2-719(3) does not contain a conspicuousness requirement. Comment 3 to Section 2-719(3), which discusses exclusion of consequential damages, also fails to address conspicuousness. The failure to make a limitation of consequential damages conspicuous is one factor in determining whether a limitation is unconscionable. D. S. Am. (E), Inc. v. Chronografix Imaging Systems, Inc., 873 F. Supp. 786 (E. D. N. Y. 1995). Nonetheless, to err on the side of caution, any such disclaimer should be conspicuous to avoid a court imposing such a requirement and potentially voiding any limitation of liability. See generally, Krupp PM Eng'g. v. Honeywell, Inc., 530 N.W.2d 146 (Mich. 1995).

(c) Reducing the Statute of Limitations (**§16.2**)

Traditionally, a statute of limitations bars a potential plaintiff from bringing a claim after a set period of time after the action which gave rise to the claim first arose. See, e.g. A.B Alexander d/b/a A.B. Alexander and Associates v. The Perkin Elmer Corp., 729 F.2d 576 (8th Cir. 1984). Most states have statutorily codified this time period as three or four years. See, e.g., California: Calif. Stat. Ann. §337 (1996) (4 years), and Maryland: Md. Stat. Ann §5-101(1996) (3 years). By default, Section 2-725(1) of the UCC provides for a four-year statute of limitations beginning when the cause of action first accrues, but allows the parties to reduce the statute of limitations by mutual agreement to a minimum of one year. By agreeing to a period less than the statutory time period, the licensor may reduce the time period in which the licensee may bring a claim, thus limiting the licensor's risk and, consequently, its liability. A smart licensee will make such clause mutual to also reduce its liability. Courts have been reluctant to extend the four-year statute of limitations. See, e.g, Grus v. Patton, 790 S.W. 2d 936 (Mo. App. 1990) (seller's unsuccessful attempts to repair defects over eight-year period did not toll four-year statute of limitations).

5. **Breach and Termination** (§6)

A license's termination provisions are extremely important from both the licensor's and licensee's perspective's as each has different concerns about the ability to terminate the license agreement and the rights of each party upon such termination.

(a) The Licensee's Breach

The licensor is very concerned with the protection of its intellectual property and, to a lesser degree, receiving payment. While a "cure period" of thirty days is standard for most breaches by a licensee, most licensors seek to include a provision allowing the licensor to immediately terminate the license or obtain an injunction if the licensee violates any of the terms of the license grant or the license agreement's confidentiality provisions. The basis for immediate termination stems from the licensor's desire to immediately stop the misuse of its software or confidential information, as these breaches cannot be cured. Other issues such as payment, which are not so critical and can be easily cured, are subject to a standard 30-day cure period.

At the same time, the licensee wants to make sure the licensor can only terminate the license and take possession of the software for a material breach. In addition, the licensee should carefully consider any self-help measures the licensor seeks to include in the license and any language regarding the licensor's ability to disable the software without liability. Many licensees insist that the license contain a provision allowing the licensee to use the software until any dispute is resolved.

(b) The Licensor's Breach

Except for breach of the confidentiality provisions, almost all breaches by the licensor are subject to a cure period, usually no less than thirty days. Furthermore, the licensee's right to terminate the license agreement for breach should be for the licensor's *material* breach only.

Software, especially customized software, is often very complex. Thus it may require quite some time to diagnose a problem, code the solution, and then install and test the software. The licensee can protect itself from the resulting late delivery by including a provision for liquidated damages should the licensor fail to deliver the software in a timely manner or if the software fails to operate in accordance with the functional specifications. However, the amount of liquidated damages must not be so high as to be considered unconscionable or it will be unenforceable. See UCC §2-718 comment 1.

In addition to timeliness, licensees are very concerned with the agreement's termination for the licensor's *material* breach in failing to deliver the contracted software. In such an event, the licensee is faced with a dilemma: the licensor has not delivered a working product, but if the licensee terminates the agreement its business may be severely affected. As such, many licensees want the option of either receiving the software's source code to complete the project itself, the right to receive monetary damages, or both. To ensure it receives the source code when licensor breaches the license agreement, most licensee's insist on the execution of an escrow agreement. While this ensure the release of the software's source code to the licensee, receipt of the source code does not necessarily solve the licensee's problems. See Section IV. for a greater discussion of this issue.

(c) Termination for Convenience

Often, software development contracts will contain a termination for convenience clause which allows one or both parties to terminate a contract without cause. These clauses are usually inserted at the insistence of the licensee, as it allows the licensee to terminate its contractual obligations upon payment of a predetermined fee to the licensor. Licensors do not favor termination for convenience clauses as they often prevent the licensor from recognizing the full value of the agreement. Each party should carefully consider the inclusion of such clauses. If included, the parties should include language which protects them financially in the event of such termination and clearly delineate how any termination fee will be calculated.

6. **Governing Law and Forum (§28)**

While most parties desire to be governed by the laws and forum of their own jurisdiction, the choice of governing law and forum is not always a "fall on your sword" issue in domestic software agreements. Many licensors are anxious, however, to avoid Texas as it has strong consumer protection laws, while favored jurisdictions include New York, which generally benefits licensors.

To settle any dispute as to the forum, some licensors and licensees include language in their license agreements stating that the forum will be the licensor's choice if the licensee elects to arbitrate or litigate, and that the forum will be the licensee's choice if the licensor elects to bring an action. The benefit is that such language serves to discourage parties from bringing claims. This solution is not viable for the choice of governing law as there must be one pre-agreed governing law to interpret the license agreement prior to any action being commenced.

A choice of forum in a license agreement will not always be honored or enforced by a court. If, however, the court finds the choice of forum clause to be valid, reasonable and fairly-negotiated as part of the licensing agreement, the burden is on the party opposed to the forum to show why it should not be enforced. George Jumara and Evangelina Jumara v. State Farm, Inc. Co., 55 F. 3d 873, 880 (3d Cir. 1995). To limit potential disputes over the enforceability of such clauses, the contractual language should state that the forum selection clause applies to "any dispute" which would include tort as well as contract claims. See Terra International, Inc. v. Mississippi Chemical Corp, 922 F. Supp. 1334 (N.D. Iowa 1996).

Internationally, it is imperative to utilize the laws of the United States, United Kingdom, Sweden or other western countries as most countries do not have developed software laws or case law for software. An exclusive forum selection clause is also important as most local courts have a bias against foreign licensors and do not always enjoy the same level of competency as the judiciary in the United States.

7. **Alternative Dispute Resolution**

In general, each party should carefully consider whether to accept alternative dispute resolution ("ADR") for the resolution of any disputes. ADR can take many forms, including but not limited to arbitration, mediation, mini trials and neutral evaluation. Each has its benefits and drawbacks which are magnified in intellectual property disputes. Given the ever-increasing expense of litigation in court, the uncertainty of juries and the diversion of corporate resources even when a party prevails, an increasing number of parties are choosing ADR. The two principal forms of ADR, arbitration and mediation, are discussed below.

(a) Arbitration

Arbitration in some ways is quicker than the court system but may be slower for certain important issues. For example, a licensee would not want to arbitrate whether a licensor must indemnify the licensee for an alleged intellectual property infringement. Alternatively, a court can quickly issue an injunction in the licensor's favor if the licensee breaches the terms of the license grant. For a discussion of the issues involved in obtaining an injunction, see Friedman and LaMotta, When Protecting Software Through an Injunction, How Do You Spell Relief?, 18 Computer Law. 18 (March 1994). While there is a strong public policy in favor of arbitration, a court can not compel the parties to arbitrate a matter which they did not agree to submit to arbitration. Shopsmith Woodworking Promotions, Inc. v. American Woodworking Academy, Inc., 1995 WL 614355 (Ohio 1995). As such, if the parties desire to utilize arbitration, the license agreement should clearly indicate that intent.

Another issue arises when an entity attempts to enforce an award for an injunction in a foreign jurisdiction. Most courts are hesitant to enter a court order for injunctive relief based on a decision of a foreign jurisdiction. At the same time, they are much more likely to support an arbitral award for injunctive relief. The New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards (the "Convention") has been adopted by 108 countries. The Convention addresses not only the enforcement of foreign arbitral awards, but also agreements to arbitrate. As a result of the widespread acceptance of the Convention, arbitration in some situations may be preferable to a judicial decision for injunctive relief.

Arbitration is advantageous in terms of cost, particularly when used in smaller disputes. Even with large cases, there is cost savings, mainly due to the absence of extensive and protracted discovery and the lack of an appeals process. In addition, there is no need for hiring court reporters for depositions or expert witnesses, as most arbitrators are themselves experts in the field.

Arbitrators are not bound by legal precedent, thus even if a party has a solid legal case, arbitration may result in a totally unpredicted outcome. They need not articulate a rationale for their decision. As such, arbitration may or may not be a prudent choice if the dispute is one commonly dealt with by the courts in a more predictable fashion. There are no evidentiary rules in arbitration, however. If there is crucial evidence in the dispute that would not likely be admissible in court and would negatively impact the party in question, a court may be the better choice.

Another consideration is the business relationship between the parties to the dispute. An ongoing relationship, e.g., in the performance of long-term contracts, is often more likely to be preserved through an arbitration proceeding than by litigation. Arbitration is less stressful on the parties and it is private. The lack of publicity can also help protect the present and future business relationship between the parties as well as relationships with other clients or vendors.

Arbitration may benefit a breaching party due to the potentially greater time period needed to reach a resolution than in a court of law. Furthermore, an entity must disclose its claims in arbitration, which puts a licensor at a disadvantage assuming the licensee is in breach. Finally, under arbitration all actions must be by mutual agreement, allowing one party to potentially delay the proceedings if it chooses.

(b) Mediation

Mediation is usually a much quicker process than arbitration due to the limited nature of discovery and the desire of the parties to move quickly through mediation given its non-binding nature. This is extremely important if the nature of the dispute is time-sensitive. The absence of discovery also avoids potentially damaging admissions or the production of damaging documentation. Further, the use of a qualified expert as the mediator ensures that the neutral party will be well-versed in the law governing the issues in dispute. Mediation also offers lower costs and greater confidentiality due to the limited discovery and the fact that any decision is not publicly reported. Finally, the often acrimonious nature of litigation is usually avoided due to the more relaxed nature of the proceedings.

8. <u>Payment</u>

Payment terms will usually depend on the type of license granted and whether the contract requires any software development work to be performed.

(a) Service Bureau Licenses

Most software license agreements require payment in advance or upon installation and acceptance. Service bureau licenses are usually priced and paid on a per "transaction" basis and billed monthly. The actual billing structure is dependent on the type of software involved. For example, with cellular telephone billing software, the license fee may be based on the number of subscriber bills printed or with electronic medical records on the number of patients in the database. Service bureau licenses are usually utilized when the software is very expensive and the licensee wishes to conserve cash flow by paying by the transaction instead of purchasing an outright license. On a long-term basis, a service bureau license is usually less cost-effective, although it may allow a licensee to switch vendors more easily as the licensee has less money "invested" in the software.

(b) Development Contracts

Most license agreements with a software development component provide for payment on a time and materials basis or on the basis of certain pre agreed milestones. Each structure has certain benefits for both the licensor and the licensee. The ultimate payment structure chosen by the parties will reflect the allocation of risk agreed to by the parties.

(i) Time and Materials vs. Fixed Price

Payment on a time and materials basis is preferred by the licensor as the licensor is paid as it renders its services, greatly reducing the risk of non-payment while, at the same time, eliminating the risk of underestimating the cost of a project. The greatest risk to a developer in a fixed price contract is that it significantly underestimates the costs involved. If a large contract experiences overruns in the time and labor to finish the project, the overrun can cost the developer tens of millions of dollars. At the same time, without a fixed price, the licensee can never be certain what the cost of the software will be until acceptance. Cynical licensees believe that the developer/licensor has no incentive to limit costs in the absence of a fixed price contract because it bears no economic risk, thus increasing the cost to the licensee.

The licensee is usually billed on a monthly basis for time and materials contracts. For complex projects, payment on a time and materials basis is not favorable for licensees as the licensee cannot be sure that at the end of the project the services will have been satisfactorily performed. Making substantial contemporaneous or even upfront payments to the licensor, greatly reduces the licensee's leverage in the event of a dispute with the licensor.

(ii) Milestone Payments

Pre agreed milestones provide greater protection for the licensee while assuring the licensor will receive progress payments necessary to fund its development efforts. This method also provides the licensee greater leverage in the event a dispute arises with the licensor. The use of milestones is not without risk, as the parties must agree what triggers payment (i.e., delivery, acceptance, etc.), which has ramifications on both parties. A licensee should be wary of payment on delivery before the software has been tested, while the licensor must carefully consider accepting payment upon acceptance, as the licensee has greater leverage in not accepting the milestone. A compromise is to have the licensee make payment on delivery, but state that such payment is only an "advance" and that all such payments are immediately repayable to the licensee if the ultimate deliverable is not accepted. Coupling these payments to the establishment of an advance payment bond in an amount equal to the amount of these "advances," effectively limits the licensee's risks. At the same time, the licensor has complete use of its money less the minimal cost of the bond.

(c) Setoff

Many licensees seek to include language in the license agreement allowing the licensee to set off payments owed to the licensor in the event of a dispute between the parties. A licensee must specifically state that it possesses the right of setoff as this right is statutorily based and does not exist under common law. 80 *C.J.S. SetOff and Counterclaim 4*. See also Stanley v. Clark, 159 F. Supp. 65, 66 (D.N.H. 1957) (citing C. J.S.) ; Carfoss Const. Corp. v. MMSG Ltd. Partnership; 904 F. Supp. 450 (D. Md. 1995) (as right of set off does not exist under Maryland common law it may be exercised only with respect to statutory authority or incident to a courts' equity jurisdiction). Licensors uncertain as to the status of applicable statutory law should insist on an affirmative statement that the licensee may not offset payment to prevent the licensee from gaining additional leverage over the licensor. Removing the right of offset eliminates the licensee's leverage through the ability to withhold payment. In practice, however, a dissatisfied licensee will offset monies owed to the licensor regardless of any contractual prohibition to the contrary or applicable statutory law.

C. Other Issues to Consider

1. The Work Made For Hire Doctrine and Moral Rights

(a) Work Made for Hire Doctrine

United States law holds that the copyright in a work is initially vested in the person who creates it. 17 U.S.C.§ 201(a) (1994). Therefore, an independent contractor, as the "author" of a product, usually retains all copyrights to that product unless he or she assigns the rights to the buyer. 17 U.S. C. § 201(d) (1994). Absent any assignment, the buyer is only deemed to hold a non-exclusive license. See Effects Associates v. Cohen, 817 F. 2d 72 (9th Cir. 1987), aff'd, 908 F.2d 555 (9th Cir. 1990), cert. denied sub nom. Danforth v. Cohen, 498 U.S. 1103 (1991). Such a limited and non-exclusive license to use the work may place a buyer at a severe disadvantage vis-à-vis its competitors. A contractor, for instance, could potentially disclose a buyer's proprietary information in licensing the work to others, and thereby nullify any competitive advantage the employer gained by commissioning the work. In addition, as the "owner" of the copyright in the work, a contractor could limit a buyer's right to use or distribute the work if such use is outside the scope of the original commission.

An independent contractor retaining ownership in software specified and funded by the buyer may seem counterintuitive. A buyer may invest large sums of money and significant technical input in a project only to find that the contractor claims ownership of the work when the project results in a commercially saleable product. The courts have attempted to soften the effect of this situation by implying a fully paid-up license in the employer to use the software for all purposes intended in the contract and, importantly, to modify the software as necessary to support those uses. See e.g., Clifford Scott Aymes v. Jonathan J. Bonnelli d/b/a Island Swimming Sales, Inc., 47 F.3d 23 (2d Cir. 1995). While these softening interpretations help avoid the harsh results of the rule granting ownership to independent contractors, the courts ultimately hold that, absent an explicit assignment to the employer, the independent contractor owns software produced pursuant to contractual arrangement. Notably, independent contractors rarely demand additional consideration or concessions for such assignments. Failure to secure an assignment from a contractor may result in the loss of a significant asset to the employer, especially where a product may have commercial value apart from the internal use contemplated by the employer.

There are instances where a company will be presumed to be the owner of a commissioned work under the so-called "work made for hire" doctrine. In the United States an employer may be considered the original author of a commissioned work if the work qualifies as work made for hire under the United States Copyright Act. 17 U.S.C. §201(b) (1994). Section 201 of the Copyright Act provides that "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." 17 U.S.C. §201(b) (1994). Classifying the work as work made for hire determines not only the initial ownership of copyright, but also the copyright's duration (§302 (c)), the owner's renewal rights (§304(a)), termination rights (§203(a)), and the right to import certain goods bearing the copyright (§601(b)(1)). See 1 Melvin D. Nimmer and David Nimmer, Nimmer on Copyright, §5.03[A] 5-10 (1990). Work made for hire is defined as: "(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." 17 U.S.C. §101 (1994).

Since most computer software does not automatically fall within one of the nine types of works enumerated in category (2) above, writing a software program will generally qualify as work made for hire only if it was "prepared by an employee, within the scope of his or her employment." However, an independent contractor will not usually qualify as an "employee" within the meaning of the Copyright Act. In Community for Creative Non-Violence v. Reid, 490 U.S. 703 (1989) ("CCNV"), the Supreme Court declared that an artist, who was commissioned by a non-profit organization to create a sculpture, was an "independent contractor" and not an employee within the meaning of the Copyright Act, even though the non-profit organization directed enough of the sculptor's work to ensure that he produced a sculpture that met their specifications. CCNV, at 753. The United States Supreme Court later unanimously generalized CCNV as the appropriate standard for defining an employee outside of the copyright area as well. Nationwide Mutual Ins. Co. V. Darden, 503 U.S. 318, 322 (1992). If the independent contractor does not qualify as an employee, the employer can only gain title to the work product of the contractor by having the contractor execute an assignment transferring his or her ownership rights in the work to the employer. CCNV, at 750.

Therefore, in order to be guaranteed sole and exclusive ownership of the copyright, a buyer would be well advised to have the contractor execute an assignment transferring to the buyer the contractor's entire right, title and interest in the work. (See Section IX. C for a Model Consulting Agreement with an assignment clause).

If a contractor previously executed an agreement without an assignment clause, the employer should have a comprehensive assignment agreement executed by the contractor and should be sure to list the consideration that the contractor is receiving for signing the assignment agreement. (See Section IX.D for a Model Assignment Agreement). For any such assignment to be valid, it must be in writing, signed by both parties BancTraining Video Systems v. First American Corp., 956 F. 2d 268 (6th Cir. 1993), prior to the work's creation. Schiller & Schmidt, Inc. v. Accent Publishing Co., Inc., 969 F. 2d 410 (7th Cir. 1992) (subsequent writing can not correct the fact that there was no written agreement as required by statute at the time the work was created) but see Playboy v. Dumas, 53 F. 3d 549 (2d Cir. 1995), cert. denied, 516 U.S. 1010 (1995) (prior oral agreement that work is work made for hire may later be memorialized in writing as the work is created).

(b) Moral Rights

Under the Berne Convention, "moral rights" in a work may exist in the author regardless of the author's status as an employee or contractor. Furthermore, moral rights may be viewed as separate and distinct from any other ownership rights generally provided for in copyright laws.

Under the Berne Convention an author's moral rights are inalienable, and thus it is not likely that such rights could be contractually transferred by a contractor to an employer. Berne Convention Article 6bis. Furthermore, a waiver of such rights may be difficult or impossible to enforce in some jurisdictions. Some countries allow moral rights to be waived but not assigned. In such countries, an employer hiring a contractor to perform work would be well-advised to include a waiver provision in any legal document with the contractor to protect against ownership claims by the contractor at a later point in time. While signatories to the Berne Convention are typically required to recognize and comply with the Berne Convention's requirements on an author's moral rights, the United States does not recognize broad moral rights. The United States recently enacted legislation affording limited moral rights to prevent mutilation or destruction of visual works of art only, and only under certain circumstances. 17 U.S.C. § §106, 113 (1988), amended by Pub. L. 101-650, §604, Dec. 1, 1990. The unwillingness of the United States to recognize moral rights is evidenced by its insistence that the General Agreement on Tariffs and Trade (GATT) and NAFTA specifically provide that the United States is under no obligation to recognize such rights.

The question of whether a U.S. employer would have to recognize an offshore contractor's moral rights under the Berne Convention is closely tied to the issue of how the Berne Convention is implemented in countries which do not deem treaties to be self-implementing. See Melville B. Nimmer and Paul E. Geller, International Copyright Law and Practice, §3 pp. 69-76 (1993). The answer to that question is found in Article 36 of the Berne Convention, which provides that:

(1) any country party to the Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.

(2) It is understood that, at the time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention. Berne Convention Article 36.

Therefore, the Berne Convention appears to leave the decision about self-implementation of the treaty to each individual member country.

This has also been the position of the United States, which has never viewed the Berne Convention to be self-implementing. The United States acceded to the Berne Convention by means of the Berne Convention Implementation Act of 1988. Pub. L. No. 100-568 (Oct. 31, 1988). In doing so, the United States included an express provision denying the self-implementation of the Berne Convention. Id. Since the Berne Convention is not self-implementing, the Berne Convention's provisions are not by themselves enforceable in U.S. courts. Moreover, the United States Copyright Act specifically declares that no right or interest in a work protected under Title 17 may be claimed by virtue of, or in reliance upon, the Berne Convention's provisions or the United States' adherence to the Convention. Pub. L. No. 100-568 §4(c) (Oct. 31, 1988). In other words, neither the Berne Convention itself, nor the fact of adherence to the Convention, will affect the current law of the United States. Since U.S. law does not recognize most moral rights, a U.S. employer hiring an offshore contractor in a jurisdiction that is a signatory to the Berne Convention need be less concerned about the applicability of moral rights if the employer can ensure that U.S. law will govern in case of a copyright dispute between the parties, and if the work will only be used in the United States. In an attempt to accomplish this, the U.S. employer may select U.S. law by including in a contract with the offshore contractor a choice of law clause. However, this approach is not entirely free of problems.

(c) Independent Contractors in General

It is important to note that the Internal Revenue Service ("IRS") has recently issued new guidelines for determining whether an individual is an employee or an independent contractor. The definition of an "employee" remains unchanged, and is still determined on the ability of the employer to control the method and results of an individual's work.

Under the new guidelines, the IRS has abandoned its 20-point test in favor of a new test involving "categories of evidence." Under this new test, a business must divide factors pertaining to a given worker's status into three categories: behavioral control, financial control and type of relationship. "Behavioral control" includes facts pertaining to whether or not the business controls how the individual does his or her job (e.g., training and instructions given). "Financial control" comprises evidence related to the business aspects of the worker's job (e.g., the worker's investments and expenses). "Type-of-Relationship" examines relational indicators (e.g., written contracts and length of association). These "categories of evidence" allow a broader and more flexible examination of an individual's status than the prior 20-point test, as the IRS publication indicates that all evidence as to degree of control and independence will be considered. See Publication 15A of the Internal Revenue Service (1997).

For a more detailed discussion of the issues involved with the use of independent contractors from an international perspective, see Classen and Paul, Increasing Global Competitiveness by Utilizing Offshore Independent Contractors, 2 Int'l. Computer Law. 2. (No. 11 1994); as to domestic concerns, see Classen, Paul and Sprague, Increasing Corporate Competitiveness by Utilizing Independent Contractors, 11 Computer L. Ass'n. Bull. 2 (No. 1 1996) and Schulze, Watch Out What You Wish For - You May Get Your Wish or Ownership Issues Continued: More on Applying the Work Made for Hire Doctrine to Computer Programmers, 8 Computer L. Ass'n. Bull. 12 (No. 2 1993).

2. **Export Issues**

(a) General

Under the United States' export regulations, an individual may "undertake transactions subject to the Export Administration Regulations[3] ("EAR") without a license or other authorization, unless the regulations affirmatively state such a requirement." 15 CFR §736.1. The EARs are consistent with the position of many European governments' that anything not prohibited is allowed, in contrast to the Bureau of Export Administration's previous position that everything is prohibited unless an exception exists. Under the EAR, licenses are not required for most shipments to Canada and shipments to U.S. territories, possessions and commonwealths.

(b) Definitions

Section 734.2(b)(1) of the EARs defines "export" as:

(i) an actual *shipment* or *transmission* of items subject to the EAR out of the United States; or

3 The Export Administration Regulations are issued by the Department of Commerce and administered by the Bureau of Export Administration ("BXA") to implement the Export Administration Act of 1979, as amended.

(ii) "release" of technology or software subject to the EAR to a foreign national in the United States.

Section 734.2(b)(2) defines "export of technology or software" as:

(i) any "release" of technology or software subject to the EAR in a foreign country; or

(ii) Any release of technology or software subject to the EAR to a foreign national.

In the context of this definition, Section 734.2(b)(3) of the Export Administration Regulations defines "release" as:

(i) Visual inspection by foreign nationals of U.S.-origin equipment and facilities;

(ii) Oral exchanges of information (with foreign nationals) in the United States or abroad; and

(iii) The application to situations abroad of personal knowledge or technical experience acquired in the United States.

(c) Export of Software and Technology

The first step in exporting any software or technology is to determine whether an export license is needed. Under 15 C.F.R. 736.2(b), the exporter must apply a ten-step process to determine whether the exporter's software or technology requires a license under the EAR. Based on the results, software or technology will fall into one of three categories:

(i) No License Required ("NLR"). If software or technology to be exported is either not subject to the EAR or does not require a license as a result of the ten-step process under 15 C.F.R. 736.2(b), it is considered to be No License Required or "NLR".

(ii) License Exceptions. If a determination is made that the software or technology requires a license under the EAR, the exporter must determine whether a License Exception is available. A "License Exception" is the authorization to export under stated conditions that would otherwise require a license. 15 C.F.R. 740.1(a). For software and technology, two potential License Exceptions are available under Section 740.

(X) ***Technology and Software Under Restriction ("TSR").***

Section 740.6(d) allows export and re-export of software and technology, subject to national security controls, to Country Group B upon receipt of a Letter of Assurance. This License Exception is similar to the old GTDR.

(Y) ***Technology and Software-Unrestricted ("TSU").*** Section 740.13 of the EAR provides a License Exception for certain "Operation Technology" and software, software updates and mass market software permitting their export without a license. This License Exception covers certain mass market software such as software sold over the counter through mail order transactions and telephone call transactions, sales technology, and software updates. "Operation technology" is defined as "the minimum technology necessary for the installation, operation, maintenance (checking), and repair of those products that are lawfully exported or re-exported under a license, License Exceptions or NLR." 15 C.F.R. 740.13(a)(1). This License Exception is similar to the old GTDU.

(iii) If a License Exception does not exist, the exporter must apply for a license under 15 C.F.R. 748.

3. **Ownership of Custom-Developed Software (§§3.2, 3.5)**

Ownership of software developed by the licensor for a specific customer is often a contentious issue. Usually, the licensee claims ownership based upon the fact that it has paid the licensor to develop the software and that the software would not have been otherwise developed. The licensor desires to retain ownership to keep the integrity of its software (i.e., the licensor does not want its customers owning portions of its proprietary software, especially parts of the program's core code) and to potentially profit from relicensing the custom piece of software.

This issue is often resolved by having the licensor retain ownership of the custom-developed portion of the licensor's software but have the licensor pay the licensee a royalty based on future license fees received by the licensor from relicensing the custom portion. Another potential solution is to have the licensee retain ownership of the custom software and grant to the licensor the right to market the custom software and have the licensor pay a royalty to the licensee for each license sold.

These are not the only solutions. If the licensor is solely concerned with the licensee owning part of the licensor's core code, the licensee can retain ownership of the custom portion without the right of sub-license or assignment. Another alternative, but one which is less attractive, is to have the licensor and licensee jointly own the custom software. This would allow each party to market the software to whomever it chooses, while at the same time having the right to make modifications and enhancements. This alternative may be detrimental to the licensor as the licensee may license the software to the licensor's direct competitors. Under joint copyright ownership, however, each owner has a duty to account to the other. 1 Melvin B. Nimmer and David Nimmer, Nimmer on Copyright, §6.12[A] (1990); See, e.g. Oddo v. Ries, 743 F.2d 630 (9th Cir. 1984). At the same time this approach is probably unrealistic as most likely the custom portion is of little value unless it is licensed in conjunction with the rest of the software. Other alternatives include having the licensor give the licensee a significant price discount to recognize the intrinsic value the licensor will receive by retaining ownership of the custom developed software.

4. **Functional Specifications**

The software's functional specifications are the technical architecture that the software must meet once it has been developed to the licensee's requirements. The functional specifications should be extremely detailed and should be agreed upon prior to execution of the license agreement, as they will determine the cost and extent of the effort exerted by the licensor in the software's development. If the functional specifications have not been agreed upon in detail, it is impossible for the licensor to determine with confidence the price of the development effort as the scope of the development effort has not been limited or fixed.

A significant amount of litigation has arisen as a result of agreements being executed containing general language that the "parties shall negotiate in good faith the functional specifications immediately upon execution of this Agreement." After execution, a dispute often arises because the parties are unable to agree on the functional specifications given that the licensor is usually constrained by a fixed price, a limit a licensee is not usually concerned with. At least one court has recognized the licensee's obligation to provide the licensor with the needed information to develop a system. See, H/R Stone, Inc. v. Phoenix Business Systems, Inc., 660 F. Supp. 351 (S.D.N.Y. 1987) (licensee breached implied covenant of good faith and fair dealing by failing to provide sufficient information to allow licensor to undertake development.
The licensee is also at risk because it does not have a document outlining in detail the deliverable it will receive for a fixed price. In the extreme, a court may find the lack of a contract under the theory of contractual indefinitiveness, e.g., the functional specifications were such a material portion of the contract that the contract could not exist without them. See generally, Rates Technology, Inc. v. New York Telephone Co., 1995 WL 438954 (S.D.N.Y. 1995) and U.C.C. §2-204. This possibility finds support under the U.C.C., which requires an agreement to (a) evidence a contract for the sale of goods, (b) be signed by the parties, and (c) specify a quantity in order to be legally enforceable. U.C.C. §2-201 comment 1.

The prudent methods of contracting are to: (1) enter into a two-phase contract with the first phase consisting of a fixed price engagement to draft the functional specifications, and assuming that the parties can agree on the functional specifications, a second phase consisting of the development effort at a fixed price; (2) jointly develop the functional specifications prior to execution of a fixed price contract; or (3) enter into a time and materials contract. The first option is less attractive to the licensor as once the functional specifications have been agreed to, the potential licensee can shop the functional specifications to other potential software developers to get the best price. The second alternative is less attractive to the licensor's business people who want to obtain a binding commitment from the licensee and who do not want a long, drawn-out process in order to reach a final agreement during which time the licensee could select another licensor. From the licensee's perspective, the third option does not provide the price protection needed to protect against cost overruns and necessary for its budgeting process. Finally, the parties must decide whether the licensed software when delivered or accepted meets the functional specifications or the current documentation for the licensed software.

Both the licensor and the licensee should be wary of incorporating the licensee's Request for Proposal ("RFP") and the licensor's RFP response into the contract. Many contracts incorporate these documents in an often ill-fated attempt to incorporate each party's understanding of their obligations. The licensee often wants to include the RFP to bind the licensor to the standards set forth in the RFP and the standards the licensee expects the licensor to meet. The licensor often desires to incorporate its RFP response for its own protection as the licensor will often reject certain of the RFP's requirements in the licensee's RFP response. At the same time, the licensee often wants to include the licensor's RFP response to hold the licensor to statements set forth in the licensor's RFP response. A problem arises, however, when the delivery requirements set forth in the RFP and RFP response differ from each other and from the specifications included in the contract from the parties' negotiations. Further disputes often arise in trying to resolve any differences between the RFP and the RFP response and what the parties agreed to. To avoid these potential issues, it is preferable to agree on and attach functional specifications negotiated after the successful bidder has been selected. The RFP and RFP response in turn should then be negated by the contract's "integration" or "entire agreement" clause.

5. Acceptance and Acceptance Test Procedures (§17)

The concept of acceptance and the corresponding acceptance test procedures are extremely important in custom software development contracts. Off-the-shelf shrinkwrap licenses deem acceptance to have occurred with the opening of the cellophane surrounding the box containing the software or, alternatively, with the use of the software. While uncertain, the enforceability of off-the- shelf acceptance has recently been upheld. See ProCD, Inc. v. Zeidenberg, 86 F. 3d 1447 (7th Cir. 1996).

With custom software, the concept of acceptance is not difficult to understand, but in practicality it is difficult to quantify, as at the time the license agreement is executed, the functional specifications for the software may not have been agreed to. Thus it is difficult, if not impossible, to agree on the acceptance tests if the parties do not know what will be needed to test the software, much less know what the software will look like in the completed product. Furthermore, there is the question of what level of "bugs" is acceptable.

The acceptance test procedures should be objective in nature such that an independent third party should be able to determine whether the licensed software has satisfied the tests. Any acceptance test procedures should be mutually agreed to by the parties to ensure fairness. The licensor usually drafts the test's procedures protocol document given its familiarity with its own software and submits this document to the licensee for its approval. The licensee then either accepts the document or suggests potential modifications. To ensure that there is mutual agreement as to what constitutes "acceptance," the term should be carefully defined. Otherwise, a court itself may determine what is "acceptable" software. See, Sha-I Corp. v. City and County of San Francisco, 612 F. 2d 1215 (9th Cir. 1980) (satisfactory completion of 95% of acceptance requirements constituted acceptance).

Software by its nature is considered imperfect and bugs will always exist in a program's code. Consequently, most agreements contain language to the effect that the software will "substantially conform" to the functional specifications or "comply in all material respects." Thus, many agreements classify and delineate the levels of errors and then quantify how many of each level are acceptable. For an example of the classification of errors, see Appendix A to the Model Software Maintenance and Services Agreement attached hereto in Section IX.B.

Like off-the-shelf software, custom software contracts should include a provision that the use of the software in a commercial context shall be deemed acceptance. Otherwise, the licensee may have an incentive not to accept the software while receiving all commercial benefits of the software from its use. (§17.3)

6. **Specific Performance** (§16.1)

Most smart licensees try to include the remedy of specific performance in their license agreements. Sections 2-711 and 2-716 of the UCC specifically identify specific performance as an acceptable remedy. Licensors are hesitant to include this remedy because, if included, a licensee may be able to force the licensor to deliver the software regardless of cost. Given that the risk of large cost overruns is always present with software development, the risk to the licensor is great if such remedy is included. Smart licensees also seek to include a statement that they are entitled to specific performance to force the licensor to place its software in escrow if the license agreement requires the licensor to do so, as well as to enforce the license agreement's indemnification provisions.

Licensors should carefully consider the risks when the licensee seeks to include broad statement such as "the right to obtain equitable relief" in the license agreement. While the equitable remedy of injunctive relief for breach of the agreement's confidentiality provisions is important to include," all equitable remedies" are broader than necessary and should be limited solely to injunctive relief. Smart licensors will try to include language in the license agreement that, upon the licensor's breach of the warranty, the licensee shall be entitled to monetary damages only, or to specifically state that the licensee is not entitled to obtain an equitable remedy.

7. **<u>Liquidated Damages and Penalties.</u>**

Licensees often seek to include a provision for liquidated damages for the late delivery of software in development contracts. Usually these damages amount to 0.5% of the contract value (excluding the value of hardware and third party software) for each week a delivery is late for up to 10% of the contract value. The licensor must carefully consider what will trigger payment. Payment should be based on late delivery of the software and not acceptance of the software by the licensee.

Many licensees will try to tie payment to acceptance of the software by a certain date and not the contractual delivery date. This creates significant risk for the licensor as acceptance is totally within the control of the licensee. At the same time a licensee may be hesitant to base such damages on late delivery as the licensor may deliver poor quality software just to avoid paying liquidated damages, believing that the poor quality of the software can be corrected during any cure period. The licensee should include language allowing the right of offset against future progress payments if the licensor does not pay the liquidated damages as required.

The licensor should ensure that the payment of liquidated damages is in full satisfaction of any liability the licensor may have for late delivery. The licensee may want to provide further protection by providing for termination of the agreement if the licensor has not delivered the software when the maximum payment amount has been reached to avoid giving the licensor an additional cure period. Finally, the licensee should carefully word the liquidated damages provision and limit the liquidated damages to a reasonable level to avoid the appearance of a penalty. Unreasonably large liquidated damages are void as penalties.

Licensors often seek to raise their prices when the licensee asks for liquidated damages, claiming the licensor's initial price did not reflect the additional element the licensee has asked them to assume through the payment of liquidated damages. <u>See generally</u> UCC §2-2-718(1) and Annotation, <u>Contractual Liquidated Damages Provisions Under UCC Article 2</u>, 98 A.L.R. 3d 586 (1980).

8. **<u>Maintenance</u> (Section IX. B.)**

Maintenance may function like an extended warranty. Any maintenance provisions, however, should be separate and distinct from the warranty in the license agreement, and should ideally be in a separate agreement. This is important due to the difference in the licensor's liability for breach of the warranty contained in the license agreement and breach of a separate maintenance agreement. Under some license agreements the warranty begins on acceptance. Under others, acceptance does not occur until the expiration of the warranty. During the warranty, the licensee may terminate the license agreement if the software does not meet the functional requirements or perform in accordance with the license's other requirements and potentially receive a refund of the entire license fee. If the software does not meet the functional specifications during the maintenance period, however, the licensee can terminate the maintenance agreement but will usually only be entitled to receive a refund of the maintenance fee provided the maintenance provisions are contained in a separate agreement.

Annual maintenance charges are generally set at the rate of 15% to 18% of the original license fee. Some licensor's calculate the maintenance fee on the aggregate of the license fee plus the cost of any enhancements or modifications made by the licensor, while others consider any enhancements or modifications to be consulting services or professional services and not included in the base fee for calculating the maintenance fee. In addition, the licensor usually agrees to maintain only the one or two most recent versions of the software because of the difficulty of keeping track of all the different versions and whether they are comparable. Many agreements provide that if the licensor ceases to provide maintenance, the licensor will provide the licensee with a copy of the software's source code so that the licensee can maintain the source code itself. Licensees should realize, however, that it may be impractical for them to maintain the system itself given the complex nature of many large software systems and the large learning curve necessary to master the system.

Most maintenance agreements void any obligation to maintain the software if the licensee modifies the software in any way, or if any problems with the software result from the negligent or unauthorized actions by the licensee. Finally, a smart licensor will claim ownership of any modifications, enhancements or derivative works created by the licensor while performing maintenance for the licensee.

Licensees often want the licensor to agree to offer maintenance for a set period of the 5-10 years from acceptance without committing to actually purchasing maintenance from the licensor. This requirement is understandable as an expensive software system is worthless unless it is properly maintained. At the same time, a reasonable licensee can not expect the licensor to fix or project its prices ten years into the future. The solution is to include language that the licensor will provide such services at "licensor's then-existing price." Both the licensor and licensee should be concerned about any increase in the maintenance fees tied to the Consumer Price Index ("CPI") as the CPI does not adequately reflect the true cost to the licensor. In the 1970s and 1980s, the CPI rose significantly driven by higher real estate prices while technology salaries remained constant, while in the mid-1990s the CPI experienced only minor increases while technology salaries rose rapidly.

Finally, all maintenance agreements should require the licensor to update the product documentation in connection with any enhancement or alteration to the software and ensure the documentation is consistent with the licensed software. An aggressive licensee will seek to require that the licensor's software as maintained will be compatible with all third party software or hardware upgrades such as Oracle or Informix. This creates great risk for the entity providing maintenance given the uncertainty of when such upgrades will occur and the cost to make the licensor's software compatible.

One issue of great concern to licensors is when the licensee seeks to maintain the software through the use of independent third parties. Licensors are often concerned that these independent third parties may be their competitors who will learn the licensors' trade secrets or siphon off the licensors' maintenance revenue, which is usually a significant portion of their profits. See, e.g., Hodge Business Computer Systems, Inc. v. U.S.A. Mobile Communications, Inc., 910 F.2d 367 (6th Cir. 1990). This area is very complicated as the failure to allow third parties to provide maintenance support potentially exposes the licensor to antitrust concerns. For a more detailed discussion of these Antitrust issues, see Section III. C.11 below. See Johanson and Zollman, Computer Maintenance Raises Antitrust Issues, Nat'l. L. J., May 20, 1996, at C40, col.3.

9. **Training and Documentation** **(§§11 and 13.1)**

(a) Training

A detailed description of the training to be provided by the licensor is important to both the licensor and the licensee. The licensor wants to put distinct limits on the training to be provided to the licensee to fix the licensor's cost. This is especially important when to reduce costs both parties want to use a "train the trainer" approach. The description should set forth absolute time limits, the class size, class location, materials to be provided and the language in which the classes will be taught. A licensor will also want to delineate the skills the attendees must have to attend the specific training. This is to ensure that the licensor does not spend time teaching basic programming skills that the attendees should already possess. The licensor also wants to carefully state which skills will be taught, and what skills the attendees will possess upon completion of the course. For example, training should teach the attendees how to operate the software, but the licensor should not make statements to the effect that the licensee's attendees will be able to maintain the software unless such training will be provided.

At the same time, the licensee wants to clearly state that upon completion of training, the licensee will be able to fully operate the software, that future training will be available at a mutually agreed-to time if the licensee desires to purchase extra training and that all documentation and training provided by the licensor to the licensee will be accurate and current. Further, the licensee's attendees will receive copies of all documentation used during the course.

(b) Documentation

All documentation provided by the licensor should be in sufficient detail to allow a reasonably-skilled programmer to operate and use the software. The licensor should warrant that the documentation is the most current version of the documentation, complete and free from any errors and omissions and that the documentation corresponds to the licensee's current version of the software installed at the licensee's site and not a base line version of the software. Further, the licensor should promptly provide the licensee with updated documentation reflecting any changes made to the software utilized by the licensee.

A smart licensee will also want the licensor to warrant that the software meets the specifications provided in any documentation or that the documentation is applicable to the version of the software delivered to the licensor. Unless the licensor desires to make a profit on duplicating the documentation, the licensee should be free to reproduce the documentation without cost provided the license reproduces the licensor's protective marks (i.e., copyright notices) and does not modify the documentation.

10. **Bankruptcy (§6.1)**

(a) Licensor's Bankruptcy.

In response to the concern of the software industry and licensees in particular, the bankruptcy laws were rewritten to protect licensees in the event of a licensor's bankruptcy. Under Section 365(n) of the United States Bankruptcy Code (11 U.S.C. §365(n)) (the "Bankruptcy Act"), a licensee's rights to intellectual property which is the subject of a license cannot be unilaterally terminated as a result of the licensor's bankruptcy. Id. The trustee in bankruptcy can still reject the license agreement causing any executory provisions to become null and void, but the licensee can elect to retain its rights under the software license. If the licensee elects to retain its intellectual property rights, it must continue to pay the license fees due the licensor, and must forego certain remedies otherwise due under the Bankruptcy Act for the termination of the license agreement (e.g. rights to set off or any §503(b) claims and any priority claim). Under the Bankruptcy Act, the licensee does not need to act to preserve its license. 11 U.S.C. §365(n)(1)(B), but see In re E.I. International, 123 B.R. 64 (Bankr. D. Idaho 1991).

Other executory provisions of the contract are not enforceable by the licensee, such as maintenance and any unfinished development work. The licensee is able to require the trustee to turn over any embodiments of the licensed technology, provided they were stated in the license, including any exclusivity right. 11 U.S.C. §§365(n)(1)(B) and 365(n)(3).

See Bartlett, Effects of Bankruptcy on Licensing Under 11 U.S.C. §365(n), 5 J. Proprietary Rts. 20 (July 1993); Brown, Hansend, Salerno, Technology Licenses Under Section 365(n) of the Bankruptcy Code: The Protections Afforded The Technology User, 95 Com. L.J. 170, (1990); The Protection of Intellectual Property Rights of a Licensee When a Licensor Goes Into Bankruptcy Under the Amended 11 U.S.C. 11 §365, 73 J. Pat. & Trademark Off. Soc'y 893 (1991).

(b) Licensee's Bankruptcy.

Under Section 365(b) of the Bankruptcy Act, an intellectual property license is considered to be an unexpired lease or executory contract. As such, a licensee who declares bankruptcy and desires to assume the license agreement must cure all breaches, fully perform its obligations under the license agreement, and provide adequate assurances that it will perform in the future. If the licensee fails to do so, it must reject the license agreement and relinquish all rights to the underlying intellectual property.

To provide a greater level of protection, a licensor can include certain financial requirements in the license agreement which would allow the licensor to terminate the license agreement for the licensee's failure to abide by such requirements. These rights are separate and distinct from those provisions typically placed in a license agreement allowing the licensor to terminate the license for the licensee's bankruptcy. These termination provisions are void under the Bankruptcy Act. 11 U.S.C. § 365(e)(1); see also, In re: Computer Communications, Inc., 824 F. 2d 725 (9th Cir. 1987). Furthermore, a trustee can not assign a license to another entity without the licensor's consent, regardless of whether such transfer is allowed under the license agreement. In re Alltech Plastics, Inc., 71 B.R. 686 (Bankr. W.D. Tenn. 1987); 11 U.S.C. § 365(c).

In addition, a personal services contract can not be assigned or assumed by a debtor under the Bankruptcy Code. In re Catron, 158 B.R. 624 (E.D. Va. 1992), aff'd, 158 B.R. 629, aff'd, 25 F. 3d 1038. But see In re Fastrax, Inc., 129 B. R. 274 (Bankr. M. D. Fla. 1991) (subcontract for installation of storage, retrieval and distribution computer center not a personal service contract and could be performed by another computer software company).

11. Antitrust Issues

Traditionally, the provision of maintenance, enhancement and support services has been very lucrative for licensors, due to the high margins involved with such work. Licensees are often at the mercy of the licensor, as the licensor has the familiarity with the software and the necessary proprietary software tools to undertake such work. With the advent of outsourcing, the proliferation of competent third parties to maintain proprietary software, and the increasing desires of licensees for other alternatives, some licensors have sought injunctions to prohibit third-party access to licensors' proprietary software without a license, see, e.g. Triad Systems Corp. v. Southeastern Express Co., 64 F. 3d 1330 (9th Cir. 1995), cert. denied, 516 U.S. 1145 (preliminary injunction granted and affirmed on appeal); Independent Services Organizations Antitrust Litigation, 910 F. Supp. 1537 (D. Kan. 1995) (counterclaim for preliminary injunction against ISO granted) or seeking damages for such use. See, e.g., Data General Corp. v. Grumman Systems Support Corp., 36 F. 3d 1147 (1st Cir. 1994) (jury awarded damages for copyright infringement for unlicensed use of diagnostic software). The licensors' actions are based on their claims that their software is a copyrightable, proprietary asset, and that the third party has not purchased a license for the software.

At the same time, however, a licensor's attempt to exploit its software may be subject to liability based on the antitrust laws. Antitrust claims are usually based on illegally tying or monopolization. Licensees and other third parties have often claimed that licensors "tie" the use of their software to the purchase of maintenance services from the licensor in a violation of the antitrust laws. A tying arrangement is "an agreement by a party to sell one product only on the condition that the buyer also purchase a different product, *or at least agree not to purchase that product from any other supplier.*" (Emphasis supplied.) Northern Pacific Ry. v. United States, 356 U.S. 1, 5-6 (1958).

In Data General Corp. v. Grumman System Support Corp., 36 F. 3d 1147 (1st Cir. 1994), Data General sued Grumman for utilizing Data General's copyrighted diagnostic software which had been provided to Data General's customers on the specific condition that the customer not allow a third party service provider such as Grumman access. Grumman in turn counter-claimed that Data General's actions violated the antitrust laws. The First Circuit held that Data General as a copyright holder had presumptively a valid business reason for refusing to license its copyrighted software. Id. at 1187. This holding is consistent with other similar cases in this area. See, MAI Systems Corp. v. Peak Computing, Inc., 991 F. 2d 511 (9th Cir. 1993), cert. denied, 510 U.S. 1033 (1994); Advanced Computer Services of Michigan v. MAI Systems Corp., 845 F. Supp. 356 (E.D. Va. 1994), but see Electronic Data Systems Corp. v. Computer Associates Int'l., Inc., 802 F. Supp. 1463 (N.D. Tex. 1992) (allegation of tying of licenses for certain software to licenses for maintenance software is a valid claim of action), see also, Service and Training, Inc. v. Data General Corp., 963 F. 2d. 680 (4th Cir. 1992), (refusal of the licensor to license maintenance software, except to computer purchasers who self-maintained, held not to be an antitrust violation or a violation of copyright policy, but rather the right of a copyright owner to exercise control over its copyright). At least one court has held, however, that the mere refusal to license a patented invention or copyrighted work may give rise to liability if the holder does so with an "anticompetitive" interest. Image Technical Services, Inc. v. Eastman Kodak Co., 125 F. 3d 1195 (9th Cir. 1997).

Moreover, a licensor may not continue to collect royalties from the licensee after the copyright underlying the licensed software has expired. April Productions, Inc. v. G. Schirmer, Inc., 126 N.E. 2d 283 (Ct. App. N.Y. 1955). Attempts to collect such payments after the copyright has expired may be considered copyright misuse and a violation of the antitrust laws. See, DSC Communications Corp. v. DGI Technologies 81 F. 3d 597 (5th Cir. 1996). See, also, Brulotte v. Thys Co., 379 U.S. 29, 33 (1964) (attempts to collect royalties under expired patent constituted an improper use of patent monopoly, analogous to tying purchase or use of patented article to purchase or use of unpatented one).

For a general discussion of the antitrust issues in maintenance, enhancement and support services. See Soobert, Antitrust Implications of Bundling Software and Support Services, 21 U. Dayton L. Rev. 63 (1995); Hamilton, Software Tying Arrangements Under the Antitrust Laws: A More Flexible Approach, 71 Denv. U.L. Rev. 607 (1994); Johanson & Zollman, Computer Maintenance Raises Antitrust Issues, Nat'l. L. J. C40 col. 3 (May 20, 1996).

12. **Self Help**

At least one court has upheld a licensor's right to remotely deactivate a licensee's software for breach of the license's payment provisions. American Computer Trust Leasing v. Jack Farewell Implement Co., 763 F. Supp. 1473 (D. Minn. 1991), 967 F. 2d 1208 (8th Cir. 1992). The Central District Court of California has held, however, that disabling devices/codes may violate the Computer Fraud and Abuse Act, 18 U.S.C. §1030. North Texas Preventative Imaging v. Eisenberg, No. CV 96-71 Att. S. (C. D. Ca. Aug. 19, 1996).

IV. ESCROW AGREEMENTS

Escrow agreements are usually entered into to protect the licensee by providing it with access to the licensed software's source code in the event of either a material breach of the license agreement by the licensor, the failure of the licensor to properly maintain the software or offer maintenance for a set period of time (at least five years), or the bankruptcy/insolvency of the licensor. Furthermore, some licensees seek to include language in the license agreement that, in the event of a dispute, the licensor must place all advance license payments in escrow until the software has been accepted or the dispute resolved. A smart licensor will ensure that in the event of bankruptcy, the software will not be automatically released to the licensee, but rather the bankruptcy must be in conjunction with a material breach of the licensor's obligations. Otherwise, it would be inequitable to cause a release when the licensor is not in material breach but for its financial trouble.

Disputes often arise as to whether the software to be "escrowed" must be placed with an independent third party, i.e., an escrow agent, or held by the licensor. The licensor is usually hesitant to place its source code in the hands of a third party where the licensor is unable to control release of the source code, while the licensee should insist on the use of an independent third party as the licensor may wrongfully refuse to release the source code to the licensee in contravention of the escrow agreement.

Releasing the source code to the licensee, however, does not necessarily solve the licensee's problems. It may take some time for the licensee to understand the operation of the software and make the software system operational. Furthermore, placing fully- documented software in escrow does not immediately allow a licensee to support the system. In actuality, the source code is probably of little value without an employee/programmer of the licensor to support it and explain the software's operating to the licensee. Finally, there is the administrative burden on the licensee to see that the licensor has indeed placed a working copy of the source code and documentation in escrow and has also escrowed all enhancements, modifications, etc.

A smart licensee will require that the licensor escrow the software and documentation necessary to operate the software. The licensor should update all escrowed documentation and software no less than quarterly and warrant that the software escrowed is the current version of the software presently utilized by the licensee. The licensor should also escrow all tools needed by the licensee if it took possession of the software. In addition, the licensee should receive the right to recruit and hire the licensor's employees in the event the source code is released to the licensee. Finally, the licensee should make sure all escrow terms allow the licensee to utilize third parties and contractors to work on the source code if the original license grant does not allow this.

Use of the licensed software's source code which is released under an escrow agreement should still be subject to the terms of the license agreement and its use should be restricted solely to maintaining the licensee's copy for the licensee's internal purposes only. In addition, strict confidentiality restrictions should apply. From the licensee's perspective, the licensee should have the automatic right to receive the source code once it files a claim with the escrow agent, without having to arbitrate or invoke the escrow agreement.

See Section IX. E for a model Escrow Agreement.

V. CONFIDENTIALITY PROVISIONS AND TRADE SECRET LAWS

A. Proprietary Information Clauses and Agreements (§12)

Proprietary information agreements, which are also known as confidentiality agreements or non-disclosure agreements, are essential when dealing with intellectual property. While trade secrets are often protected under state trade secret laws (which are usually based on the Uniform Trade Secrets Act), proprietary information agreements provide an added level of protection. While it is not required that this legal protection appear in a separate agreement from the license agreement, it is preferable that such a separate and distinct agreement exist. A separate agreement avoids any claim that the parties' confidentiality obligations do not survive the termination of the license agreement. This is especially important for the licensor.

Often, licensors and licensees have no choice but to release proprietary information to the other. Release of such information could, for instance, be incidental to instructing the licensor as to the specific requirements a product must meet or as to specific functions a product must perform. In such cases, the execution of a proprietary information agreement is imperative to protect the licensee's proprietary information.

Proprietary information agreements provide the terms and conditions under which one party's proprietary information will be provided to another party, and also limitations on the use of such information by the receiving party. By executing a proprietary information agreement, the parties may agree upon what information will be exchanged, under what conditions the information will be returned to the disclosing party, the period for which the information will be kept confidential, and the right of the disclosing party to obtain equitable as well as monetary relief if the receiving party breaches its obligations under the agreement.

Proprietary information agreements can not actually prevent an independent contractor from disclosing an employer's proprietary information. Rather, proprietary agreements should be viewed as providing a framework for enforcing the employer's rights upon the contractor's breach. Every agreement should, therefore, include a provision for equitable relief which would allow the injured party to obtain injunctive relief without prejudicing its rights to obtain other remedies. The availability of equitable relief is very important, since it entitles an injured party to immediate relief when a breach of the proprietary information agreement occurs. This is especially important as monetary damages alone can be inadequate once proprietary information has been widely disseminated.

A proprietary information agreement should also include clauses addressing governing law, choice of forum, personal jurisdiction, arbitration, and the survival of the obligation of confidentiality beyond the termination of the agreement.

It is important to make sure that the agreement provides that all software shall be considered proprietary and confidential, regardless of whether or not it is marked as such. This is important because although most agreements require confidential and proprietary information to be marked, the media (disk or tape) containing the software will usually not be marked by the programmer who may be unfamiliar with the confidentiality agreement or the importance or marking the media.

Proprietary information agreements may be unilateral or bilateral. A unilateral agreement protects only one party's information, while a bilateral agreement would protect both party's information. (See Sections IX. I and J for model unilateral and bilateral proprietary information agreements).

Licensees should be cognizant that a licensor may transfer trade secret material as part of the deliverable work. Occasionally, cases of trade secret infringement arise out of criminal acts such as trespass and larceny against the premises or property of another, usually a direct competitor. However, the fact that no clandestine raids on competitors' source code or design documents has occurred should not lure the licensee into believing that no trade secret misappropriation has taken place. Software engineers and programmers carry so-called "tool kits" around in their heads and in their personal files. They consider stock routines to handle common programming exercises such as input/output, disk access, data capture, and graphics generators to be the building blocks of their work. The suggestion that such software would be proprietary to the entity that paid the development costs associated with the routines if often a radical departure from what they consider fair and equitable. The fact that they may be subject to confidentiality and invention assignment agreements does not always change their point of view on this issue.

Consequently, licensees should exercise caution when retaining licensors to avoid unwittingly committing trade secret misappropriation from one of the licensor's previous customers. The licensor should be interviewed and screened to ensure that its engagements did not involve the licensee's direct competitors or products likely to tempt the contractor into taking shortcuts by copying prior work. The licensor should be cautioned against using stock routines, and the contractor's reputation within the industry should be verified.

B. Trade Secret Laws

(i) General

In addition to the contractual protection provided by a proprietary information agreement, most proprietary and confidential information is protected under the relevant state trade secret laws, almost all of which are derived from the Uniform Trade Secret Act. See e.g. California: Cal. Civ. Code § 3426 et. seq.; Maryland: MD Code Ann. Com. Law §11-1201 et. seq.; Pennsylvania: 18 Pa. C.S. §3930; New York, however, has not adopted the Uniform Trade Secret Act.

State trade secret laws offer broader protection than copyright laws because the trade secret laws apply to concepts and information which are both excluded from protection under federal copyright law. See 17 U.S.C. § 102(b). Information eligible for protection includes computer code, Trandes Corp. v. Guy F. Atkinson Co., 996 F. 2d 655, 663 (4th Cir.), cert. denied, 510 U.S. 965 (1993); University Computing Co. v. Lykes-Youngstown Corp., 504 F. 2d 518 (5th Cir.), reh'g denied, 505 F. 2d 1304 (5th Cir. 1974); Integrated Cash Management Servs., Inc. v. Digital Transactions, Inc., 732 F. Supp. 370 (S.D.N.Y. 1989), aff'd 920 F. 2d 171 (2d Cir. 1990); program architecture, Trandes, 996 F. 2d at 661; Computer Assocs. Int'l, Inc. v. Bryan, 784 F. Supp. 982 (E.D.N.Y. 1992), and algorithms, Vermont Microsystems, Inc. v. Autodesk, Inc., 88 F. 3d 142 (2d Cir. 1996); Micro Consulting, Inc. v. Zubeldia, 813 F. Supp. 1514, 1534 (W.D. Okl. 1990), aff'd without opinion, 959 F. 2d 245 (10th Cir. 1992). Mathematical algorithms are also protectable under patent law. Arrhythmia Research Technology v. Corazonix Corp., 958 F. 2d 1053 (Fed. Cir.) reh'g denied, 1992 U.S. App. LEXIS 9888 (Fed. Cir. 1992); In re Iwashi, 888 F. 2d. 1370 (Fed. Cir. 1989).

Courts are divided as to the application of trade secret protection for customer lists. See Morlife, Inc. v. Perry, 1997 WL 464807 (Cal. App. 1997) (file of customer business cards maintained by sales manager are trade secrets) and In re American Preferred Prescription, Inc., 186 B.R. 350 (Bankr. E. D. N. Y. 1995) (client list is trade secret). See also, DeGiorgio v. Megabyte Int'l., Inc., 468 S. E. 2d 367 (Ga. 1996) (only tangible customer lists are subject to protection as a trade secret), and Ed Nowogroski Insurance v. Rucker, 944 P. 2d 1093 (Wash. 1997) (memorized client list constitutes trade secret), but see Vigoro Indus. v. Cleveland Chem. of Ark., 866 F. Supp. 1150 (E. D. Ark. 1994) (customer lists alone not considered a trade secret), and WMW Machinery Company, Inc. v. Koerber A.G., 658 N. Y.S.2d 385 (App. Div. 1997) (customer lists are not trade secrets where lists are readily ascertainable from sources outside employee's business). Further, at least one court has held that the execution of a non-disclosure agreement by an employee does not in and of itself create trade secret status for the employer's customer lists. Equifax Servs., Inc. v. Examination Management Servs., Inc., 453 S. E. 2d 488 (Ga. App. 1994).

A majority of courts have held that claims based on trade secret laws are not pre-empted by federal copyright law. Bishop v. Wick, 11 U.S.P.Q. 2d 1360 (N. D. Ill. 1988); Brignoli v. Balch, Hardy & Scheinman, 645 F. Supp. 1201 (S.D.N.Y. 1986), but see, Computer Associates International v. Atari, 775 F. Supp. 544 (E.D.N.Y. 1991); Enhanced Computer Solutions, Inc. v. Rose, 927 F. Supp. 738 (S. D. N. Y. 1996); Benjamen Capital Investors v. Cossey, 867 P. 2d 1388 (Or. Ct. App. 1994). At the same time, however, two commentators have suggested that trade secret laws may be the only method of protection for the ideas incorporated in the functionality of mass distributed commercial software. Johnston & Crogan, Trade Secret Protection for Mass Distributed Software, 11 Computer Law. 1 (Nov. 1994).

To maintain a concept's or information's status as a trade secret, the owning entity should undertake a number of actions to protect the confidential nature of the information. These actions include marking all tangible property containing such confidential information, including any disks or tapes as "Proprietary and Confidential." All employees and consultants should execute a confidentiality agreement prior to their access to confidential information, and the owning entity should limit the dissemination of the information to a need-to-know basis.

Matters of public knowledge, general knowledge of an industry or routine or small differences in procedures or methodology are not considered to be trade secrets. Anaconda Co. v. Metric Tool & Die Co., 485 F. Supp. 410, 421-22 (E.D. Pa. 1996). Furthermore, any skill or experience learned during the course of employee's employment is not considered to be a trade secret. Rigging Int'l Maintenance Co. v. Gwin, 128 Cal. App. 3d 594 (1981), but see Air Products and Chemicals, Inc. v. Johnson, 442 A. 2d 1114 (Pa. Super. 1982) (details of research and development, projected capital spending and marketing plans are trade secrets); Den-Tal-Ez, Inc. v. Siemens Capital Corp., 566 A. 2d 1214 (Pa. Super. 1989) (detailed units costs, profit margin date and pricing methods are trade secrets.

For a general overview of trade secret issues, see Peterson, Trade Secrets in an Information Age, 32 Hous. L. Rev. 385 (1995) and Dodd, Rights in Information: Conversion and Misappropriation Causes of Action in Intellectual Property Cases, 32 Hous. L. Rev. 459 (1995).

(ii) Restatement of Torts

Section 757(b) of the Restatement of Torts sets forth six factors to determine whether a concept or information is a trade secret: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of the measures taken by the owner to guard the secrecy of the information; (4) the value of the information to the business and to its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Thus, the determination of whether a piece of information is a trade secret depends on whether it meets these requirements.

(iii) Uniform Trade Secrets Act

Under the Uniform Trade Secrets Act ("UTSA"), for "information" to be found to be a "Trade Secret" it must meet a two-pronged test. First, a Trade Secret is defined broadly to include "information, including a formula, pattern, compilation, program, device, method, technique or process." Second, such information must derive actual or potential economic value from not being known and not being readily ascertainable by proper means by other persons, who can obtain economic value from its disclosure or use, and such information is subject to reasonable efforts by the owner to maintain its secrecy. UTSA §1(4); see, e.g., MD Code Ann. Com. Law §11-201(e).

The UTSA defines "Misappropriation" to mean the (i) acquisition of a trade secret by a person who knows or has reason to know the trade secret was acquired by improper means, or (ii) disclosure or use of a trade secret without express or implied consent by a person who improperly acquired knowledge of the trade secret, or who at the time of disclosure or use, knew or had reason to know that the trade secret had been improperly acquired, and there was an obligation to maintain its confidentiality. UTSA §1(2); see, e.g, MD Code Ann. Com. Law §11-201(c).

An owner of trade secrets is entitled to receive injunctive relief and damages for the misappropriation of its trade secrets. USTA §3. Such damages include the actual loss caused by the misappropriation and any unjust enrichment arising as a result of the misappropriation, that is not taken into account in computing any actual loss. UTSA §3; see, e.g, MD Code Ann. Com. Law §11-1203. A court may also award attorney's fees if willful and malicious misappropriation exists. UTSA §4(iii); see, e.g., MD Code Ann. Com. Law §11-1204.

Given the differences in state trade secret laws, the choice of governing law is very important. For example, South Carolina has recently enacted legislation providing that written agreements not to disclose trade secrets will be enforced without limitation on duration or geographic scope when the employee knows or has reason to know of the trade secret's existence. S.C. Code Ann. §39-8-30(d) (Law Co-op. 1997), while the Wisconsin Court of Appeals in an unpublished decision declined to enforce a non-disclosure provision in an agreement because it was unlimited as to time and overly broad. Williams v. Northern Technical Services, Inc., 568 N.W. 2d 784, No. 95-2809 Wis. Ct. App. (1997).

(iv) Economic Espionage Act of 1996

The new Economic Espionage Act of 1996 makes certain misappropriations of a trade secret a federal crime and provides enhanced penalties for the theft of trade secrets. 18 USC § 1831 (1996). Under this law, anyone who seeks to steal a trade secret related to or included in a product that is produced for or placed in interstate or foreign commerce that injures the owner of that trade secret shall be subject to a fine not more than $5 million or imprisonment of not more than ten years, or both. 18 USC § 1832.

The Economic Espionage Act defines trade secrets broadly as:

> all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs or codes, whether tangible or intangible, and whether or how stored, compiled or memorialized physically, electronically, graphically, photographically, or in writing if: (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by the public.

18 U.S.C. 1839(3) (1996).

This law is also applicable to anyone who receives, buys, or possesses such information knowing that such information has been stolen or appropriated, obtained or converted without authorization. 18 U.S.C. § 1832 (a)(3). The Economic Espionage Act does not preempt or displace any other remedies, whether civil or criminal, provided by United States federal, state, commonwealth or territory law for the misappropriation of trade secrets. 18 USC § 1838 (1996). Individuals who violate the act are subject to fines of $500,000 and ten years in prison, while a corporation may be fined up to $5,000,000. 18 U.S.C. § 1832(a).

While the Economic Espionage Act contains criminal penalties unlike the USTA, a plaintiff under the EEA must prove guilt "beyond a reasonable doubt." Further, the due process requirements for criminal acts must be satisfied.

VI. SHRINKWRAP LICENSES

Shrinkwrap licenses derive their name from the practice of containing them on (or currently in) a shrinkwrap package which also contains the software and documentation. The license is visible through the cellophane packaging and usually provides that the purchaser is bound by the terms of the license upon opening the shrinkwrap. If the licensee does not agree with and therefore does not wish to be bound by the terms of the license, it should return the unopened package to the licensor for a full refund. There is no opportunity to negotiate the terms of the license.

Until recently, courts had been hesitant to enforce shrinkwrap licenses, based on the Uniform Commercial Code. See generally, Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F. 2d 91 (3d Cir. 1991) (shrinkwrap license not enforceable under Section 2-207 of UCC as license terms mutually altered the contract between the parties); Arizona Retail Systems v. Software Link, 831 F. Supp. 759 (D. Ariz. 1993) (shrinkwrap license not binding under UCC 2-207 and 2-209). See also Vault Corporation v. Quaid Software, Ltd., 847 F. 2d 255 (5th Cir 1988) (provisions of shrinkwrap license unenforceable to the extent their validity is based on Louisiana Software License Enforcement Act which is pre-empted by federal copyright law.)

In ProCD, Inc. v. Zeidenberg, 86 F. 3d 1447 (7th Cir. 1996), the Seventh Circuit held that "shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general" (i.e. unconscionable). The court rejected the applicability of UCC § 2-207 stating that a battle of the forms could not exist if only one form existed. Thus, there is a dichotomy of opinion as to the enforceability of shrinkwrap licenses. See also, Hill v. Gateway 2000, Inc., 105 F. 3d 1147 (7th Cir. 1997), cert. denied, 118 S. Ct. 47 (1997) (contract terms in computer box enforceable, including arbitration clause).

Given that most shrinkwrapped software is utilized in the consumer market it is subject to the Magnuson-Moss Act. Consequently, to avoid coverage under the Magnuson-Moss Act, and the accompanying limitations, a licensor must be very careful as to the warranties it makes. See Section III.B.1(b)(ii) for a detailed discussion of the Magnuson-Moss Act.

For a more detailed discussion, see, Lemley, Intellectual Property and Shrinkwrap Licenses, 68 S. Cal. L. Rev. 1239 (1995); Moore and Hadden, On-Line Software Distribution: New Life for "Shrinkwrap" Licenses?, 13 Computer Law. 1 (April 1996); Recent Legal Developments in Shrink Wrap License Agreements, 12 Computer L. Strategist 1 (April 1996); Miller, The Enforceability of Shrinkwraps as Bare Intellectual Property Licenses, 9 Computer Law. 15 (August 1992).

VII. PROPOSED UNIFORM COMMERCIAL CODE ARTICLE 2B

A. General

Article 2 of the UCC applies to "transactions in goods" and is the fundamental law applied in commercial transactions. UCC §2-102. At the time Article 2 was adopted in 1951, the use of software was not foreseen and certainly was not a significant part of commercial business transactions as it is today. As such, business people and lawyers have not had a uniform law to look to in commercial transactions involving software, creating uncertainty as to how business disputes involving software should be resolved.

Software is neither fish nor fowl as it is bought and sold like a good but yet it is not a tangible product. In the past, courts have looked to whether a software transaction was primarily the sale or license of software (in which case software has been found to be a good) or the provision of services such as software development (see, e.g., Micro Managers Inc. v. Gregory, 434 N.W.2d 97, 100 (Wis. Ct. App. 1988)) to determine whether the UCC Article 2 would apply to a particular transaction. If the contract is primarily for the provision of a software program, the UCC will apply. The trend has been to recognize that the UCC governs software transactions. Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 674-75 (3d Cir. 1991); RPX Indus., Inc. v. Lab-Con, Inc., 772 F.2d 543, 546 (9th Cir. 1985); Triangle Underwriters, Inc. v. Honeywell, Inc., 604 F.2d 737, 742-43 (2d Cir. 1979), including those transactions involving customized software. See, e.g., Advent at 674; Colonial Life Inc. Co. v. Electronic Data Systems, 817 F. Supp. 235, 239 (D.N.H. 1993). See also, Note, Computer Programs as Goods Under the UCC, 77 Mich. L. Rev. 1149 (1979).

The application of UCC Article 2 to software transactions creates significant unforeseen liability for the licensor. See Phillips, When Software Fails: Emerging Standard of Vendor Liability Under the Uniform Commercial Code, 50 Bus. Law. 151 (1994). Numerous sections of Article 2 on their face appear to be inapplicable to software, or at least fail to recognize the nature of software. For example, the perfect tender rule under Section 2-601 would require that the software tendered by the licensor be in total conformity with the contract. See generally, Cohn, Kirsh & Nimmer, License Contracts Under Article 2 of the Uniform Commercial Code: A Proposal, 19 Rutgers, Computer & Tech. L.J. 281 (1994). Yet it is uniformly acknowledged that software by its nature is imperfect. As such, while there has been a great desire for a uniform law to address software licensing and add certainty in commercial transactions, there has been a great hesitancy to apply Article 2 as is.

B. History of Attempts to Apply UCC Article 2 to Software Licensing

1. **Massachusetts Model**

In 1990 a committee headed by Stephen Y. Chow (Phone (617) 854-4000), in conjunction with the Business Law Section of the Massachusetts Bar Association drafted a model UCC Article 2B to serve as a discussion point for adapting the UCC to software licensing. The committee created a completely new article by modifying those sections of Article 2 which it thought were inapplicable to software while maintaining the majority of Article 2. Although this article was widely circulated, there was no attempt to adopt it under Massachusetts law or elsewhere.

2. Hub and Spoke Approach

As a result of the increasing need for a uniform law for software licensing, the National Conference of Commissioners for Uniform State Laws ("NCCUSL") began to create plans to adapt Article 2 to software. The committee discussed utilizing a hub and spoke approach to apply UCC Article 2 to software licensing.

Under a hub and spoke approach, existing UCC Article 2 would serve as a "hub" and from that hub, spokes, i.e., those portions of UCC Article 2 that needed to be amended for software licensing such as the perfect tender rule, would protrude. In August of 1995, after reviewing several drafts of a revised Article 2 utilizing the hub and spoke approach, the NCCUSL Conference Board decided not to pursue the hub and spoke approach but instead to support a totally new Article 2B to directly address software licensing. For a general discussion of the hub and spoke concept, see Nimmer, Intangibles Contracts: Thoughts of Hub, Spokes and Reinvigorating Article 2, 35 Wm. & Mary L. Rev. 1337 (1994) and Feldman, A New Draft of UCC Article 2: A High Tech Code Takes Form, 12 Computer Law. 1 (1995).

3. Article 2B

In September 1995, the NCCUSL Conference Board began discussing a proposed UCC Article 2B. Article 2B was to be a completely new article drafted along the lines of the Massachusetts model. When approved in final form, the Article needed to be voted on by the full NCCUSL Conference Board and then sent to the individual states to adopt into law. After going through many revisions and being subject to much criticism from many consumer groups and the Federal Trade Commission for being too vendor-oriented, the proposed Article "died" in March 1999 when it became clear NCCUSL lacked a consensus to approve its ratification. On April 17, 1999, NCCUSL announced that there would be no proposed Article 2B of the UCC.

Previous drafts of Article 2B are available from the University of Houston Law School's World Wide Web Home Page at *http://www.lawlib.uh.edu/ucc2b* or the University of Pennsylvania's Law Library at *http://www.law.upenn.edu/library/ulc/ucc2*.

C. Present Status

NCCUSL now plans to draft and offer to the states for enactment a separate commercial statute or uniform act known as the Uniform Computer Information Transaction Act (UCITA). NCCUSL plans to have the UCITA ready for enactment by the states in the fall of 1999. It believes that a uniform law is needed given the considerable diverse legislative activity within the states regarding electronic commerce issues. This issue is particularly troublesome since electronic transactions can, and frequently are, conducted across state lines. NCCUSL sees the UCITA as an intermediate step that will bring uniformity and clarity to this area of law until it can develop further.

VIII. RECOMMENDED RESOURCE MATERIALS

A. Beutel, Contracting for Computer Systems Integration, Michie.
B. Douglas and Binder-Arain, Computer and Information Law Digest, Warren, Gorham & Lamont.
C. Feldman and Nimmer, Drafting Effective Contracts, Aspen Law & Business.
D. Gordon, Computer Software: Contracting for Development and Distribution, John Wiley and Sons.
E. Hancock, Data Processing Agreements, Business Laws, Inc.
F. Nimmer, The Law of Computer Technology, Warren, Gorham & Lamont.
G. Raysman and Brown, Computer Law, Law Journal Seminars Press.
H. Ridley, Quittmeyer, and Matuszeski, Computer Software Agreements, Warren, Gorham & Lamont.
I. Scott, Scott on Computer Law, Aspen Law & Business.
J. Software Transactions, Business Laws, Inc.

Useful newsletters include The Computer Lawyer published by Aspen Law & Business, Phone: (800) 638-8437, and The Intellectual Property Law Counsellor published by Business Laws, Inc., Phone: (800) 759-0929.

IX. MODEL FORMS

A. Annotated Master Software License and Services Agreement
B. Software Maintenance and Services Agreement
C. Consulting Agreement
D. Assignment
E. Escrow Agreement
F. Software License, Maintenance and Subscriber Billing Services Agreement (Service Bureau License Agreement)
G. Year 2000 Warranties
H. Year 2000 Surveys
I. Unilateral Proprietary Information Agreement
J. Bilateral Proprietary Information Agreement

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Section IX.A.

MASTER SOFTWARE LICENSE AND SERVICES AGREEMENT

THIS MASTER SOFTWARE LICENSE AND SERVICES AGREEMENT is made this day of ______, 2000 by and between ____, a ________________ corporation with its address at ______________________________________ (hereinafter "**Licensor**") and __________________, a ________________ corporation with offices located at ________________________________(hereinafter "**Customer**").

- ***Who is the Customer?***
- ***Who are the appropriate contracting entities?***
- ***Is the Licensee financially stable and able to pay Licensor or is a parent guaranty needed?***
- ***Is a parent guaranty needed to ensure the Licensor's performance?***
- ***Consider the Licensor's and Customer's address as it may have income tax implications for the Licensor and sales tax implications for the Licensee.***

BACKGROUND

Licensor has developed and owns certain proprietary software for use in the ____________ industry. Customer desires to obtain licenses to use such software and Licensor desires to license such software to Customer on the terms and conditions set forth herein.

- ***The "Background" should slightly favor Licensor to show that Customer desired to conduct business with Licensor. While immaterial to the license itself, the Background may have some impact on any litigation arising from the license.***

IN CONSIDERATION of the foregoing and the mutual covenants set forth herein, and intending to be legally bound, the parties agree as follows:

1. DEFINITIONS

The following words shall have the following meanings when used in this Agreement:

1.1 "Affiliate(s)" or "Affiliate Company" shall mean those companies that are initially listed on Appendix A attached hereto, which may be amended from time to time with the prior written consent of an authorized executive officer of Licensor.

- ***Think about who is going to be able to use the Software and how its affects Licensor's revenues and pricing. A Customer may want to provide software to all of its "Affiliates" including those overseas. Licensor wants to restrict the license to the Customer alone or the Customer's then existing "Affiliates" who are listed on the attached Appendix. By listing the Affiliates any potential misunderstanding as to who may use the Software or the additional cost of including such entitles is***

avoided. The Customer may not add an entity to the list of Affiliates without Licensor's permission. The number of Affiliates is usually an element of price.

1.2 "Critical Error(s)" shall mean a failure of the Software which severely impacts Customer's ability to provide service and which cannot be temporarily eliminated through the use of a "Bypass" or "Work Around."

1.3 "Error(s)" shall mean a failure of the Software to substantially conform to the user documentation and operating manuals furnished by Licensor or the specification governing said Software which failure materially impacts operational performance or functional performance.

1.4 "Functional Specifications" shall mean those specifications to which the Software shall conform as set forth in each order attached hereto.

- ***The Functional Specifications should be set out in detail prior to execution of an order to avoid later disagreements. Agreement in advance may not be feasible, however, depending on the nature of the development undertaken by Licensor. Any plan should be objective in nature to protect Licensor.***

1.5 "License(s)" shall mean any personal, non-exclusive, non-transferable, non-assignable license or licenses for Customer's internal use only granted by Licensor to Customer to use the Software or Software Products under this Agreement.

1.6 "Object Code" shall mean the binary machine readable version of the Software.

1.7 "Services" shall mean the work done by Licensor in support of the Software and Software Products, including but not limited to installation services, training, consulting, support, telephone support, and such other services as may be defined in an accepted order.

1.8 "Site" shall mean a Customer's computer facility located in one specific geographic location.

1.9 "Software" shall mean the object code version of all Licensor programs, data, routines, etc., with Customer's specified enhancements for the particular Software licensed by Customer as identified in each particular order.

1.10 "Software Acceptance Plan" shall mean that plan set forth in Exhibit 2 to each particular order, attached hereto.

- ***The Software Acceptance Plan should be set out in detail prior to execution of an order to avoid later disagreements. Agreement in advance may not be feasible, however, depending on the nature of the development undertaken by Licensor. Any plan should be objective in nature to protect Licensor.***

1.11 "Software Products" shall mean all physical components, other than Software, that are offered by Licensor, including but not limited to, documentation, magnetic media, job aids, templates and other similar devices.

1.12 "<u>Source Code</u>" shall mean those statements in a computer language, which when processed by a compiler, assembler or interpreter become executable by a computer.

- ***The Definitions section is very important as this is where the Customer may try to insert a definition which has a favorable implication later in the Agreement based upon its use. For example, many customers try to define "Agreement" to include the RFP. This is dangerous as the Deliverables may have changed since Licensor responded to the RFP or Licensor may never have intended to meet certain requirements of the RFP and listed such requirements in the "Exceptions" portions of Licensor's RFP response. Both the RFP and RFP Response should not be included in the Agreement. If the RFP and RFP response are included in the Agreement the two documents often are inconsistent, leading to potential problems of interpretation.***

2. <u>ORDERS</u>

Customer may place orders for Software, Software Products and Services, subject to the terms of this Agreement by execution and submission to Licensor of an order substantially in the form of Appendix B, attached hereto, which may be amended from time to time. **All orders acceptable to Licensor shall be executed by Licensor and returned to Customer by Licensor within three (3) weeks from Licensor's receipt of the order. All orders shall be deemed to incorporate the terms and conditions of this Agreement and any amendments hereto. In the case of any conflicts between the terms of this Agreement and any particular order, the terms of the particular order shall prevail. All typed, stamped, or preprinted portions of Licensor's and Customer's orders or acknowledgments or other communications shall not be binding upon the parties unless mutually agreed upon by authorized representatives of the parties in writing.** Such mutually agreed upon writings shall prevail over this Agreement for that specific order only.

- ***This is a master agreement to which work orders will be attached to it. A master agreement saves time by not having to negotiate a new contract for each project as the master agreement contains the "boiler plate" terms and conditions which will apply to all transactions. The work orders are usually more detailed as they set forth the work to be performed and any special terms and conditions that relate to that particular work order. Consequently, the work orders become very important because in the case of a conflict between the master agreement and the work order, the terms and conditions of the particular work order supersede the master agreement.***
- ***The license needs to set forth a time period in which to respond to an order so that there is not an unlimited offer outstanding by the licensee.***
- ***The contract should be specific that any terms and conditions set forth in either party's standard forms (i.e., orders, order acknowledgements, etc.) are not part of the contract to avoid a "battle of the forms".***

3. <u>LICENSE</u>

3.1 Subject to the provisions of this Agreement as well as the payment of all applicable license fees for the term of such license, **Licensor grants Customer** and Customer accepts **a**

limited, personal, non-exclusive, non-transferable, non-assignable Object Code license to use the Software and Software Products **for Customer's internal use only** in the **United States** on the Central Processing Units ("CPUs") set forth in each particular order and to the extent ordered by Customer. Licensor agrees to provide Customer with associated Software Products and Services subject to the provisions of this Agreement.

- ***Customer - Who is the Customer?***
- ***License - Licensor "licenses" its software, Licensor does not "sell" it. "Selling" indicates a transfer of ownership meaning the Customer could potentially "resell" the software to a third party.***
- ***Limited - Customer has only limited rights in the software.***
- ***Personal - Use of the software is "personal" to the Customer only.***
- ***Non-exclusive - Other customers may receive a similar license to use the <u>same</u> software.***
- ***Non-transferable - The Software cannot be transferred to other entities.***
- ***Non-assignable - The Software cannot be assigned to other entities.***
- ***Object code - No source code is being licensed. Customer will receive object code only.***
- ***Internal use - The Software cannot be used for outsourcing, timesharing, service bureaus, etc.***
- ***United States - To avoid export issues and the potential diversion of the software, the Customer may use the software only in the United States.***

**** The entire license grant is preceded by the clause "Subject to the provisions of this Agreement" which allows Licensor to terminate the license grant if the Customer breaches the individual terms of the Agreement.***

***** Most of these issues are pricing issues. For example, while Licensor may not initially grant a source code license which will limit Licensor's ability to earn revenue from maintaining the software or developing enhancements, Licensor will license source code for an appropriately larger license fee.***

3.2 All Software and Software Products used in, for or in connection with the software, parts, subsystems or derivatives thereof (the "System"), in whatever form, including, without limitation, source code, object code, microcode and mask works, including any computer programs and any documentation relating to or describing such Software or Software Products, such as, but not limited to logic manuals and flow charts provided by Licensor, including instructions for use of the Software or Software Products and formulation of theory upon which the Software or Software Products based, are furnished to Customer only under a personal, non-exclusive, non-transferable non-assignable Object Code license solely for Customer's own internal use.

3.3 Except as provided in this Agreement, no license under any patents, copyrights, trademarks, trade secrets or any other intellectual property rights, express or implied, are granted by Licensor to Customer under this Agreement.

3.4 Customer shall not and shall not permit its Affiliates or any third party to translate, reverse engineer, decompile, recompile, update or modify all or any part of the Software or merge the Software into any other software.

- ***Section 3.4 restricts the Customer from modifying or enhancing the Software. It is essential this paragraph remain in the Agreement, otherwise the Customer (and potentially the Customer's other vendors) would under the Sega, Atari and Bateman decisions have the right to reverse engineer the Software to create its own interfaces, etc. It is also important that the Customer is forbidden from merging the Software with other software, which in turn may create a new work which could be copyrighted in the Customer's name.***

3.5. All patents, copyrights, circuit layouts, mask works, trade secrets and other proprietary rights in or related to the Software are and will remain the exclusive property of Licensor, whether or not specifically recognized or perfected under the laws of the jurisdiction in which the Software is used or licensed. Customer will not take any action that jeopardizes Licensor's proprietary rights or acquire any right in the Software, the Software Products or the Confidential Information, as defined in Section 12 herein below. **Unless otherwise agreed on a case-by-case basis, Licensor will own all rights in any copy, translation, modification, adaptation or derivation of the Software or other items of Confidential Information, including any improvement or development thereof. Customer will obtain, at Licensor's request, the execution of any instrument that may be appropriate to assign these rights to Licensor or perfect these rights in Licensor's name.**

- ***Section 3.5 provides that even if the Customer created a derivative work, in contradiction to Section 3.4, Licensor will have sole and exclusive ownership of such work.***

3.6 Customer shall not allow any third party to have access to the Software or Software Products without Licensor's prior written consent.

- ***Section 3.6 prevents the Customer from utilizing outside contractors and consultants from utilizing or working on the software. This protects Licensor from the Customer hiring Licensor's competitors or outsourcing the software and its maintenance.***

4. TERM OF AGREEMENT

The term of this Agreement shall commence upon the execution of this Agreement, and shall continue for ____ years and thereafter may be terminated by either party upon at least ninety (90) days prior written notice to the other, or at any time upon the breach of this Agreement or any order by either party.

- ***This "term" relates to the term of the master agreement although the term of the individual licenses granted by the work orders may be different.***

5. TERM OF LICENSES

Subject to the limitations contained in this Agreement, the term of each individual License granted under this Agreement begins on the date of delivery of the Software, and shall terminate on the date set forth on the order that requested such license, unless earlier terminated as provided in this Agreement.

- ***The term of the "License" must begin on "delivery" and not on "acceptance" otherwise the Customer would be under no legal obligations as to the use of the Software prior to "acceptance". Binding the Customer to the terms of the license upon delivery does not indicate the Customer's acceptance or create an obligation for the Customer to pay the applicable license fee.***

6. <u>TERMINATION OF AGREEMENT AND/OR LICENSE</u>

6.1 Licensor shall have the right to terminate this Agreement or any order and, at its option, take possession of the Software and Software Products, if (a) in Licensor's reasonable judgment, Customer's financial condition does not justify the terms of payment specified above, unless Customer immediately pays for all Software, Software Products and Services which have been delivered, and pays in advance for the balance of Software, Software Products and Services remaining to be delivered during the term of this Agreement; (b) Customer makes an assignment for the benefit of creditors, or a receiver, trustee in bankruptcy or similar officer is appointed to take charge of all or any part of Customer's property or business; (c) Customer is adjudicated bankrupt; or (d) Customer neglects or fails to perform or observe any of its obligations under this Agreement and such condition is not remedied within thirty (30) days after Customer's receipt of written notice by Licensor to Customer setting forth Customer's breach. **Notwithstanding anything contained in this Agreement or any order, Licensor shall have the right to immediately terminate this Agreement without notice if Customer breaches Sections 3, 12 or 13 or otherwise misuses the Software in contravention of this Agreement.**

- ***Licensor must have the <u>immediate</u> right to terminate the Agreement without granting a cure period if the Customer breaches the Agreement by misusing the software. This position is justifiable because a cure period cannot "absolve" the breach.***

6.2 **In the event Licensor shall be in material breach or default of any of the terms, conditions, or covenants of this Agreement or any order, and such breach or default shall continue for a period of ninety (90) days after the receipt of Customer's written notice to Licensor setting forth Licensor's breach,** Customer shall have the right to cancel this Agreement or any such order placed by Customer without any charge, obligation, or liability whatsoever, except as to the payment for Software, Software Products, and/or Services already received and accepted by Customer.

- ***Licensor must have a time period in which to "cure" any defaults. The time period must be long enough to allow Licensor to be able to do so. Given the nature of software, this period can be no less than 30 days.***

6.3 Upon termination, cancellation or expiration of this Agreement or any order, Customer shall, without request by Licensor, immediately return all papers, materials and property of Licensor held by Customer. In addition, each party will assist the other in the orderly termination of this Agreement or any order and in the transfer of all property, tangible and intangible, as may be necessary for the orderly, non-disrupted business continuation of each party.

- ***All Licensor documentation should be returned by the Customer to Licensor without Licensor having to request that the documentation be returned.***

6.4 Within ten (10) days of the termination, cancellation or expiration of any order or License granted hereunder, Customer shall, upon Licensor's request, certify in writing that all copies of the Software, in whole or in part, have been removed from its production libraries. Concurrent with this certification, Customer will return to Licensor all documentation, Software and Software Products required by Licensor to be returned or Customer's project manager will certify to Licensor that such documentation, Software and Software Products have been destroyed.

- ***If the Customer requires a "termination for convenience" clause, the clause must be carefully worded to clearly state how the termination fee will be determined. In such a case, the Customer must pay for work completed, Licensor's termination costs and Licensor's lost profit. The Licensor business person must determine whether the Customer should compensate Licensor based on Licensor's costs (a cost plus model) or on a percent complete (of the project) basis. In either case, the Agreement should provide that Licensor is entitled to recover Licensor's lost profit or at least a pro rata portion of the lost profits.***

7. OBLIGATIONS THAT SURVIVE TERMINATION

The parties recognize and agree that their obligations under Sections 8, 12, 14, 15, 16 and 28 of this Agreement survive the cancellation, termination or expiration of this Agreement and any particular order or License. These same Sections shall apply for the duration of Customer's use of Software licensed under the license granted in Section 3 or any order.

- ***The obligations of the parties that will survive termination of the Agreement, i.e., payment to Licensor, confidentiality, limitation of liability, governing law etc. should be specifically listed because these obligations would otherwise "terminate" with the Agreement. As a result, Licensor may be unable to get paid or protect its proprietary information since the Agreement is no longer in existence and thus the Customer is no longer bound by the terms of the Agreement.***

8. LICENSE FEES

8.1 The fees for the Software, Software Products, and Services ordered hereunder, including any applicable discount and payment schedules, shall be set forth in each particular Order, attached hereto.

8.2 The machine class of each Software License, where applicable, shall be determined at the time of order, **in accordance with Licensor's then current price list as may be amended from time to time [and initially set forth in Appendix C]**. Unless Customer moves the

Software to a higher class Central Processing Unit ("CPU"), said machine class shall not change for any existing License and Licensor shall not restructure machine classes or License fees in any way that will cause an increase in any License fees for Licenses already acquired by Customer, other than in accordance with this Section.

- ***Pricing should be determined by the type of license granted.***
- ***Licensor must have the ability to amend its pricing, otherwise the Customer may claim the price is fixed for the duration of the license or the Agreement.***

8.3 If Customer moves the Software to a higher machine class CPU, Customer shall notify Licensor in writing thirty (30) days prior to the move and shall incur and pay an upgrade charge that will be the difference between the License fee charged for functionally identical Software placed on the higher class CPU, after any associated discounts are applied, and the License fee paid by Customer for the Software being moved.

8.4 If Customer desires, subject to obtaining Licensor's prior written consent, to operate the Software subsequent to a change in control of Customer, other than with the designated CPU's or other than at Customer's site identified in the order, Customer will be required to pay Licensor a transfer fee according to Licensor's then-existing fee structure.

- ***Section 8.4 allows Licensor to charge the Customer a transfer fee for a change of control.***

9. <u>TERMS OF PAYMENT</u>

Licensor shall invoice Customer for Software, Software Products, and Services based upon the terms described in each particular order.

Licensor may charge Customer a one and one-half percent (11/2%) monthly finance charge to be calculated monthly with respect to all outstanding amounts not paid within thirty (30) days following the date of Licensor's invoice(s), but in no event shall any finance charge exceed the maximum allowed by law.

- ***Licensor must have the right to charge interest on unpaid balances, otherwise the Customer would have no motivation to pay its bills on time. If a dispute occurs, Licensor may be unable to charge the Customer interest while the dispute is being resolved or afterwards if Licensor is successful in its claim.***

10. <u>TAXES</u>

There shall be added to the charges provided for in this Agreement amounts equal to any taxes, whether federal, state, or local, however designated, that may be validly levied or based upon this Agreement or upon the Software, Software Products and Services furnished hereunder, excluding, however, taxes based on or measured by Licensor's net income, and any taxes or amounts in lieu thereof paid or payable by Licensor in respect of the foregoing. Taxes payable by Customer shall be billed as separate items on Licensor's invoices and shall not be included in Licensor's prices. Customer shall have the right to have Licensor contest with the imposing jurisdiction, at Customer's expense, any such taxes that Customer deems are improperly levied.

- ***The Customer as the purchaser should pay all taxes except taxes on Licensor's income. If the Customer claims a tax exemption it must produce the appropriate documentation to prove its exemption.***
- ***The Licensor and Customer should closely examine where the services will be provided and the individual state tax laws to minimize sales taxes levied by many states.***

11. TRAINING

If requested by Customer, Licensor shall provide, at Licensor's then existing price, instructors and the necessary instructional material, at mutually agreed upon locations and times, to train Customer's personnel in the operation and use of the Software furnished hereunder.

12. PROPRIETARY INFORMATION

Each party acknowledges and agrees that any and all information emanating from the other's business in any form is "Confidential Information", and each party agrees that it will **not, during or after the term of this Agreement, permit the duplication, use, or disclosure of any such Confidential Information to any person not authorized by the disclosing party, unless such duplication, use or disclosure is specifically authorized by the other party in writing prior to any disclosure. [Each party shall use reasonable diligence, and in no event less than that degree of care that such party uses in respect to its own confidential information of like nature, to prevent the unauthorized disclosure or reproduction of such information.]** Without limiting the generality of the foregoing, to the extent that this Agreement permits the copying of Confidential Information, all such copies shall bear the same confidentiality notices, legends, and intellectual property rights designations that appear in the original versions and party shall keep detailed records of the location of all Confidential Information.

- ***The first paragraph uses a "strict liability" standard for the disclosure of information, i.e., no disclosure is permitted without permission. An alternative "reasonable" standard is included in the bracketed language. The alternative language requires the receiving party to use a reasonable standard but does not contain a blanket prohibition on disclosure.***

For the purposes of this Section, the term "Confidential Information" shall not include: information that is in the public domain; information known to the recipient party as of the date of this Agreement as shown by the recipient's written records, unless the recipient party agreed to keep such information in confidence at the time of its receipt; and information properly obtained hereafter from a source that is not under an obligation of confidentiality with respect to such information. Notwithstanding anything contained in this Agreement, all Software shall be considered proprietary and confidential regardless of whether it is marked. The provisions of this Section 12 shall survive termination or expiration of this Agreement, for any reason.

Notwithstanding the previous paragraphs, all information provided by either party to the other under this Agreement shall be kept confidential in conformance with and subject to the terms of a certain Proprietary Information Agreement dated ________, 1999 by and between the parties hereto.

- ***A separate proprietary information agreement should be executed in conjunction with the Agreement as it will be more complete and better protect Licensor's interest.***

13. REPRODUCTION OF MANUALS, DOCUMENTATION, OBJECT CODE AND SOURCE CODE

13.1 Manuals and Documentation. **Customer shall have the right, at no additional charge, to reproduce solely for its own internal use, all original manuals and documentation furnished by Licensor pursuant to this Agreement and any order, regardless of whether such manual or documentation is copyrighted by Licensor. All copies of manuals or documentation made by Customer shall include any proprietary notice or stamp that has been affixed by Licensor.** Licensor shall furnish for each License purchased by Customer, and at no additional charge to Customer, one (1) copy of the relevant documentation sufficient to enable Customer to operate the Software. All documentation shall be in the English language.

- ***Licensor usually does not make money from copying its manuals, thus Licensor is not concerned that the Customer makes copies so long as the Customer incorporates Licensor's protective notices. Some licensors will provide soft copies of their documentation at the increased risk of misuse.***

13.2 Object Code. One copy of the Object Code may be reproduced by Customer, at no additional charge, only for back-up or archival purposes. Customer shall notify Licensor in writing of its methods and procedures for archiving the Object Code prior to doing so.

13.3 Source Code. Upon purchase of a Source Code License, one additional copy of the Source Code may be reproduced by Customer, at no additional charge, only for back-up or archival purposes. Customer shall notify Licensor in writing of its methods and procedures for archiving the Source Code prior to doing so.

- ***When a Customer buys a Source Code license it buys only one copy of the Source Code with the right to make a backup copy for archival purposes. The Customer must buy a second copy of the Source Code if it wants to modify the Source Code while using the original copy in production.***
- ***The Customer is prohibited under Section 3.4 from reverse engineering the Software.***

14. PATENT AND OTHER PROPRIETARY RIGHTS INDEMNIFICATION

14.1 The following terms apply to any infringement or claim of infringement of any **existing United States** patent, trademark, copyright, trade secret or other proprietary interest based on the licensing, use, or sale of any Software, Software Products and/or Services furnished to Customer under this Agreement or in contemplation hereof. **Subject to the limitations contained in this Agreement,** Licensor shall indemnify Customer for any loss, damage, expense or liability, including costs and reasonable attorney's fees, **finally awarded**, that may result by reason of any such infringement or claim, except where such infringement or claim arises solely from Licensor's adherence to Customer's written instructions or directions which involve the use of merchandise or items other than (1) commercial merchandise which is available on the open market or is the same as such merchandise, or (2) items of Licensor's origin, design or selection; and Customer shall so indemnify Licensor in such excepted cases. Each party shall defend or settle, at its own expense, any action or suit against the other for which it has indemnification obligations hereunder. Each party shall notify the other promptly of any claim of infringement for which the other is responsible, and shall cooperate with the other in every reasonable way to facilitate the defense of any such claim.

- ***This section addresses intellectual property rights infringement by Licensor's software.***
- ***The infringement is limited to <u>existing</u> United States intellectual property. With foreign transactions indemnification should be limited to the United States and the country in which the software will be used.***
- ***"Finally awarded" limits Licensor's obligation to pay until all appeals have been exhausted.***
- ***The language of the second sentence limits the Licensor's liability to the amounts set forth in Section 16. A smart licensee will insist on unlimited liability for the intellectual property indemnification.***
- ***Licensor must be careful to limit indemnification to a specific entity and not a broad class of entities, i.e., all Affiliates of Customer.***

14.2 If the indemnifying party fails to assume the defense of any actual or threatened action covered by this Section 14 within the earlier of (a) any deadline established by a third party in a written demand or by a court and (b) thirty (30) days of notice of the claim, the indemnified party may follow such course of action as it reasonably deems necessary to protect its interest, and shall be indemnified for all costs reasonably incurred in such course of action; provided, however, that the indemnified party shall not settle a claim without the consent of the indemnifying party.

- ***This language allows a party to undertake its own defense itself if the indemnifying party fails to do so.***

14.3 In addition, in the event an injunction or order shall be obtained against Customer's use of any item by reason of any such infringement allegation or if, in Licensor's sole opinion, the item is likely to become the subject of a claim of infringement or violation of any **existing United States** patent, copyright, trademark, trade secret, or other proprietary right of a third party, Licensor will, without in any way limiting the foregoing, in Licensor's sole discretion and at Licensor's expense either: (a) procure for Customer the right to continue using the item; (b) replace or modify the item so that it becomes non-infringing, but only if the modification or replacement does not, in Licensor's reasonable sole opinion, adversely affect the functional performance or specifications for the item or its use by Customer; or (c) **if neither (a). nor (b). above is practical, remove the item from Customer's Site and refund to Customer any license fees paid by Customer less a pro rata portion for periods of use subsequent to removal**, and release Customer from any further liability under the applicable order.

- ***Licensor always needs the option to refund the Customer's money if Licensor cannot alter the software to make it non-infringing or obtain a license for the Customer to use the Software, otherwise Licensor could potentially be obligated to provide a software fix/license regardless of cost or Licensor's ability to do so.***

- ***Traditionally, there is no limitation of liability for patent indemnification claims.***

14.4 In no event shall Customer be liable to Licensor for any charges after the date that Customer no longer uses the item because of actual or claimed infringement.

15. INDEMNITY

Subject to the limitations contained in this Agreement, Licensor agrees to indemnify and hold harmless Customer, and Customer agrees to indemnify and hold harmless Licensor respectively, from any liabilities, penalties, demands or claims **finally awarded** (including the costs, expenses and **reasonable attorney's fees** on account thereof) **that may be made by any third party** for personal bodily injuries, including death, resulting from the indemnifying party's gross negligence or willful acts or omissions or those of persons furnished by the indemnifying party, its agents or subcontractors or resulting from use of the Software, Software Products and/or Services furnished hereunder. Licensor agrees to defend Customer, at Customer's request, and Customer agrees to defend Licensor, at Licensor's request, against any such liability, claim or demand. Customer and Licensor respectively agree to notify the other party promptly of any written claims or demands against the indemnified party for which the indemnifying party is responsible hereunder. The foregoing indemnity shall be in addition to any other indemnity obligations of Licensor or Customer set forth in this Agreement

- ***This section addresses personal injury, property damage, and economic injury. The first clause limits Licensor's liability to the amounts set forth in Section 16 (i.e., to the amount of money received from the Customer). For public policy reasons many jurisdictions forbid tortfeasors from limiting their liability for personal injuries in consumer transactions.***
- ***"Finally awarded" limits Licensor's obligation to pay the Customer until all appeals have been exhausted.***
- ***Indeminification is traditionally granted for third party claims and should not be given for liability arising from the actions of the contracting parties themselves.***
- ***An indemnification clause allows a recovery in those states which recognize the doctrine of contributory negligence and not the doctrine of comparative negligence. It also allows for the recovery of attorneys fees which are usually not recoverable.***

16. LIMITATION OF LIABILITY

16.1 LICENSOR SHALL NOT BE LIABLE FOR ANY (A) **SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF PROFITS,** ARISING FROM OR RELATED TO A BREACH OF THIS AGREEMENT OR ANY ORDER OR THE OPERATION OR USE OF THE SOFTWARE, SOFTWARE PRODUCTS AND SERVICES INCLUDING SUCH DAMAGES, **WITHOUT LIMITATION, AS DAMAGES ARISING FROM LOSS OF DATA OR PROGRAMMING, LOSS OF REVENUE OR PROFITS, FAILURE TO REALIZE SAVINGS OR OTHER BENEFITS, DAMAGE TO EQUIPMENT, AND CLAIMS AGAINST CUSTOMER BY ANY THIRD PERSON, EVEN IF LICENSOR HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES;** (B) DAMAGES (REGARDLESS OF THEIR NATURE) FOR ANY DELAY OR FAILURE BY LICENSOR TO PERFORM ITS OBLIGATIONS UNDER THIS AGREEMENT DUE TO ANY CAUSE BEYOND LICENSOR'S REASONABLE CONTROL;

OR (C) CLAIMS MADE A SUBJECT OF A LEGAL PROCEEDING AGAINST LICENSOR MORE THAN TWO YEARS AFTER ANY SUCH CAUSE OF ACTION FIRST AROSE.

- ***Licensor should disclaim all "speculative" and "third party" damages. Damages recoverable by the Customer should be limited to Customer's actual direct damages. The Uniform Commercial Code does not requires that any disclaimer be "conspicuous" although this requirement may be imposed by the courts. Therefore this section should be in large block letters.***
- ***Licensor will not be liable for any damages suffered by the Customer's customers or any other third party.***
- ***By requiring claims be brought within 2 years, Licensor limits its risk/liability by shortening the statute of limitations which may be up to 12 years.***

16.2 NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, LICENSOR'S LIABILITIES UNDER THIS AGREEMENT, **WHETHER UNDER CONTRACT LAW, TORT LAW, WARRANTY OR OTHERWISE SHALL BE LIMITED TO DIRECT DAMAGES NOT TO EXCEED THE AMOUNTS ACTUALLY RECEIVED BY LICENSOR PURSUANT TO THE PARTICULAR ORDER FROM WHICH SUCH DAMAGES AROSE.**

- ***Licensor seeks to limit its liability under both <u>contract</u> and <u>tort</u> theories which have different statues of limitations and different bases for which a recovery can be made.***
- ***Licensor must limit its liability (to the amount received from the Customer) or it could potentially be liable for Licensor's entire net worth. (Traditionally, there is no limitation of liability for patent indemnification claims and for consumer transactions personal bodily injury).***
- ***Limitation of liability is an element of price. Licensor has based its pricing on limiting Licensor's liability at the amount received from the Customer, or alternatively 1X contract value. If the Customer wants a higher limitation of liability, Licensor can raise its limit of liability but: (a) the license fee must increase because Licensor is now bearing more risk; or (b) Licensor must buy errors and omissions insurance and charge the Customer for the cost.***
- ***It is important to retain a default remedy provision, otherwise a court may find Licensor's warranty "failed of its essential purpose" (i.e., did not provide the Customer with an adequate remedy) and void Licensor's limitation of liability and disclaimer for consequential damages.***
- ***A smart licensee will seek to limit its own liability as well by making the clause mutual.***

17. <u>ACCEPTANCE OF SOFTWARE AND SOFTWARE PRODUCTS</u>

17.1 Licensor and Customer shall jointly conduct Software and Software Products acceptance tests during the installation process at a Customer designated location(s) during a thirty (30) day acceptance period. The acceptance period will commence once the Software is operational in the Customer designated location(s). The Software and Software Products shall (1) materially comply with the provisions of the order; (2) function substantially in accordance with Licensor's specifications; (3) be compatible and substantially conform to user documentation and operating manuals furnished by Licensor; and (4) substantially comply with a mutually agreed upon Software Acceptance Plan that shall be developed and agreed to in writing by Customer and Licensor prior to installing the Software in the first Customer designated location. Licensor will assume the responsibility for the initial preparation of the Software Acceptance Plan.

17.2 If, during the acceptance period, Customer determines that the Software and/or Software Products do not substantially meet the above requirements, Customer shall so notify Licensor in writing, specifying in detail the area of noncompliance. Licensor shall use its good faith efforts to correct all conditions that prevent the Software and/or Software Products from substantially meeting the requirements within fifteen (15) calendar days following receipt of notice from Customer. If all Customer reported conditions that prevent the Software and/or Software Products from substantially complying with the acceptance criteria are not corrected by the end of acceptance period, the Customer will notify the Licensor, in writing, within two (2) calendar days following the end of the acceptance period identifying the specific areas of non-compliance. Failure to notify Licensor in writing will constitute acceptance of the Software and/or Software Products. Upon receipt of written notice of non-compliance an extension period of sixty (60) calendar days begins which will supply Licensor with the time necessary to correct the deficiencies identified in the notice. Within five (5) days after such sixty (60) day period the Customer will provide written notice to Licensor indicating Customer's acceptance of the Software and/or Software Products, Customer's desire to extend the "extension period" or the Customer's intent to terminate this Agreement without penalty or further financial obligation.

17.3 Notwithstanding anything contained herein, or any order to the contrary, **Customer shall be deemed to have accepted the Software if Customer uses the Software in the operation of Customer's business prior to accepting the Software.**

- ***The Agreement must provide that use of the Software in the operation of the Customer's business constitutes acceptance. Otherwise there is no incentive for the Customer to start or complete acceptance test procedures. If the Customer is using the software in conducting its business the software most likely meets the Customer's requirements.***

18. WARRANTY AND WARRANTY DISCLAIMER

- ***Because Section 2-316 of the UCC requires that warranty disclaimers be "conspicuous" this paragraph is broken into several shorter paragraphs to allow ease of reading and comprehension and Section 18.4 which contains the actual disclaimer is in block letters.***

18.1 Except as provided below, Licensor warrants that it owns all rights, title and interest in and to the Software and Software Products, or that in the case of any third party software that it has the right to grant a sublicense to use such third party software, that all Software and Software Products shall substantially conform to the Functional Specifications set forth in each order, and that the Software and Software products shall be free from material defects in workmanship and materials that prevent them from substantially meeting the aforementioned criteria. Licensor further warrants that any Services provided by Licensor under this Agreement shall be performed in a workmanlike manner and in accordance with the prevailing professional standards of the software industry. This warranty coverage shall include any modifications made to the Software by Licensor. **Such warranty shall extend for sixty (60) days from acceptance. This warranty shall survive inspection, test, acceptance, use and payment.**

- ***Licensor carefully limits what it warrants. Licensor only warrants that (1) Licensor owns the Software or has the right to license the software, (2) the software substantially conforms to the functional specifications, and (3) the software is free from material defects in workmanship and materials. By using the phrases "substantially conforms" and "material defects", Licensor allows itself a small level of error as software by its nature is imperfect.***
- ***Licensor's warranty is sixty (60) days. Warranty is an element of price. If the Customer wants a one year warranty, Licensor can provide one at an increased price.***
- ***Avoid stating "Licensor represents and warrants". A "representation" creates a legal risk that Licensor might be held to have "misrepresented" (which is fraud) its software leading to stronger penalties.***
- ***The Licensor should also include a specific Y2K warranty and disclaimer. A Licensor and Licensee favorable versions are attached hereto as Exhibit IXG. The failure to include any warranty will usually not be acceptable to the Licensee and a court will likely find its exclusion unconsionable. Thus, the Licensor should negotiate a mutually agreeable warranty during the negotiations when it may have greater leverage.***

18.2 Licensor does not warrant that the operation of the Software or the operation of the Software Products will be uninterrupted or error free.

18.3 In the event of any breach of the warranties set forth in this Agreement, Licensor's sole and exclusive responsibility, and Customer's sole and exclusive remedy, shall be for Licensor to correct or replace, at no additional charge to Customer, any portion of the Software or Software Products found to be defective; provided, however, that **if within a commercially reasonable period Licensor neither corrects such defects nor replaces the defective Software or Software Products, then Customer's sole and exclusive remedy shall be to receive direct damages not to exceed the license fees paid to Licensor for use of the defective Software or Software Products.** In the event of any breach of any provision of this Agreement other than the warranties set forth in this Agreement, Customer's sole and exclusive remedy shall be to receive direct damages not to exceed the amounts received by Licensor pursuant to the particular order from which such damages arose. For the avoidance of doubt, Customer's monetary remedies for any breaches of any provision of this Agreement (including, without limitation, the warranty provisions) shall not, in the aggregate, exceed an amount equal to the amounts actually received by Licensor from Customer.

18.4 **EXCEPT AS SET FORTH IN THIS SECTION 18, LICENSOR MAKES NO EXPRESS OR IMPLIED REPRESENTATIONS OR WARRANTIES** WITH RESPECT TO THE SOFTWARE, SOFTWARE PRODUCTS OR SERVICES OR THEIR CONDITION, MERCHANTABILITY, FITNESS FOR ANY PARTICULAR PURPOSE OR USE BY CUSTOMER. LICENSOR FURNISHES THE ABOVE WARRANTIES IN LIEU OF ALL

OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

- ***UCC Section 2-316 requires all warranty disclaimers to be "conspicuous". Therefore the disclaimer should be in capital block letters.***
- ***If Licensor does not disclaim all other warranties, Licensor may be liable for certain implied warranties including the failure of the software to function as the Customer thought it would.***

18.5 Any and all warranties shall be void as to Services, Software or Software Products damaged or rendered unserviceable by (1) the acts or omissions of non-Licensor personnel; (2) misuse, theft, vandalism, fire, water, or other peril; and (3) moving, relocation, alterations or additions not authorized by Licensor.

- ***Licensor will not be liable for a breach of warranty if the Customer was the cause of any such breach.***

****** It is important to note that there is a difference between warranty and maintenance. Warranty is much more comprehensive including modifying the software to make it work. Maintenance involves only maintaining an ongoing operating system to a lesser standard. Breach of the maintenance provisions will usually result in a refund of the maintenance fees paid to Licensor but a breach of warranty may entitle Customer to a refund of all development and services fees paid to Licensor, which is a much greater amount.***

19. RIGHT TO MOVE

Any Software License may be temporarily transferred to a backup computer while the licensed computer is inoperative or for emergency testing purpose. The backup computer may be at the same Customer Site, another Customer Site, or an off-site location under emergency conditions and after sufficient advance notice has been given to Licensor of the name and location of the off-site operator. Customer may redesignate the Site or the CPU on which the Software will be used for on-going operations with Licensor's consent. Customer shall be permitted concurrent operation at the new and old Site or CPU for not more than thirty (30) days and such operation will require no additional fees. Customer shall provide Licensor written notice of the redesignation within a reasonable length of time of the Software being moved to the new Site or CPU. In the event Licensor consents to the Customer moving the Software to another Customer Site or CPU, or Customer assigning the Software licensed under this Agreement, Licensor agrees that it shall continue the warranty and assist in its transfer to such other Site, CPU or assignee.

20. ERROR CORRECTION UNDER WARRANTY

20.1 During the warranty period, Customer will notify Licensor verbally of Errors, and provide written notification to Licensor within seventy-two (72) hours of such verbal notification. Licensor shall provide Customer with a telephone number which is answered from 9:00 a.m. to 6:00 p.m. Washington, D.C. Time, Monday through Friday, except for Licensor holidays. Customer shall have access via this telephone number to individuals who shall accept Error reports and are qualified to assist Customer with the verification of suspected Errors and who may provide solutions for said Errors. Customer shall be provided with a telephone number which is answered for all hours outside of Monday through Friday, 9:00 a.m. to 6:00 p.m. Washington, D.C. Time by individuals who shall accept Error reports.

20.2 During the warranty period, Licensor shall use its good faith efforts to immediately correct any Critical Errors affecting Customer's continued business use of the Software after Licensor's notification of the Error. Licensor will use its good faith efforts to correct all other Errors within twenty (20) days after Licensor's notification of the Error.

21. CUSTOMER PREPARATION

If the Software or Software Products are to be installed by Licensor, the Customer shall have all things in readiness for installation, including, but not limited to, other equipment, connections and facilities for installation at the time the Software or Software Products are delivered. In the event the Customer shall fail to have all things in readiness for installation on the scheduled installation date, the Customer shall reimburse Licensor for any and all expenses caused by Customer's failure to have things in readiness, unless Customer has notified Licensor at least thirty (30) business days prior to the scheduled installation date. Customer agrees to provide and bear the cost of all communications costs incurred by Licensor from the Customer site and the costs of a dedicated dial up communications facility equipped with 56KB Hayes compatible modem for the purposes of remote access and support by the Licensor consultant or phone support group. In addition, Customer shall fully cooperate with Licensor during the term of this Agreement.

22. ASSIGNMENT

Customer may not assign or transfer its interests, rights or obligations under this Agreement or any order by written agreement, merger, consolidation, operation of law or otherwise, without the prior written consent of an authorized executive officer of Licensor. Any attempt to assign this Agreement by Customer shall be null and void. Furthermore, for the purposes of this Agreement the acquisition of an equity interest in Customer of greater than 25 percent by any third party shall be considered an "assignment."

- ***Licensor must limit the ability of the Customer to assign the Agreement to avoid losing potential license fees. In a merger or acquisition, the entity being acquired will seek to assign its pre-merger contracts to the acquiring party to avoid paying a transfer or license fee. By stating that any assignment is "void" a court will not allow the assignment. In the absence of such language the court will allow the assignment and award Licensor monetary damages even though the Agreement states it may not be assigned without Licensor's permission.***

23. AMENDMENTS, MODIFICATIONS OR SUPPLEMENTS

Amendments, modifications or supplements to this Agreement or any order shall be permitted, provided all such changes shall be in writing signed by the authorized representatives of both parties, and all such changes shall reference this Agreement and identify the specific articles or sections of this Agreement or the particular order that is amended, modified or supplemented.

24. INDEPENDENT CONTRACTOR

All work performed by Licensor in connection with the Software, Software Products and/or Services described in this Agreement shall be performed by Licensor as an independent contractor and not as the agent or employee of Customer. All persons furnished by Licensor shall be for all purposes solely Licensor's employees or agents and shall not be deemed to be employees of Customer for any purpose whatsoever. Licensor shall furnish, employ and have exclusive control of all persons to be engaged in performing Services under this Agreement and shall prescribe and control the means and methods of performing such Services by providing adequate and proper supervision. Licensor shall be solely responsible for compliance with all rules, laws and regulations relating to employment of labor, hours of labor, working conditions, payment of wages and payment of taxes, such as employment, Social Security, and other payroll taxes including applicable contributions from such persons when required by law.

25. COMPLIANCE WITH LAWS

Licensor and Customer each shall comply with the provision of all applicable federal, state, county and local laws, ordinances, regulations and codes including, but not limited to, Licensor's and Customer's obligations as employers with regard to the health, safety and payment of its employees, and identification and procurement of required permits, certificates, approvals and inspections in Licensor's and Customer's performance of this Agreement.

26. SECURITY, ACCESS AND SAFETY REQUIREMENTS

Licensor shall instruct its employees, agents and subcontractors that they shall comply with Customer's security, access and safety requirements for the protection of Customer's facilities and employees while on Customer's premises.

27. RELEASES VOID

Neither party shall require waivers or releases of any personal rights from representatives of the other in connection with visits to Licensor's and Customer's respective premises. No such releases or waivers shall be pleaded by Licensor or Customer or third persons in any action or proceeding against an employee.

28. GOVERNING LAW

The validity, construction, interpretation and performance of this Agreement shall be governed by and construed in accordance with the domestic laws of the State of Maryland except as to its principals of conflicts of laws and the parties hereto irrevocably submit to the jurisdiction and venue of the Federal District Court for the District of Maryland to resolve any disputes arising hereunder or related hereto.

- ***Licensor would like the Agreement to be governed by the laws of Maryland although there is some flexibility as to the particular state law. It is also important to have the venue (the location of any trial) be in Maryland. Some states such as Texas favor the Customer while others such as New York favor the Licensor.***

- ***To have a valid governing law clause, there must be a nexus between the parties and the chosen law. If there is not, the parties risk a court rejecting their choice.***
- ***Licensor wants to avoid arbitration or alternative dispute resolution (ADR) because arbitrators tend to "split the baby". In addition, it may be very difficult to get an immediate injunction to halt the misuse of Licensor's Software. Advantages of arbitration are quicker resolution, lower cost, and lower profile.***
- ***Think carefully before including language that any software or services delivered to Customer will be considered "goods" under the Uniform Commercial Code. There may be unintended consequences to Licensor, i.e., the "perfect tender" rule.***

29. WAIVER OF BREACH

No waiver of breach or failure to exercise any option, right or privilege under the terms of this Agreement or any order on any occasion or occasions shall be construed to be a waiver of the same or any other option, right or privilege on any other occasion.

- ***This provision provides that if either party fails to enforce any of its rights now, such party is not prohibited from enforcing such rights at a later date. This provision should always be mutual.***

30. FORCE MAJEURE

Neither party shall be responsible for any delay or failure in performance of any part of this Agreement to the extent that such delay or failure is caused by fire, flood, explosion, war, embargo, government requirement, civil or military authority, act of God, act or omission of carriers or other similar causes beyond its control. If any such an event of force majeure occurs and such event continues for ninety (90) days or more, the party delayed or unable to perform shall give immediate notice to the other party, and the party affected by the other's delay or inability to perform may elect at its sole discretion to: (a) terminate this Agreement or the affected order solely upon mutual agreement of the parties; (b) suspend such order for the duration of the condition and obtain or sell elsewhere Software, Software Products, or Services comparable to the Software, Software Products, or Services to have been obtained under the order; or (c) resume performance of such order once the condition ceases with the option of the affected party to extend the period of this Agreement up to the length of time the condition endured. Unless written notice is given within thirty (30) days after the affected party is notified of the condition, option (c) shall be deemed selected.

- ***All force majeure clauses must be carefully reviewed to ensure that the Customer cannot automatically terminate the Agreement. It is preferable that the Agreement be put on hold until the force majeure dissipates.***

31. SEVERABILITY

If any of the provisions of this Agreement or any order shall be invalid or unenforceable under the laws of the jurisdiction where enforcement is sought whether on the basis of a court decision or of arbitral award applicable to the entire Agreement or order, such invalidity or unenforceability shall not invalidate or render unenforceable the entire Agreement but rather the entire Agreement or order shall be construed as if not containing the particular invalid or unenforceable provision or provisions and the rights and obligations of Licensor and Customer shall be construed and enforced accordingly.

32. NOTICES

All notices, demands, or other communications herein provided to be given or that may be given by any party to the other shall be deemed to have been duly given when made in writing and delivered in person, or upon receipt, if deposited in the United States mail, postage prepaid, certified mail, return receipt requested, as follows:

Notices to Licensor:	Notices to Customer:
______________________	______________________
______________________	______________________
______________________	______________________
Attn: ________________	Attn: ________________

With a required copy to:

____

____

____

____

Attn: General Counsel

or to such address as the parties may provide to each other in writing from time to time.

- ***Always include the business person and the legal department in the notices to avoid any notice "falling through he cracks".***
- ***By requiring a second copy be delivered to the General Counsel, Licensor limits the risk that a notice could be misplaced or lost.***
- ***All notices should be effective upon receipt not mailing because the notice may get lost in the mail or delayed, potentially allowing the Customer to terminate the Agreement without Licensor ever knowing it was in breach.***

33. RISK OF LOSS

Risk of loss or damage to Software and/or Software Products licensed by Customer under this Agreement shall vest in Customer when the Software and/or Software Products have been received by Customer, or its representative, provided that such loss or damage is not caused by Licensor, its employees or agents.

34. BACKGROUND, ENUMERATIONS AND HEADINGS

The "Background," enumerations and headings contained in this Agreement are for convenience of reference only and are not intended to have any substantive significance in interpreting this Agreement.

35. INCORPORATION OF APPENDICES AND ORDERS

Appendices [A, B, and C] referred to in this Agreement and attached hereto and all orders attached hereto are integral parts of this Agreement and are incorporated herein by this reference.

36. SPECIFICATIONS

Licensor reserves the right, without prior approval from or notice to Customer, to make changes to the Software and Software Products and to substitute Software and Software Products reflecting those changes provided the Software and Software Products delivered substantially conform to the new specifications.

- ***Licensor reserves the right to make periodic non-material changes in the specifications, otherwise Licensor may be unable to make any changes without breaching the Agreement.***

37. THIRD PARTY SOFTWARE

Customer shall have sole responsibility to obtain and pay for any third party software necessary or desirable to operate the Software.

- ***Licensor will not provide any third party software unless the cost of third party software was included in Licensor's pricing. This clause is very important. Often the complete nature of the software/hardware needed to produce an operational system with the contracted performance requirements is unknown. The Licensor should never assume this risk without price protection.***

38. ENTIRE AGREEMENT

This Agreement, the orders, appendices and subordinate documents referenced in this Agreement constitute the entire agreement between the parties with respect to the subject matter contained herein, superseding all previous agreements pertaining to such subject matter, and may be modified only by an amendment executed in writing by the authorized officers of both parties hereto. All prior agreements, representations, warranties, statements, negotiations, understandings and undertakings are superseded hereby **and Customer hereby represents and acknowledges that in entering into this Agreement it did not rely on any representations or warranties other than those explicitly set forth in Section 18 of this Agreement.** Both parties hereto represent that they have read this Agreement, understand it, agree to be bound by all terms and conditions stated herein, and acknowledge receipt of a signed, true and exact copy of this Agreement.

- ***This statement prevents the Customer from trying to hold Licensor to any statements by Licensor's salespeople or those contained in Licensor's RFP response that are not specifically included in the Agreement.***

- ***The acknowledgment that Customer did not rely on any representations or warranties other than set forth in Section 18 attempts to avoid any liability for tort claims as well as contract claims.***

IN WITNESS WHEREOF, the parties have executed this Agreement **under seal** as of the day and year first written above.

- ***An actual corporate seal is not necessary as the word "(Seal)" is legally valid because many corporations no longer have actual corporate seals. The use of a "seal" in Maryland extends the statute of limitations from the three to twelve years.***

WITNESS/ATTEST: **CUSTOMER**

______________________ **[By]:**______________________**(Seal)**

ATTEST: **LICENSOR**

____________________________ **By:**_________________________**(Seal)**

[6.8.99]

- ***To be legally binding, persons signing for the Customer and Licensor must be authorized and have "signing authority".***
- ***The use of the word "By" and the signators title limits the signators' personal liability by indicating the person signing is doing so in their corporate capacity.***
- ***"Attest" is used for a corporate licensee, "witness" for an individual licensee.***
- ***Check the date of the form you are using to make sure it is the most recent version.***

SCHEDULES

The Schedules are very important as they contain the crucial details of the Agreement, i.e., payment, deliverables, acceptance test procedures etc. The deliverables should be very detailed and not a high level requirements document.

DO NOT UNDER ANY CIRCUMSTANCES FAIL TO READ OR UNDERSTAND THE SCHEDULES.

OTHER COMMON CLAUSES/ ISSUES

- ***Time is of the essence. This clause states that Licensor will deliver the Software on time. If Licensor is even one minute late, the delay is considered material allowing the Customer to terminate the Agreement and collect damages from Licensor.***

- ***Liquidated damages. Liquidated damages are a pre-determined estimate of the damages the Customer will incur by Licensor's breach which eliminates the requirements that the Customer prove its damages. Once the Customer demonstrates that the Agreement was*** *breached; the payment of the agreed to damages would be made potentially from a non-refundable bond placed by Licensor. Liquidated damages are often included in development contracts but are considered counter-productive because the parties relationship is often ruined if the injured party tries to collect these damages during the contract term. Further, the receipt of monetary damages does not compensate or alleviate the licensee problems arising from not having a functional software system.*

- *<u>Insurance</u>. Most Customers require Licensor to provide a certificate of insurance evidencing Licensor has the required insurance from an acceptable company. Language should also be included that Licensor has the right to self-insure. Finally, do not waive Licensor's/Licensor's insurer's right of subrogation (the right of Licensor or its insurer to sue any co-tortfeasor for their pro-rata portion of any damages award) the waiver of this right may raise Licensor's insurance rates.*

APPENDIX A

CUSTOMER AFFILIATES

[list Affiliates]

Customer may from time-to-time designate additional Affiliates to be eligible under this Agreement subject to any additional license fees required under this Agreement and the prior written consent of Licensor.

APPENDIX B

FORM OF
SOFTWARE LICENSE AND SERVICES ORDER

Order No. _________

1. REFERENCE TO AGREEMENT: This Order is subject to the provisions of a certain Master Software License and Services Agreement, between _____________, (the "Customer") and Licensor dated _____________, 1999.

2. LIST OF SOFTWARE AND CHARGES:

   Customer agrees to license the following Software and purchase the following Services from Licensor:

QTY	OPERATING SYSTEM, RELEASE, & PRODUCT DESCRIPTION	TYPE OF LICENSE	LICENSE FEE
______	______________________	______	$__________

3. LICENSE TERM: The license granted to Customer under this Order shall begin the date the Software is first installed and continue for ______ (__) years.

4. LENGTH OF WARRANTY AND SCHEDULED START DATE: Sixty (60) days commencing upon acceptance of the Software by Customer. The warranty period for any Software module(s) or Enhancement(s) not delivered at the time of initial implementation will commence upon acceptance of such Enhancements or Software.

   Customer agrees that all software modules as defined in the Functional Specifications Document Exhibit 1 will be tested for acceptance in accordance with Section 17 of this Agreement and Exhibit 2 attached hereto.

5. PAYMENT TERMS: Customer shall pay Licensor for the License and other fees according to the following schedule:

   50% upon execution of this Order No. ____
   40% upon Delivery
   10% 30 days after Acceptance

6. SOFTWARE DELIVERY ADDRESS:

   ____
   ____
   ____

   Attn:____________________

7. INVOICE ADDRESS:

____
____
____

Attn:__________________

8. LICENSOR'S SPECIFICATIONS WITH WHICH THE SOFTWARE SHALL COMPLY: The Software will comply with the terms of this Agreement and the "Functional Specification Document" as specified in Exhibit 1 attached to this Order.

9. INSTALLATION PROVISIONS: System hardware, system software and network communications installation provisions per the manufacturer's specifications shall be provided by Customer.

10. SYSTEM HARDWARE, SYSTEM SOFTWARE AND NETWORK COMMUNICATIONS: All system hardware, system software, and network communications will be provided by Customer.

11. SERVICES TO BE PROVIDED BY LICENSOR:

12. TRAINING MANUALS AND DOCUMENTATION: One set of training materials and user manuals will be provided by Licensor to Customer. Customer may reproduce these materials in accordance with Section 13 of this Agreement.

13 CPU IDENTIFICATION: In conformance with Section 8 of this Agreement, the Software shall be operated solely on the following CPU: CPU No: ____________.

IN WITNESS WHEREOF, the parties have executed this Order under seal as of the day and year set forth below.

LICENSOR:	**CUSTOMER:**
BY:______________________**(SEAL)**	**BY:**______________________**(SEAL)**
Name, Title	**Name, Title**
DATE:	**DATE:**

[6.4.99]

EXHIBIT 1 TO ORDER NO. ___

FUNCTIONAL SPECIFICATIONS

EXHIBIT 2 TO ORDER NO. ________

SOFTWARE ACCEPTANCE PLAN

[The salesperson must decide whether Licensor will provide pricing in advance or whether all prices will be at Licensor's then-existing rate."]

APPENDIX C

PRICE SCHEDULE
Prices as of _________, 1998

I. SOFTWARE

A. LICENSES

1. TERM OF LICENSES AVAILABLE: Licensor may offer Customer a Software License for any term listed in this Section. Such License shall continue for the period of time indicated, so long as Customer is not in default under this Agreement. The provisions for each term are as follows:

i. Perpetual. For payment of a one-time perpetual License fee, Customer shall be granted a perpetual License to use the Software for ninety-nine (99) years or until discontinued by Customer in accordance with this Agreement.

ii. Annual. For payment of an annual License fee, Customer shall be granted a one (1) year License to use the Software. Customer shall notify Licensor in writing at least thirty (30) days in advance of the pending expiration if Customer desires to discontinue said License. Otherwise, said annual License will be automatically renewed for another term of one (1) year until discontinued by Customer in accordance with this Agreement. If perpetual Licenses are offered by Licensor, Customer may elect to convert an annual License to a perpetual License by providing Licensor thirty (30) days written notice in advance of the perpetual License effective date and Customer shall receive a credit in the amount of fifty percent (50%) of all annual license fees already paid for the particular License being converted. Such credit shall be applied toward payment of the perpetual License fee then currently in effect under this Agreement.

iii. Monthly. For payment of a monthly License fee, Customer shall be granted a License to use the Software on a monthly basis until discontinued by Customer in accordance with this Agreement. If Customer elects to convert a monthly License to a perpetual or annual License, Customer shall so notify Licensor in writing by providing Licensor thirty (30) days written notice in advance of the perpetual or annual License effective date. Customer shall receive a credit in the amount of fifty percent (50%) of all monthly License fees paid for the particular License being converted. Such credit shall be applied toward payment of the perpetual or annual License fee then currently in effect under this Agreement.

2. TYPES OF SOFTWARE LICENSES AVAILABLE: The types of Licenses that may be offered by Licensor to the Customer are as follows:

i. Corporate License. A Corporate License grants Customer, including all Affiliated Companies listed, the right to duplicate the Software and Software Products for use at as many Customer locations and on as many leased Central Processing Units ("CPU's") as Customer desires. Customer shall pay only one (1) Corporate License fee for this type of license. If Customer orders Software Maintenance for Software under a Corporate License, then Customer shall pay only one (1) Software Maintenance fee for said Software.

ii. Site License. Each Site License grants Customer the right to use the Software on any or all CPU's located at the facility indicated on the Order as the Site License address. Customer must obtain a separate Site License for each site where the Software is located.

iii. CPU License. Each CPU License grants Customer the right to use the Software on a single CPU designated by type and serial number. A separate CPU License is required for each CPU on which the licensed Software will be used.

3. LICENSE FEES: A one time perpetual "Right To Use" Site License for ____________. **[FILL IN PRICE SCHEDULE]**

II. SERVICES

A. SYSTEM INSTALLATION: This support service option provides initial Software installation as follows:

Prices for system installation include instructor and training materials. Licensor's reasonable and customary travel expenses will be billed separately.

Installation Charges. The installation cost for the Customer is a one time fee of $____________ exclusive of all reasonable and customary travel charges. An invoice for this fee will be sent once Licensor begins the installation process. Should the installation exceed the time period specified herein, due to elements beyond Licensor's control, an additional charge of $__________ per week will be applicable.

B. TELEPHONE SUPPORT: Licensor maintains a group of highly trained phone support specialists who will be familiar with your application. If there is a problem or even a question that requires our attention, we can remotely access your system through the telephone line and modem that was installed with the system. This capability allows us to assist you as if we were sitting locally in the service center. Licensor's phone support specialists can resolve system problems, answer questions, dispatch a hardware support team, or assist your field consultant in support activities.

This support service provides a reasonable number of calls to Licensor's telephone support organization from a single point of contact at each installed location. This group will assist Customer in testing, evaluating, diagnosing, and directing Customer personnel via telecommunication to make the Software function substantially in accordance with the installed generic release specification. The phone support group will report all Software bugs to the appropriate Licensor personnel and can report suspected hardware problems to the appropriate Customer Contact.

Under this support service option, Licensor will receive phone calls from Customer representatives during the hours of 8:00 A.M. to 7:00 P.M. Eastern Standard Time, Monday through Friday excluding Licensor holidays.

Telephone Support Charges: The Telephone Support cost for the Customer is a one time fee of $____________ exclusive of all reasonable and customary travel charges. An invoice for this fee will be sent once Licensor begins the Telephone Support process. Should the Telephone Support exceed the time period specified due to elements beyond Licensor's control, an additional charge of $____________ per week will be applicable.

C. CONSULTING SUPPORT: This support service option provides a dedicated consultant to assist the Customer with Software questions, work with local users on establishing site specific operational procedures, assume all table maintenance responsibility, discuss system enhancement alternatives, provide follow up training, and work with Customer to prepare Software user guides.

After initial training is completed and daily on-site support is no longer needed, Licensor will continue to be responsive to Customer's needs by maintaining a Licensor consultant dedicated to your account. The consultant will answer any questions that arise, assist in problem resolution and make any necessary table modification. Customer will have up to thirty (30) hours a month of consultant availability included in the basic monthly charge. Consultant hours used in excess of thirty per month will be billed at the rate of $_______/hour. All reasonable and customary travel expenses incurred by Licensor in rendering such services will be billed separately.

Customer Support Charges: The Customer Support charges for the Customer is a one time fee of $____________ exclusive of all reasonable and customary travel charges. An invoice for this fee will be sent once Licensor begins the Customer Support process. Should the Customer Support exceed the time period specified due to elements beyond Licensor's control, an additional charge of $____________ per week will be applicable.

D. FOLLOW UP TRAINING: This support service option will provide follow up training to assist Customer in the use of Software and Software Products. Two classes of follow up training are available.

[DESCRIBE TRAINING]

Training $____________/year

E. ENHANCEMENTS:

i. Generic Releases: Licensor will price Generic Releases consisting of Customer requested software enhancements in accordance with the price schedule specified in this Appendix C. Once a Generic Release has been priced, Customer will receive a proposal for the release which will be valid for thirty (30) days. The proposal will consist of a price quote and a delivery interval from the time the Licensor receives written approval to begin work from Customer. Licensor will not begin work on any Generic Release until receiving written authorization from Customer to proceed with the development activity. Licensor will use the lowest rate possible when multiple enhancements are requested for a specific generic release. Licensor's reasonable and customary travel charges will be invoiced separately.

ii. Generic Release Charges: Licensor will provide prices for all Enhancement requests in accordance with the following schedule of charges:*

a) Hourly rate - $_____ per hour. This applies to anything less than eight hours. The minimum is four hours.

b) Daily rate - $_____ per day. This applies to anything less than forty hours. The minimum number of hours at this rate is eight.

c) Weekly rate - $_____ per week. This applies to anything less than 160 hours and greater than 39 hours.

d) Monthly rate - $_____ per month. This rate is for 160 hours; anything beyond 160 hours will be billed at the rate of $_____ per hour.

* Licensor will use the lowest rate possible when multiple enhancements are programmed at one time.

III. HARDWARE

A. SYSTEM HARDWARE: Customer will supply all necessary system hardware to run the Software in Customer designated locations. The selection of system hardware will be contingent upon Licensor approval. This includes, but is not limited to, computer hardware, peripheral devices, modems, and cables. Licensor agrees to assist Customer in the selection of suitable system hardware necessary to operate the Software. Customer will acquire all hardware maintenance services necessary to support the Software implementation. Licensor agrees to work with Customer to provide all Software modifications necessary to support upgrades or changes to Customer owned hardware within a mutually agreed upon time frame.

B. <u>HARDWARE MAINTENANCE</u>: Customer is responsible for all ongoing maintenance charges for all system hardware.

IV. <u>SYSTEM SOFTWARE</u>

A. <u>SYSTEM SOFTWARE</u>: Customer will supply all necessary system software to run the Software in Customer designated locations. The selection of system software will be contingent upon Licensor approval. This includes, but is not limited to, operating system software, communications software, and firmware, and other system software which may facilitate the use of the Software. Licensor agrees to assist Customer in the selection of suitable system software necessary to operate the Software. Customer will acquire all system software maintenance services necessary to support the Software implementation. Licensor agrees to work with Customer to provide all Software modifications necessary to support upgrades or changes to Customer supplied system software within a mutually agreed upon time frame.

B. <u>SYSTEM SOFTWARE MAINTENANCE</u>: Customer is responsible for all system software maintenance.

V. <u>NETWORK COMMUNICATION</u>

A. <u>NETWORK COMMUNICATIONS</u>: Customer will supply all networking required to implement the Software. All networking will be contingent upon Licensor approval. This includes, but is not limited to, data circuits, communications equipment, modems, and cabling. Licensor agrees to assist Customer in the determination of network communication requirements necessary to implement the Software. Customer agrees to provide all network communications maintenance services required to support the Software implementation. Licensor agrees to work with Customer to provide all Software modifications necessary to support upgrades or changes to Customer supplied Networking within a mutually agreed upon time frame. All Software modifications will be provided as part of a Generic Release for a fee that is calculated based upon the price schedule listed in this Appendix B as amended from time to time. The Generic Release programming activity will begin upon receiving written authorization from Customer complete with all necessary technical information on the new network architecture. Customer agrees to provide and bear the cost of a dedicated dial up communications facility equipped with 56KHayes Compatible modem at Customer's CPU hardware for the purposes of remote access and supporting the Licensor's consultant or phone support group.

B. <u>NETWORK COMMUNICATIONS MAINTENANCE</u>: Customer is responsible for all network communications maintenance.

VI. <u>MISCELLANEOUS</u>

A. <u>PRICE CHANGES</u>: All prices set forth in this Appendix B are subject to change upon thirty (30) days prior written notice to Customer.

B. OTHER COSTS: Customer agrees to pay all of Licensor's reasonable, actual, out of pocket costs, including but not limited to travel expenses incurred by Licensor in project management, system analysis and consulting during the term of this Agreement, such expenses will be billed to Customer separately at cost.

[4.22.98]

SOFTWARE MAINTENANCE AND SERVICES AGREEMENT

THIS SOFTWARE MAINTENANCE AND SERVICES AGREEMENT is made this _____ day of ____________, 1998 by and between ________________ a __________ corporation, with its principal place of business at ____ (hereinafter "Company") and ______________________, a __________ corporation, (hereinafter "Customer"), with offices located at ______________________________ ______.

BACKGROUND

Company has licensed Customer Company's proprietary _______ software as modified to meet Customer's needs in accordance with the Software License and Services Agreement dated _____________, 1998 by and between Company and Customer (the "Software License Agreement"). Customer desires to have Company maintain and support such software and Company desires to maintain and support such software for Customer under the terms and conditions set forth herein.

IN CONSIDERATION of the foregoing and the mutual covenants set forth herein, and intending to be legally bound, the parties agree as follows:

1. DEFINITIONS. The following words shall have the following means when used in this Agreement:

1.1 "Bypass" shall mean a procedure communicated by Company to Customer, which permits Customer to avoid Error(s) by implementing the same when using the Software.

1.2 "Enhancement(s)" shall mean a modification to the Software that alters the functionalities described in the Functional Specifications without materially degrading the functionalities or performance of the Software prescribed by the Functional Specifications.

1.3 "Error(s)" shall mean a failure of the Software to conform to the Functional Specifications.

1.4 "Error Report" shall mean the document to be created by Company, pursuant to Article 3 hereof, each time that Customer reports an Error.

1.5 "Fix(es)" shall mean the document to be created by Company pursuant to this Agreement in order to correct Errors.

1.6 "License(s)" shall mean any license or licenses granted by Company to Customer to use the Software under the Software License Agreement.

1.7 "Object Code" shall mean the binary machine readable version of the Software.

1.8 "Maintenance Services" shall mean the services to be provided under this Agreement.

1.9 "Optional Maintenance Services" means the services that Customer may elect to receive from Company pursuant to the provisions of Article 4 hereof; it is hereby agreed that if Customer elects to receive any Optional Maintenance Services, the said Optional Maintenance Services shall thenceforth be deemed to constitute Maintenance Services.

1.10 "Severity Level" shall mean the level of severity assigned to a reported Error with the Software, in accordance with the Severity Level definitions set forth in Exhibit A to this Agreement.

1.11 "Site" shall mean a Customer computer facility located in one specific geographic location.

1.12 "Software" shall mean Company's proprietary ______________ software as modified with Customer's specified enhancements, including Bypasses, Fixes, Enhancements, Updates and Upgrades. The term Software includes Software Products.

1.13 "Software Products" shall mean all physical components, other than program codes that are offered by Company, including but not limited to, manuals, documentation, magnetic media, job aids, templates and other similar devices.

1.14 "Update" shall mean a compendium of Fixes which Company releases to the users of the Software from time to time and which Company shall supply to Customer pursuant to the terms of this Agreement.

1.15 "Upgrades" shall mean a new release or version of the Software constituting a compendium of Enhancements.

Any capitalized terms not defined in this Agreement shall have the meaning sset forth in the Software License Agreement.

2. COMPANY'S OBLIGATIONS

2.1 In consideration of Customer's performance hereunder, Company shall, in addition to the other obligations imposed on Company hereby, render the Maintenance Services pursuant to Article 3 hereof, and render such Optional Maintenance Services as Customer may elect to purchase pursuant to the provisions of Article 4 hereof.

2.2 All Maintenance Services performed by Company under this Agreement shall be performed by Company in a professional manner in accordance with industry standards. If

Company receives notice of defects in the Maintenance Services, Company shall reperform said Maintenance Services. Company does not warrant that the Maintenance Services or Software will be uninterrupted or error free.

2.3 The parties acknowledge and agree that, notwithstanding anything to the contrary herein contained, Company shall not maintain the Hardware or the Third Party Software.

3. MAINTENANCE SERVICES

3.1 By rendering the Maintenance Services, Company shall correct all Errors, regardless of how such Errors are brought to the attention of Company, in accordance with this Agreement, and, in particular, Exhibit A hereto. During the term of this Agreement, Company shall provide the following types of Maintenance Services:

3.1.1 *Telephone Support.* Company telephone support representative(s) shall be available to receive Customer telephone calls between the hours of 8:30 a.m. and 5:30 p.m., Washington, D.C. time, Monday through Friday, excluding public holidays. Company shall provide Customer with a telephone number that is answered at all other times by an individual who will accept Error Reports. Such telephone support representative(s) shall serve as the Customer's interface with Company and shall ensure that reported Errors are handled in a timely manner as specified in Exhibit A hereto. Company shall provide to Customer in writing, the name(s) and telephone number(s) of such telephone support representative(s) within ten (10) days of the later of the execution of this Agreement or the acceptance of the Software by Customer under the Software License Agreement. All Errors shall be investigated and if the Error relates to the Software, or is directly caused by the Software, (a) an Error Report shall be opened, (b) the Error shall be assigned a Severity Level as per the provisions of Exhibit A hereto, and (c) the Error shall be resolved in accordance with the procedures and processes set forth in Exhibit A hereto.

3.1.2 *Installation Assistance.* Company shall provide to Customer telephone assistance for the implementation or installation of Bypasses, Fixes and Updates between the hours of 8:30 a.m. and 5:30 p.m., Washington, D.C. time, Monday through Friday, excluding public holidays.

3.1.3 *Bypasses.* Company shall provide to Customer such Bypasses as are necessary to ensure the resolution of Errors which can be resolved by a Bypass.

3.1.4 *Fixes.* Company shall provide to Customer such Fixes as are necessary to ensure the resolution of Errors which can be resolved by a Fix.

3.1.5 *Updates.* Company shall, as soon as they are made available, provide to Customer such Updates as it provides to the users for the Software from time to time.

3.1.6 *Enhancements.* Company shall provide to Customer such Enhancements as it provides to the users for the Software from time to time.

3.1.7 *Upgrades.* Company shall provide, as soon as they are made available, to Customer such Upgrades as it provides to the users for the Software from time to time.

3.2 Other Software Products. Company shall provide to Customer, at no additional cost, any Software Products relating to the Software made generally available to other Software users without charge. Any Software Products so made available at a given cost to the other Software users shall be offered to Customer at Company's then-existing rates.

3.3 Regular Activity Reports. Upon written request by Customer, Company shall provide: (a) a status report of Error resolution activities; and (b) a status report of all outstanding Error Reports. Such status reports shall contain Company's tracking number, Error description, Error resolution status and a definitive resolution time frame and release number for all Errors.

3.4 Limitation on Maintenance Services. Notwithstanding any other provisions in this Maintenance and Services Agreement, Company shall provide Maintenance Services only with respect to the two (2) most recent Upgrades of the Software.

3.5 Intellectual Property Rights. Title to all Bypasses, Fixes, Updates, Enhancements and Upgrades shall remain solely and exclusively with Company. It is hereby acknowledged and agreed that the former shall be deemed to constitute Software for purposes of the application of the Software License Agreement.

4. OPTIONAL MAINTENANCE SERVICES

4.1 Customer shall be entitled to purchase from Company the following Optional Maintenance Services at the rates set forth in Appendix B of this Agreement:

4.1.1 Consultant Support. Software Maintenance can be extended to include up to eighty (80) hours per month of on-site or off-site consultant support to assist with the operations and support of the Software. Such consultant shall offer training, support and consultation to optimize the Software system and the Customer's practices. The consultant will also act as liaison between Customer and Company. All travel and expenses arising from consultant support shall be billed to the Customer at Company's actual cost, provided all such travel and expenses shall be approved by Customer in advance.

4.1.2 Dedicated Telephone Support. Company shall provide the number of any dedicated telephone representatives ordered by Customer. Such dedicated telephone representative(s) shall be available between the hours 8:00 AM and 6:00 PM, Washington, D.C. time, Monday through Friday, excluding public holidays. Such dedicated telephone representatives shall, in addition to telephone support services, answer application questions (i.e., how to run reports, etc.) and system questions (i.e., what system precautions should be taken during month end processing, UNIX-related questions, etc.).

4.1.3. Proactive System Checks. Should Customer purchase the services of a dedicated telephone representative, such representative shall perform weekly proactive system checks. The dedicated telephone representative shall check the Software for possible problems (i.e. runaway processes, dbspace, file system space, etc.). If problems are found they shall be reported to the Customer's designated system administrator at the affected Site within two (2) hours.

5. OUT OF SCOPE PROBLEMS

5.1. Any time incurred by Company in diagnosing or fixing problems that are not caused by the Software, or are not covered by this Agreement are billable to the Customer at Company's then-existing rates which are initially set forth in Appendix B of this Agreement, with a one-hour minimum per call.

5.2. Any travel and expenses incurred in conjunction with out of scope maintenance and support shall be billed to Customer at Company's actual costs, provided all such travel and expenses shall be approved by Customer in advance.

6. TERM OF AGREEMENT. This Agreement shall become effective ____________ and continue for a ______ () year term (the "Initial Term"). Thereafter, it shall continue on a year-to-year basis, until terminated by either party ninety (90) days prior to the anniversary date of this Agreement.

7. FEES FOR MAINTENANCE AND SERVICES

7.1 During the Initial Term, Customer shall pay Company for the Maintenance Services set forth in Section 3 an amount calculated as follows: an annual fee equal to 15% of the sum of (i) the undiscounted RTU Fee, as set forth in Section __ of the Software License Agreement; (ii) the price of the development work as set forth in Section _ of the Software License Agreement; and (ii) the price of any other enhancements or modifications to the Software undertaken by Company at the written request of Customer, including any change orders received under the Software License Agreement (collectively, the "Agreed Maintenance Fee").

7.2. Company shall charge Customer its then existing rates for all optional services. Such rates are initially set forth in Appendix B of this Agreement.

8. DESIGNATED CUSTOMER PERSONNEL. The Customer shall identify by name and location all Customer personnel who may contact the Company representatives as set forth in Sections 3 and 4. The personnel identified shall have authority to authorize an investigation of software problems and have knowledge of the rules of engagement for maintenance and support. The list of authorized Customer contact personnel is set forth in Appendix C of this Agreement, provided that such list may be revised by Customer at any time as long as Company is informed in writing and such list does not exceed a maximum of fifteen (15) Customer contact personnel.

9. CONFIDENTIALITY. Information provided by either party to the other under this Agreement shall be kept confidential in conformance with and subject to the terms of the Non-Disclosure Agreement dated ________________, 1998 by and between the parties hereto.

10. REPRODUCTION OF MANUALS, DOCUMENTATION AND OBJECT CODE

10.1. Customer shall have the right, at no additional charge, to reproduce solely for its internal use, all manuals and documentation furnished by Company relating to the Software, regardless of whether such manual or documentation is copyrighted by Company. All copies of manuals or documentation made by Customer shall include any proprietary notice or stamp that has been affixed by Company. Company shall furnish to Customer, and at no additional charge to Customer, one (1) hard copy of the relevant documentation sufficient to enable Customer to maintain and operate the Software. All documentation shall be in the English language.

10.2. One (1) copy of the Object Code may be reproduced by Customer, at no additional charge, only for back-up or archival purposes. On written request by Company, Customer shall notify Company in writing of its methods and procedures for archiving of Object Code software prior to doing so.

11. LIMITATION OF LIABILITY AND DISCLAIMER OF WARRANTY

11.1. In no event shall Company be liable for any special, indirect, incidental, punitive or consequential damages , including loss of profits arising from or related to the breach of this Agreement, even if Company had been advised of the possibility of such damages.

11.2. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, IN THE EVENT ANY REMEDY FAILS OF ITS ESSENTIAL PURPOSE, COMPANY'S LIABILITIES UNDER THIS AGREEMENT, WHETHER UNDER CONTRACT LAW, TORT LAW OR OTHERWISE, SHALL BE LIMITED TO DIRECT DAMAGES NOT TO EXCEED THE AMOUNT ACTUALLY RECEIVED BY COMPANY PURSUANT TO THIS AGREEMENT.

11.3 EXCEPT AS SET FORTH IN SECTION 2.2, COMPANY MAKES NO EXPRESS OR IMPLIED REPRESENTATIONS OR WARRANTIES WITH RESPECT TO THE SOFTWARE OR MAINTENANCE SERVICES OR THEIR CONDITION, MERCHANTABILITY, FITNESS

FOR ANY PARTICULAR PURPOSE OR USE BY CUSTOMER. COMPANY FURNISHES THE WARRANTIES IN SECTION 2.2 IN LIEU OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

11.4 No action, regardless of form, arising under this Agreement, may be brought more than one year after the cause of action has arisen, except that an action for nonpayment may be brought within two (2) years after the date of the most recent payment.

12. INDEPENDENT CONTRACTOR. All work performed by Company in connection with the Software and/or Maintenance Services described in this Agreement shall be performed by Company as an independent contractor and not as the agent or employee of Customer. All persons furnished by Company shall be for all purposes solely the Company's employees or agents and shall not be deemed to be employees of Customer for any purpose whatsoever. Company shall furnish, employ and have exclusive control of all persons to be engaged in performing maintenance services under this Agreement and shall prescribe and control the means and methods of performing such maintenance services by providing adequate and proper supervision. Company shall be solely responsible for compliance with all rules, laws and regulations relating to employment of labor, hours of labor, working conditions, payment of wages and payment of taxes, such as employment, Social Security, and other payroll taxes including applicable contributions from such persons when required by law.

13. FORCE MAJEURE. Neither party shall be responsible for any delay or failure in performance of any part of this Agreement to the extent that such delay or failure is caused by fire, flood, explosion, war, embargo, government requirement, civil or military authority, act of God, act or omission of carriers or other similar causes beyond its control. If any such an event of force majeure occurs and such event continues for ninety (90) days or more, the party delayed or unable to perform shall give immediate notice to the other party, and the party affected by the other's delay or inability to perform may elect at its sole discretion to: (a) terminate this Agreement or the affected order solely upon mutual agreement of the parties; (b) suspend such order for the duration of the condition and obtain or sell elsewhere Software, Software Products, or Maintenance Services comparable to the Software, Software Products, or Maintenance Services to have been obtained under the order; or (c) resume performance of such order once the condition ceases with the option of the affected party to extend the period of this Agreement up to the length of time the condition endured. Unless written notice is given within thirty (30) days after the affected party is notified of the condition, option (c) shall be deemed selected.

14. ASSIGNMENT. This Agreement shall be binding on the successors and assigns of both parties, provided, that neither party may assign or transfer its interests, rights or obligations under this Agreement or any order by written agreement, merger, consolidation, operation of law or otherwise without the prior written consent of an authorized executive officer of the other party, which consent shall not be unreasonably withheld. It shall be reasonable to withhold consent to such assignment or transfer if the assignee or transferee is in direct competition with the other party. Any purported assignment of this Agreement in violation of this Section 14 shall be null and void.

15. AMENDMENTS, MODIFICATIONS OR SUPPLEMENTS. Amendments, modifications or supplements to this Agreement shall be permitted, provided all such changes shall be in writing signed by the authorized representatives of both parties, and all such changes shall reference this Agreement and identify the specific articles or sections of this Agreement that is amended, modified or supplemented.

16. NOTICES. All notices, demands, or other communications herein provided to be given or that may be given by any party to the other shall be deemed to have been duly given when made in writing and delivered in person, or upon receipt, if (a) deposited in the United States mail, postage prepaid, certified mail, return receipt requested, or (b) sent by reputable overnight courier addressed as follows:

Notices to Company:	Notices to Customer:
With a required copy to:	With a required copy to:

or to such address as the parties may provide to each other in writing from time to time.

17. OBLIGATIONS WHICH SURVIVE TERMINATION. The parties recognize and agree that the obligations of the other party under Sections 9, 11 and 19 of this Agreement, shall survive the cancellation, termination or expiration of this Agreement.

18. EXPORT REGULATIONS. Customer and Company acknowledge that the Software and all related technical information, documents and materials may be subject to export controls under the U.S. Export Administration Regulations and, to the extent applicable, Customer and Company shall (a) comply with all requirements set forth in such regulations, and (b) cooperate fully with each other in any official or unofficial audit or inspection that relates to such export requirements.

19. GOVERNING LAW. The validity, construction, interpretation and performance of this Agreement shall be governed by and construed in accordance with the domestic laws of the State of Maryland except as to its principles of conflicts of laws. The parties acknowledge and agree that the United Nations Convention for the Sale of Goods shall not apply to this Agreement. The parties irrevocably submit to the jurisdiction of the Federal District Court for the District of Maryland to resolve any disputes arising under or related to this Agreement.

20. BACKGROUND, ENUMERATIONS AND HEADINGS. The "Background" enumerations and headings contained in this Agreement are for convenience of reference only and are not intended to have any substantive significance in interpreting this Agreement.

21. ENTIRE AGREEMENT. This Agreement shall constitute the entire agreement between the parties hereto and replaces and supersedes all prior agreements, written and oral, relating to the subject matter hereof, between the parties to this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement under seal as of the day and year first written above.

ATTEST:	[CUSTOMER]
______________________	By:______________________________(Seal)
ATTEST:	[COMPANY]
______________________	By:______________________________(Seal)

[4.30.98]

Appendix A

Escalation Procedures And Processes For Software Error Resolution

CLASSIFICATION OF ERRORS

All Errors reported by Customer to Company shall be assigned a Severity Level jointly agreed upon by Customer and Company. The point of contact throughout this initial Error reporting procedure shall be the applicable Company support representative available to Customer under the terms of this Agreement. Reported Errors shall be classified as follows:

Severity Level 1 - Severity Level 1 implies that the Software is not functioning. Some examples of Severity Level 1 Errors are as follows:

1. Production System down and will not restart;
2. Production Software not able to communicate with external systems (including the network control center) that halts on-line and other processing and no Bypass is available; and
3. Production Software is generating a data corruption condition that halts on-line and other processing and no Bypass is available.

Severity Level 2 - Severity Level 2 implies that the Software is running but that Customer is unable to use major portions of the Software, and no Bypass is available. Some examples of Severity Level 2 Errors are as follows:

1. Intermittent Error in a live, production system that continues processing with no Bypass; and
2. Major functional component is unavailable with no Bypass.

Severity Level 3 - Severity Level 3 implies that the Software is operating close to normal, but there is a non-critical Error for which an operational Bypass exists for such Error. Severity Level 3 Errors will be fixed in the next scheduled Update.

Severity Level 4 - Severity Level 4 includes purely cosmetic Errors and documentation anomalies.

Out-of-Scope - A reported problem is out-of-scope when it is determined not to be related to the Software and is beyond the bounds of Company's responsibility. Examples of such unrelated problems include, but are not limited to, Customer host or applications software, Customer hardware and cabling, power or environmental conditions, and human error.

SEVERITY LEVEL 1

Error Resolution - Immediate steps shall be taken toward solving the Error. Company shall work to resolve Severity Level 1 Errors on a twenty-four (24) hour basis until the Error is resolved. If required, Company staff shall be moved off of lower Severity Level Errors to service Severity Level 1 Errors.

Resource Commitment - When a Severity Level 1 Error is reported, Company shall assign all resources required to correct the Error. Work on the Error shall be continuous until a Fix is found. If system access is required, Customer shall provide a contact available to Company and access to its system and software for the duration of the Error correction procedures.

Completion Goal - The completion goal shall be to resolve one hundred percent (100%) of all Severity Level 1 Errors with a Fix or Bypass within eight (8) hours of receipt of the Error Report.

Escalation and Status Thresholds - When a Severity Level 1 Error Report is opened, the following escalation and status procedures shall be followed.

Hour 1 - Hour 3

1. The Error shall be resolved by Company first line support; or

2. The Error will be referred to the maintenance engineering group. All log files and a description of the work done by Company will be transferred to this group. The report will receive an Error Report number which will be entered into the SMS. The error will be passed to the maintenance engineering group via the SMS as well as by E-mail.

The Customer will be notified of the status of the Error.

Hour 3

1. The maintenance engineering point of contact will resolve the Error; or

2. It will be decided that more resources are required to work on the Error.

The Customer will be notified of the status of the Error.

Hour 4 - Resolution

1. Company shall continue to work on the Error, on a twenty-four (24) hour basis, until a resolution is found. All available resources shall be used to assist the person who is responsible for the resolution of the Error; and

2. The Project Manager and Operations Support Manager shall be notified that a Severity Level 1 Error has reached a critical time frame.

SEVERITY LEVEL 2

Error Resolution - Severity Level 2 Errors will be analyzed in the order that they are reported. Severity Level 1 Errors will take priority over Severity Level 2 Errors.

Resource Commitment - Appropriate technical resources will be assigned to Severity Level 2 issues as long as Severity Level 1 Errors are not open.

Completion Goal - The completion goal will be to resolve one hundred percent (100%) of all Severity Level 2 Errors with a Fix or Bypass within forty-eight (48) hours of receipt of the Error Report . If it is a Bypass, a Fix will be applied within sixty (60) days.

Escalation and Status Thresholds - When a Severity Level 2 Error Report is opened, the following escalation and status procedures will be followed.

Hour 1 - Hour 24

1. The Error shall be resolved by Company; or

2. The maintenance point of contact person will be contacted. All log files and a description of the work done by Company will be transferred to this group. An Error Report number will be assigned and entered in the trouble tracking system.

The Customer will be notified of the status at this stage.

Hour 25 - Hour 48

1. The maintenance engineering point of contact will resolve the Error; or

2. The maintenance engineer will continue working the Error until it is fixed.

3. A date will be estimated upon when this Error will be fixed.

The Customer will be notified of the status at this stage.

SEVERITY LEVEL 3

Error Resolution - Severity Level 3 errors shall be researched after Severity Level 1 and Severity Level 2 Errors. The majority of the Severity Level 3 Errors shall be scheduled for correction and be resolved as part of the next scheduled Update.

Resource Commitment - Severity Level 3 Fixes shall be included in the next scheduled Update.

Completion Goal - The completion goal and objective shall be to correct Errors in the next scheduled Update.

Escalation and Status Thresholds - The status of Severity Level 3 Errors shall be available on demand. A monthly report will be distributed that will reference any uncorrected Errors that are over ninety (90) days old.

SEVERITY LEVEL 4

Error Resolution - Severity Level 4 Errors shall be addressed at Company's discretion after Severity Level 1, Severity Level 2 and Severity Level 3 Errors are corrected. All Severity Level 4 Errors shall be scheduled for correction and be resolved as part of the next scheduled Update.

Resource Commitment - Severity Level 4 Fixes shall be included in the next scheduled Update.

Completion Goal - The completion goal and objective will be to correct issues in the next scheduled Update.

Escalation and Status Thresholds - The status of Severity Level 4 Errors shall be available on demand.

Appendix B

Optional Services and Standard Rate Schedule Effective Through [DATE]
(all prices are in United States Dollars)

BILLING RATES

Classification	$ Monthly
Senior Consultant	
Consultant	
Project Manager	
Project Leader	
System Analyst	
Training Manager	
Trainer	
Senior Programmer	
Programmer	
Documentation Specialist	

Travel and Expenses are not part of the standard rate and are to be paid by the Customer.

OPTIONAL SUPPORT SERVICES

Consultant Support $/year

Dedicated Telephone Support $/year

Off-Hour Support $/year

Consultant Support/Annual Maintenance Fee Adjustment __% Reduction

If any one individual or combination of the Consultant Support, Dedicated Telephone Support and Off-Hour Support options listed above is ordered by Customer simultaneously with the Annual Software Maintenance and Software Support Fee, the Annual Software Maintenance and Software Support Fee will be reduced to __% of the Delivered Software per Annum for that particular year.

Out-Of-Scope / Secondary Authorized Rate $/hour

To be used in conjunction with support delineated under Sections 2, 3 and 4.

Training $/program

A comprehensive training program to "train the trainers" shall be offered to Customer by Company. This instructor led program requires a total of fifteen (15) days to complete and will accommodate up to five (5) attendees. Training shall be conducted at a designated Customer location. An outline of the "train the trainer" program shall be provided by Company on request. Reasonable travel and expenses are not part of the training fee and shall be billed to Customer at Company's actual cost.

Appendix C

Designated Customer Personnel

The following Customer personnel shall be designated by Customer to contact Company in accordance with the terms of this Agreement and shall have authority to authorize an investigation of software errors and have knowledge of the terms and conditions set forth therein:

Section IX. C.

CONSULTING AGREEMENT

THIS CONSULTING AGREEMENT is made this _____ day of __________, 1998, by and between ____________________, a _________________ corporation, with its principal place of business at ____ ("Company") and ____________________________, [a _______________ corporation][individually], with [its][his] principal place of business at ______________________________________ ___________________ ("Consultant").

BACKGROUND

> Company is engaged in the development, licensing and marketing of proprietary computer software. Consultant has expertise and experience in the areas listed in Exhibit A attached hereto and desires to consult with Company in its area of expertise. Based on Consultant's experience, Company desires to retain the services of Consultant and Consultant desires to render such services on the terms and conditions set forth below.

IN CONSIDERATION of the foregoing and of the mutual covenants herein contained, the parties, intending to be legally bound, agree as follows:

1. Retention as Consultant. Company hereby retains Consultant, and Consultant hereby agrees to render consulting services to Company , upon the terms and conditions set forth herein.

2. Duties. Consultant covenants and agrees that it will, as an independent contractor, perform all services as set forth in Exhibit A attached hereto.

3. Independent Contractor Status. The parties recognize that Consultant is an independent contractor and not an employee, agent, partner, joint venturer, covenantor, or representative of Company and that Company will not incur any liability as the result of Consultant's actions. Consultant shall at all times represent and disclose that it is an independent contractor of Company and shall not represent to any third party that Consultant is an employee, agent, covenantor, or representative of Company. **[Company shall not withhold any funds from Consultant for tax or other governmental purposes, and Consultant shall be responsible for the payment of same OR Consultant shall be considered to be a "casual employee" of Company and as such Company shall withhold all required taxes from Consultant's compensation.]** Consultant shall not be entitled to receive any employment benefits offered to employees of Company including workers compensation insurance coverage. Company shall not exercise control over Consultant.

4. Compensation. Company shall pay to Consultant, as compensation for the services to be rendered, the amount set forth in Exhibit B attached hereto.

5. Term. This Agreement shall commence on the date first written above and shall continue for ____________, unless otherwise terminated as provided herein.

6. Termination. Notwithstanding Section 5 of this Agreement, Company may immediately terminate Consultant for cause without prior notice.

7. Covenant of Non-Disclosure. Consultant shall not, at any time during or after the term of this Agreement, in any manner, either directly or indirectly, divulge, disclose, or communicate to any person, firm, corporation or other entity, or use for its own benefit or for the benefit of any person, firm, corporation or other entity, and not for the benefit of Company, any information acquired from Company, its parent or subsidiaries, without the express prior written consent of an authorized executive officer of Company, as more fully set forth in a certain Proprietary Information Agreement between Company and Consultant dated ________________________, 1998. In addition, Consultant shall ensure that Consultant's employees, officers, directors, agents and representatives shall execute similar agreements protecting Company's proprietary information and agree to be bound by the terms and conditions contained therein.

8. Rights to Work. The parties acknowledge that any work performed by Consultant for Company is being created at the insistence of Company and shall be deemed "work made for hire" under the United States copyright law.

Company shall have the right to use the whole work, any part of parts thereof, or none of the work, as it sees fit. Company may alter the work, add to it, or combine it with any other work or works, at its sole discretion. Notwithstanding the foregoing, all original material submitted by Consultant as part of the work or as part of the process of creating the work, including but not limited to programs, listings, printouts, documentation, notes, flow charts, and programming aids, shall be the property of Company whether or not Company uses such material. No rights are reserved by Consultant.

All programs, specifications, documentation and all other technical information prepared by Consultant in connection with the performance of its services hereunder will become and remain Company's sole property. Title to all material and documentation, including, but not limited to systems specifications, furnished by Company to Consultant or delivered by Company into Consultant's possession shall remain with Company. Consultant shall immediately return all such material or documentation within seven (7) days of any request by Company or upon the termination or conclusion of this Agreement, whichever shall occur first.

Whenever an invention or discovery is made by Consultant either solely or in collaboration with others, including employees of Company under or relating to this Agreement, the Consultant shall promptly give Company written notice thereof and shall furnish Company with complete information thereon including, as a minimum, (1) a complete written disclosure of each such invention and (2) information concerning the date and identity of any public use, sale or publication of such invention made by or known to

Consultant or of any contemplated publication by Consultant. As used herein, the term (1) "invention" or "discovery" includes any art, machine, manufacture, design or composition of matter or any new and useful improvement thereof where it is or may be patentable under the patent laws of the United States or of any foreign country; and (2) "made," when used in relation to any invention or discovery, means the conception of the first actual or constructive reduction to practice of such invention.

Consultant hereby grants, assigns and conveys to Company all right, title and interest in and to all inventions, works of authorship and other proprietary data and all other materials (as well as the copyrights, patents, trade secrets and similar rights attendant hereto) conceived, reduced to practice, authored, developed or delivered by Consultant or its employees, agents, consultants, contractors and representatives either solely or jointly with others, during and in connection with the performance of services under this Agreement with Company . Consultant agrees that it will not seek, and that it will require its employees, agents, consultants, contractors and representatives not to seek patent, copyright, trademark, registered design or other protection for any rights in any such inventions, works or authorship, proprietary data or other materials. Consultant shall have no right to disclose or use any such inventions, works of authorship, proprietary data or other materials for any purpose whatsoever and shall not communicate to any third party the nature of or details relating to such inventions, works of authorship, proprietary data or other materials. Consultant agrees that it shall do and that it will require its employees, agents, consultants, contractors and representatives to do, at Company's expense, all things and execute all documents as Company may reasonably require to vest in Company or its nominees the rights referred to herein and to secure for Company or its nominees all patent, trademark, or copyright protection.

Consultant's obligations under this Agreement shall survive expiration or termination of this Agreement and any amendments thereto. Furthermore, Consultant irrevocably waives its moral rights in any work created, developed or delivered hereunder.

Consultant agrees it will not disclose to any third party, without the prior written consent of Company, any invention, discovery, copyright, patent, trade secret or similar rights attended hereto, made under or relating to this Agreement or any proprietary or confidential information acquired from Company under this Agreement, including trade secrets, business plans and confidential or other information which may be proprietary to Company.

Consultant warrants and represents that it has or will have the right, through written agreements with its employees, to secure for Company the rights called for in this Section. Further, in the event Consultant uses any subcontractor, consultant or other third party to perform any of the services contracted for under this Agreement, Consultant agrees to enter into and provide to Company such written agreements with such third party, and to take such other steps as are or may be required to secure for Company the rights called for in this Section. Consultant further agrees to provide the names and addresses of all agents, contractors, consultants, representatives or other third parties who perform work on behalf of Consultant under this Agreement.

9. Legal Relief. In the event Consultant breaches, or threatens to breach any of the covenants expressed herein, the damages to Company will be great and irreparable and difficult to quantify; therefore, Company may apply to a court of competent jurisdiction for injunctive or other equitable relief to restrain such breach or threat of breach, without disentitling Company from any other relief in either law or equity. In the event that any or all of the covenants expressed herein shall be determined by a court of competent jurisdiction to be invalid or unenforceable, by reason of its geographic or temporal restrictions being too great, or by reason that the range of activities covered are too great, or for any other reason, these covenants shall be interpreted to extend over the maximum geographic area, period of time, range of activities or other restrictions to which they may be enforceable.

10. Export Regulations. Consultant acknowledges its obligations to control access to technical data under the U.S. Export Laws and Regulations and agrees to adhere to such laws and regulations with regard to any technical data received under this Agreement.

11. Adherence to Laws.

11.1 Consultant agrees that in carrying out its duties and responsibilities under this Agreement, it will neither undertake nor cause, nor permit to be undertaken, any activity which either (i) is illegal under any laws, decrees, rules or regulations in effect in **[either]** the United States **[or foreign country if applicable]**; or (ii) would have the effect of causing Company to be in violation of any laws, decrees, rules or regulations in effect in **[either]** the United States **[or foreign country if applicable]**.

11.2 Consultant agrees that in connection with this Agreement or with any resultant contract or subcontract, it will not, directly or indirectly, give, offer or promise, or authorize to tolerate to be given, offered or promised, anything of value to any entity or individual with the intent to (i) influence any act or decision of such entity or individual, or (ii) induce such entity or individual to use their influence to affect or influence any act or decision in order to assist Company in obtaining or retaining business, or in directing business to any person.

11.3 Consultant agrees to notify Company immediately of any extortive solicitation, demand or other request for anything of value, by or on behalf of any entity or individual, relating to the subject matter of this Agreement.

12. Covenant of Non-Competition. Consultant agrees that for the period of this Agreement and for two (2) years thereafter, it and its employees and agents performing work hereunder will not directly or indirectly represent, be employed by, consult for or otherwise be associated with any other supplier of telecommunications software or software consulting services in the same capacity for which Consultant is providing services under this Agreement nor will Consultant be employed by or consult for any client of Company for which Consultant performs work for under this Agreement. Furthermore, Consultant agrees that Consultant and any individual or entity under Consultant's direct or indirect control will not solicit, hire or retain as an employee or independent contractor any employee or former employee of Company without the prior written consent of an authorized executive officer of Company.

13. Indemnification. Consultant shall defend, indemnify and hold harmless Company and its officers, directors, employees, agents, parent, subsidiaries and other affiliates, from and against any and all damages, costs, liability, and expense, whatsoever (including attorneys' fees and related disbursements) incurred by reason of (a) any failure by Consultant to perform any covenant or agreement of Consultant set forth herein; (b) the death or injury to any individual, or damage to or loss of Company property or the property of Company's client due to the negligence and/or willful acts of Consultant or Consultant's personnel; or (c) any breach by Consultant of any representation, warranty, or covenant under this Agreement. Company shall have the right of offset against fees or commissions due Consultant under this Agreement in the amount of any indemnification which Company is entitled under this Section 13.

14. Warranty. As an inducement for Company to enter into this Agreement, Consultant makes the following representations and warranties:

14.1 Qualifications. Consultant hereby represents and warrants to Company that all statements and materials regarding its qualifications to perform the work contemplated under this Agreement are true and correct and are not misleading or incomplete for any reason including by reason of omission. Consultant recognizes and agrees that Company may immediately terminate this Agreement if Consultant has misstated its qualifications or the qualifications of its employees, consultants, contractors, agents or representatives, to perform the work contemplated under this Agreement or otherwise breached its representations and warranties set forth in this Section 14.

14.2 Quality of Services. Consultant hereby represents and warrants to Company that all services, work and deliverables to be performed hereunder shall be performed by qualified personnel in a professional and workmanlike manner, in accordance with the highest industry standards.

14.3 Good Title. Consultant hereby represents and warrants to Company that Company will receive good and valid title to all deliverables delivered by Consultant to Company under this Agreement, free and clear of all encumbrances and liens of any type.

15. Miscellaneous.

15.1 Cooperation. Consultant agrees that at any time and from time to time, upon the request of Company, to do, execute, acknowledge and deliver, or cause to be done, executed, acknowledged and delivered, all such further acts, documents and instruments as may be required to effect any of the transactions contemplated by this Agreement.

15.2 Assignment or Amendment. This Agreement is not assignable by either Consultant or Company and all obligations hereunder shall terminate automatically upon the death of Consultant should such death occur prior to the termination of this Agreement. No alteration, modification, amendment or other change of this Agreement shall be binding on the parties unless in writing, approved and executed by Consultant and an authorized executive officer of Company.

15.3 Notices. Any notice or other communication pursuant to this Agreement shall be in writing and shall be deemed to have been fully given upon receipt to the following addresses or such other addresses as the parties may provide in writing to the other from time to time:

If to Company: If to Consultant:

Attn: General Counsel

15.4 Governing Law. This Agreement shall be construed in accordance with the domestic laws of the state of Maryland, excluding its principles of conflicts of laws. The parties hereto agree that any action related to this Agreement shall be venued solely in the Federal District Court for the District of Maryland and the parties hereby irrevocably commit to the jurisdiction of the said court.

15.5 Invalidity. The terms of this Agreement shall be severable so that if any term, clause, or provision hereof shall be deemed invalid or unenforceable for any reason, such invalidity or unenforceability shall not affect the remaining terms, clauses and provisions hereof, the parties intending that if any such term, clause or provision were held to be invalid prior to the execution hereof, they would have executed an agreement containing all the remaining terms, clauses and provisions of this Agreement.

15.6 Waiver of Breach. The waiver by either party hereto of any breach of the terms and conditions hereof will not be considered a modification of any provision, nor shall such a waiver act to bar the enforcement of any subsequent breach.

15.7 Background, Enumerations and Headings. The "Background", enumerations and headings contained in this Agreement are for convenience of reference only and are not intended to have any substantive significance in interpreting this Agreement.

15.8 Company Property. All Company property in the possession or control of Consultant including, but not limited to specifications, documentation, source code, magnetic media, and building entry keys and cards, as well as all material developed or derived by Consultant in performing its duties under this Agreement will be returned by Consultant to Company on demand, or at the termination of this Agreement whichever shall come first.

15.9 Time. Time is of the essence in the performance of Consultant's duties under this Agreement.

15.10 Entire Agreement. Except for the Proprietary Information Agreement referenced in Section 7, this Agreement shall constitute the entire agreement between the parties hereto and replaces and supersedes all prior agreements, written and oral, relating to the subject matter hereof, between the parties to this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement under seal effective the date first written above.

ATTEST:	COMPANY:
______________________	By: ____________________(SEAL)
WITNESS/ATTEST:	CONSULTANT
______________________	[By:] ____________________ (SEAL)

Federal Tax Id. No./Social Security Number________________

EXHIBIT A

DUTIES OF CONSULTANT

Consultant shall, upon the request of Company, perform the following tasks to the satisfaction of Company:

EXHIBIT B

COMPENSATION

Company shall pay to Consultant, as compensation for the services to be rendered, the sum of $________ per hour for hours actually worked for a maximum of ______ hours per year. Consultant shall work the hours required but Company shall not be obligated to provide a minimum number of hours of work to Consultant nor shall Consultant be entitled to receive any compensation for hours not worked.

Consultant shall not be reimbursed by Company for Consultant's expenses. Consultant shall report to ____________________________.

Consultant shall not be paid for travel time.

Company shall pay Consultant all undisputed invoices presented by Consultant under this Agreement within thirty (30) days of the receipt of such invoices.

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Section IX. D.

ASSIGNMENT

In exchange for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned hereby assigns to ______________________ ("Company"), its licensees, successors, and assignees any and all legal or equitable interests, including copyright interests, in any software or associated documentation which the undersigned has authored or contributed to or will author or contribute to, on the ________________________ project, to the extent such software or associated documentation did not or does not constitute "work for hire" within the meaning of the Copyright Act, 17 U.S.C. §101 et seq. By this assignment, the undersigned renounces and waives any and all rights to limit the use, distribution, modification, licensing or sale of the software and documentation or any element thereof by Company or its licensees, successors, or assignees, or to receive any compensation whatsoever by reason of any use, distribution, modification, licensing or sale of the software or documentation or any element thereof by Company, its licensees, successors or assignees.

The undersigned further agrees that on request and without further consideration (but at the expense of Company), the undersigned will communicate to Company, or its representatives all facts known to him respecting the ______________ ______ project, testify in any legal proceedings, sign all lawful papers, execute all applications, make all rightful oaths, and generally do everything possible to aid Company, its licensees, successors, assignees and nominees, to obtain and enforce proper protection for the ____________________ project in the United States and all other countries foreign thereto, and to vest the entire right, title and interest in and to the project in Company.

________________________________(SEAL)
[Name of Signatory]

Date:________________________________

Sworn and subscribed to before me this _________ day of __________________, 1998

____
Notary Public

My Commission expires:____________________

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ESCROW AGREEMENT

THIS ESCROW AGREEMENT is made this _____ day of ___________, 1998, by and among _________________, a _________ corporation, having its principal offices at________ ____ (hereinafter the "Licensor"); ______________________________, a ______________ corporation, having its principal offices at ____ (hereinafter the "Licensee"); and Mercantile Safe Deposit Company, a Maryland corporation, having its principal offices_______ ______________________, a Maryland coporation, having its principal offices at___________ ______________________ (hereinafter the "Escrow Agent").

WITNESSETH:

WHEREAS, the Licensor and the Licensee have entered into a software license agreement (the "License Agreement") dated ______________, 1998, a copy of which is appended hereto and made a part hereof, pursuant to which the Licensor has licensed to the Licensee certain computer software, including certain updates, improvements, and enhancements thereof from time to time developed by the Licensor, and such additional program changes as the Licensee may order from Licensor from time to time, and all documentation therefor developed by the Licensor (hereinafter collectively referred to as the "Product"); and

WHEREAS, it is the policy of the Licensor not to disclose the source code and related documentation (hereinafter collectively referred to as the "Source Code") for the Product to its customers except as provided in an applicable Escrow Agreement; and

WHEREAS, Licensor and Licensee agree that upon the occurrence of certain events described in Section 3(a) hereof, the Licensee shall be able to obtain the Source Code and all revisions thereof, and accordingly, the Licensor agrees to deliver said Source Code to the Escrow Agent;

NOW, THEREFORE, in consideration of the mutual covenants exchanged herein and for other valuable consideration, the adequacy and receipt of which are hereby acknowledged, the Licensor, the Licensee and the Escrow Agent hereby intending to be legally bound hereby agree as follows:

1. Deposits. The Escrow Agent, as a safekeeping (escrow) agent, agrees to accept from the Licensor the Source Code (as more fully described in Schedule A hereto) and revisions thereof as provided in Section 2 of this Agreement. The Escrow Agent will issue to the Licensor a receipt for the Source Code upon delivery. The Source Code held by the Escrow Agent shall remain the exclusive property of the Licensor, and the Escrow Agent shall not use the Source Code or disclose the same to any third party except as specifically provided for herein. The Escrow Agent will hold the Source Code in safekeeping at its offices hereinabove indicated unless and until the Escrow Agent receives notice pursuant to the terms of this Agreement that the Escrow Agent is to deliver the Source Code to Licensee or Licensor, in which case the

the provisions of this Escrow Agreement.

2. Warranty of Licensor to Licensee. Licensor warrants to Licensee that (i) the material described in Schedule A hereto constitutes the source code and documentation for the Product licensed to the Licensee pursuant to the License Agreement; (ii) the Source Code delivered to the Escrow Agent is in a form suitable for reproduction by computer and/or photocopy equipment, and consists of a full source language statement of the program or programs comprising the Product and complete program maintenance documentation, including all flow charts, schematics and annotations which comprise the precoding detailed design specifications, and all other material necessary to allow a reasonably skilled third party programmer or analyst to maintain or enhance the Product without the help of any other person or reference to any other material; and (iii) the Licensor will promptly supplement the Source Code delivered hereunder with all revisions, corrections, enhancements or other changes so that the Source Code constitutes a human-readable program for the current release of the Product.

3. Notice of Default.

(a) The Licensor shall be deemed to be in material default of its responsibilities to Licensee if (i) the Licensor is unable, at any time during the warranty period specified in the License Agreement, to correct any material malfunction, defect or nonconformity in any Product which prevents such Product from functioning substantially in accordance with the applicable specifications, documentation, performance criteria and other warranties and descriptions provided in the License Agreement, within ninety (90) business days after Licensee's notification to Licensor specifying in reasonable detail in what respects the Product fails to conform; or (ii) the Licensor becomes insolvent, makes a general assignment for the benefit of creditors, files a voluntary petition of bankruptcy, suffers or permits the appointment of a receiver for its business or assets, becomes subject to any proceeding under any bankruptcy or insolvency law, whether domestic or foreign, or has wound up or liquidated its business voluntarily or otherwise and Licensor has failed to meet its material warranty and maintenance obligations. Licensee shall give written notice (the "Notice of Default") to the Escrow Agent of any default by the Licensor. The Notice of Default shall, at the minimum, (i) be labelled "Notice of Default", (ii) identify the License Agreement and this Escrow Agreement, (iii) specify the nature of the default, (iv) identify the Source Code with specificity, and (v) demand the delivery of the Source Code to the Licensee.

(b) Upon receipt of the Notice of Default, the Escrow Agent shall send a copy thereof to the Licensor by certified or registered mail, postage prepaid, return receipt requested. If the Licensor desires to dispute the Notice of Default, the Licensor shall, within fifteen (15) business days after the receipt of the copy of the Notice of Default from the Escrow Agent, deliver to the Escrow Agent a sworn statement (the "Affidavit") saying that no default has occurred, whereupon the provisions of Paragraph 5 hereof will become applicable. If the Escrow Agent receives the Affidavit within said fifteen (15) business days, the Escrow Agent shall send a copy thereof to Licensee by certified or registered mail, return receipt requested, and the Escrow Agent shall continue to hold the Source Code in accordance with this Escrow Agreement. If the Escrow Agent does not receive the Affidavit within said fifteen (15) business days and Licensee has not terminated the License Agreement, the Escrow Agent is authorized and directed to deliver the Source Code to the Licensee.

4. Notice of Termination. Upon the termination of the License Agreement, the Licensor may obtain the return of the Source Code by furnishing written notice of the termination, agreed to by authorized and notarized signature of the Licensee to the Escrow Agent.

5. Disputes.

(a) In the event that Licensor files the Affidavit with the Escrow Agent in the manner and within the time period set forth in Paragraph 3(b) hereof, or if the Licensee shall fail to agree that the License has been terminated, the Escrow Agent shall not release the Source Code to either party except in accordance with (i) a final decision of the arbitration panel as hereinafter provided, or (ii) receipt of an agreement with authorized and notarized signatures of both Licensor and Licensee, authorizing the release of the Source Code to one of the parties hereto.

(b) Disputes arising under this Agreement shall be referred immediately to, and settled by, binding arbitration. The arbitration panel shall consist of three persons. Each of the parties hereto shall appoint one arbitrator and the two arbitrators thereby appointed shall select a third arbitrator. The arbitration shall be conducted in Baltimore, Maryland in accordance with the rules of the American Arbitration Association. The Escrow Agent shall give prompt effect to any authenticated arbitration award, notwithstanding the right of either party to seek, in any court having jurisdiction thereof, enforcement or a stay of any award rendered by the arbitrators. This Agreement shall be governed by, and construed in accordance with, the laws of the State of Maryland.

6. Payment to Escrow Agent. As payment for its services hereunder, the Escrow Agent shall receive an annual fee of $1,000.00 and $25.00 per transaction for processing paid by the Licensor, payable yearly in advance. Such fees shall be subject to renegotiation on a biannual basis.

7. Termination. This Escrow Agreement shall terminate on the earlier of the delivery of the Source Code to either party in accordance with the terms of this Agreement or upon the termination of the Software license.

8. Waiver, Amendment or Modification; Severability. This Escrow Agreement shall not be waived, amended, or modified except by the written agreement of all the parties hereto. Any invalidity, in whole or in part, of any provision of this Escrow Agreement shall not affect the validity of any other of its provisions.

9. Notices. All notices required to be given hereunder shall be in writing and shall be given by certified or registered mail, return receipt requested, or overnight courier, to the parties at their respective addresses hereinabove written, or at such other address as shall be specified hereinabove in writing to all other parties.

10. Limitation on Escrow Agent's Responsibility and Liability

(a) The Escrow Agent shall not be obligated or required to examine or inspect the Source Code, or any of the Additions. The Escrow Agent's obligation for safekeeping shall be limited to providing the same degree of care for the Source Code as it maintains for its valuable limited to providing the same degree of care for the Source Code as it maintains for its valuable documents and those of its customers lodged in the same location with appropriate atmospheric or other safeguards. However, the parties agree and acknowledge that the Escrow Agent shall not be responsible for any loss or damage to any of the Source Code due to changes in such atmospheric conditions (including, but not limited to, failure of the air conditioning system), unless such changes are proximately cased by the gross negligence or malfeasance of the Escrow Agent. If the Source Code is damaged in any way, the Licensor shall immediately upon notice from the Escrow Agent provide the Escrow Agent with an undamaged copy of the Source Code.

(b) The Escrow Agent shall be protected in acting upon any written notice, request, waiver, consent, receipt or other paper or document furnished to it, not only in "assuming its due execution and the validity and effectiveness of its provisions but also as to the truth and acceptability of any information therein contained, which it in good faith believes to be genuine and what it purports to be.

(c) In no event shall the Escrow Agent be liable for any act or failure to act under the provisions of this Escrow Agreement except where its acts are the result of its gross negligence or malfeasance. The Escrow Agent shall have no duties except those which are expressly set forth herein, and it shall not be bound by any notice of a claim, or demand with respect thereto, or any waiver, modification, amendment, termination or recision of this Escrow Agreement, unless in writing received by it, and, if its duties herein are affected, unless it shall have given its prior written consent thereto.

(d) The parties to this Agreement hereby jointly and severally indemnify the Escrow Agent against any loss, liability, or damage (other than any caused by the gross negligence or malfeasance of the Escrow Agent), including reasonable costs of litigation and counsel fees, arising from and in connection with the performance of its duties under this Agreement.

11. Use of Source Code. Licensee's use of the Source Code shall be subject to the terms, conditions and limitations contained in the License Agreement.

IN WITNESS WHEREOF, the parties hereto intending to be legally bond have executed this Escrow Agreement under seal as of the year and date first above written.

ATTEST: LICENSOR

____________________ By: ____________________ (SEAL)

LICENSEE

____________________ By: ____________________ (SEAL)

[ESCROW AGENT]

_______________________ By: ______________________ (SEAL)

SCHEDULE A

Description of Materials Constituting the Source Code and related Documentation:

SOFTWARE LICENSE, MAINTENANCE AND SUBSCRIBER BILLING SERVICES AGREEMENT

THIS SOFTWARE LICENSE, MAINTENANCE AND SUBSCRIBER BILLING SERVICES AGREEMENT is made this ______ day of ________________, 1998 by and between ______________________, a __________ corporation, with its principal place of business at ____________________________________ (hereinafter "Licensor") and ____________________________, a ______________ corporation, (hereinafter referred to as "Customer"), with offices located at ______________________________ __________________.

BACKGROUND

Customer is in the Wireless Telecommunication Services business and Licensor is in the subscriber billing business. Licensor has developed and owns certain proprietary software for use in the Wireless Telecommunications Industry and has experience in providing third party subscriber billing services. Customer desires to obtain a personal, non-exclusive, nontransferable, non-assignable domestic license to use such software and purchase subscriber billing services and Licensor desires to license such software and provide subscriber billing services to Customer on the terms and conditions set forth herein.

IN CONSIDERATION of the foregoing and the mutual covenants set forth herein, and intending to be legally bound, the parties agree as follows:

1. DEFINITIONS

The following words shall have the following meanings when used in this Agreement:

1.1 "Account" shall mean an aggregation of Subscribers.

1.2 "Business Day" shall mean Monday through Friday, excluding weekends and holidays.

1.3 "Bypass" or "Work Around" shall mean a procedure by which a user can avoid a reported problem, defined herein as a problem experienced by the Customer with a Licensor product or service which is subsequently reported to Licensor for analysis and correction, if applicable, by changes to the procedures followed or data supplied by the user when using the Software.

1.4 "Critical Error(s)" shall mean a failure of the Software which Severely Impacts Customer's ability to provide service or invoice its Subscribers for services provided and which cannot be temporarily eliminated through the use of a "Bypass" or "Work Around."

1.5 "Data Receipt Date" shall mean that day, other than Saturday, Sunday, or a Licensor holiday as detailed in Appendix E, on which Licensor anticipates having received all of Customer's Data required by Licensor for the purpose of beginning the production of Customer's Subscriber Billing Services statement data images.

1.6 "Data" shall mean all records, documents and other information, including but not limited to, all Subscriber-related service order records, Subscriber call records and payment records, in any form provided to Licensor by Customer or required for Licensor's performance of the Subscriber Billing Services to be provided under this Agreement.

1.7 "Detailed Bid Proposal" shall mean a detailed written response to Customer's request for a Software Enhancement. The response will be prepared by a qualified Licensor Software analyst and will outline Licensor's understanding of the Software Enhancement request and provide Customer with an itemized breakdown of all work efforts required by Licensor to complete the Software Enhancement. Detailed Bid Proposals will be prepared on a time and materials basis.

1.8 "Enhancement(s)" shall mean any improvement to or change in the Software Licensed by Customer that alters the original functional characteristics provided to Customer. Unless otherwise agreed in writing by Licensor, all title, ownership, and intellectual property rights to the Enhancement(s) shall vest solely and exclusively with Licensor. Customer's sole interest in the Enhancement(s) is a limited license to use the Enhancement(s) subject to the terms and conditions of this Agreement.

1.9 "Error(s)" shall mean a failure of the Software to: (a) comply with the provisions of the Order; (b) function substantially in accordance with Licensor's specifications; (c) be compatible and conform to user documentation and operating manuals furnished by Licensor; and (d) comply with a mutually agreed upon Software Acceptance Plan which shall be developed and agreed to in writing by Customer and Licensor prior to installation of the Software for which the Software Acceptance Plan has been established.

1.10 "Fix(es)" shall mean a correction of an Error(s).

1.11 "License(s)" shall mean any personal, non-exclusive, nontransferable, non-assignable license or licenses granted by Licensor to Customer to use the Software or Software Products in the United States under this Agreement.

1.12 "Object Code" shall mean the binary machine readable version of the Software.

1.13 "Order" shall mean a formal written request by Customer to Licensor indicating Customer's desire to License and/or purchase Software, Software Products and/or Subscriber Billing Services from Licensor. This formal written request shall conform in all material respects to the form detailed as Appendix A, attached hereto, which may be amended from time to time.

1.14 "Planning Estimate" shall mean a high level written response to a Customer's request for a Software Enhancement. The response will contain the estimated time a Software Enhancement requested by the Customer shall take Licensor to complete. The time estimate will be the consensus opinion of Licensor's Software Enhancement Steering Committee and will be derived without any formal detailed analysis of the Software Enhancement request by a qualified Licensor Software analyst. Planning Estimates will be provided to Customer at no additional charge.

1.15 "Severely Impacts" shall mean having a material negative impact on the Customer's ability to provide services to Customer's Subscribers or having a material negative impact on Customer's ability to manage or process information which is critical to the well being of the Customer and/or its operations.

1.16 "Site" shall mean a Customer's computer facility located in one specific geographic location.

1.17 "Software" shall mean the Object Code version of all programs, data, routines, etc., known as _______ as identified in Appendix B, and Enhancements set forth in Appendix C, and future Enhancements.

1.18 "Software Acceptance Plan" shall mean a methodology mutually agreed upon by both Licensor and Customer for determining whether the Software meets the performance and functionality criteria outlined by Licensor, and which clearly identifies:

- Those tests to be run to demonstrate that the Software substantially meets the functional and performance requirements represented by Licensor in this Agreement;
- The parties responsible for running the Software tests;
- The time frame in which the tests are to occur;
- The method by which test results are to be classified and reported and the parties with whom test results are to be shared;
- Procedures and timeframes required for the correction of Errors;
- All criteria required for Software acceptance;
- Any payments and payment terms related to the acceptance of Software.

1.19 "Software Maintenance" shall mean the work done by Licensor to provide Fixes and Enhancements to the Software.

1.20 "Software Products" shall mean all physical components, other than Software, which are offered by Licensor, including but not limited to, documentation, magnetic media, job aids, templates and other similar devices.

1.21 "Source Code" shall mean those statements in a computer language, which when processed by a compiler, assembler or interpreter become executable by a computer.

1.22 "Subscriber" shall mean an end user of Customer's products and services, defined herein as a person or entity to which Customer provides either Interconnect, Dispatch, Voice Mail, or Short Message Services or any other service directly or indirectly associated with the provision of wireless telecommunication services.

1.23 "Subscriber Billing Services" shall mean the calculation and creation of data print images of all Subscriber bills and reports as further detailed in Section 1 of Appendix D.

1.24 "Support Services" shall mean the work done by Licensor in support of its Software and Software Products, including but not limited to, installation services for Software Enhancements, training, consultant support, telephone support including support of Licensor's Subscriber Billing Services provided to Customer under this Agreement, and such other services as may be defined in an accepted Order.

1.25 "TRIS Enhancements" shall mean modifications to the TRIS Software specifically customized by Licensor for Customer.

1.26 "TRIS Software" shall mean Licensor's proprietary "Telecommunication Records and Information System" (TRIS) application software which provides Customer with the ability to add and maintain individual Billable Unit data files and to generate reports based on the data fields resident in those files.

2. ORDERS

Customer's Orders for Software, Software Products, and Subscriber Billing Services shall be subject to the terms of this Agreement and shall be evidenced by the execution and submission to Licensor of an Order substantially in the form of Appendix A, attached hereto, which may be amended from time to time. Orders shall be deemed accepted by Licensor unless written notice to the contrary is received within three (3) weeks from Licensor's receipt of the Order. Licensor will accept Orders only from those representatives of Customer authorized to place Orders with Licensor. Customer has provided Licensor with a written list of all of Customer's representatives empowered to execute Orders, attached as Appendix G, which listing may be revised by Customer from time to time. All Orders shall be deemed to incorporate the terms and conditions of this Agreement and any amendments hereto. This Agreement shall have control over typed, stamped, or preprinted portions of Licensor's and Customer's Orders or acknowledgments or other communications unless mutually agreed upon in writing by a representative of Customer designated in Appendix G and an authorized representative of Licensor. Such mutually agreed upon writings shall have control over this Agreement for that specific Order only.

3. LICENSE

3.1 Licensor grants Customer a limited, personal, non-exclusive, nontransferable, non-assignable Object Code license to use the Software and Software Products in the United States only to the extent Ordered by Customer, and subject to the provisions of this Agreement as well as the payment of all applicable License fees for the term of such License. Licensor agrees to provide Customer with associated Software Products, Software Maintenance and Support Services subject to the provisions of this Agreement.

3.2 All Software and Software Products used in, for, or in connection with the software, parts, subsystems or derivatives thereof (the "System"), in whatever form, including, without limitation, Source Code, Object Code, microcode and mask works, including any computer programs and any documentation relating to or describing such Software or Software Products, such as, but not limited to logic manuals and flow charts provided by Licensor, including instructions for use of the Software or Software Products and formulation of theory upon which the Software or Software Products are based, are furnished to Customer only under a personal, non-exclusive, nontransferable, non-assignable license solely for Customer's own use. All of the Software and all computer program specifications, documentation, procedure manuals, disks and tapes utilized, processed or developed by Licensor in connection with this Agreement or the services rendered to Customer hereunder shall be and remain the exclusive and confidential property of Licensor or third parties from whom Licensor has secured the right to use the same. The Data, records, statements or other documents created by Licensor for Customer under this Agreement are the sole and exclusive property of Licensor and shall remain the sole and exclusive property of Licensor until payment is made in full on the invoice covering the same, at which time title shall transfer to Customer. However, even in the event of non-payment, Customer shall retain title to its Subscriber listings and any Data Customer provides to Licensor and Licensor shall release all such information to Customer upon Customer's request.

3.3 Except as provided in this Agreement, no license under any patents, copyrights, trademarks, trade secrets or any other intellectual property rights, express or implied, are granted by Licensor to Customer under this Agreement.

4. TERM OF LICENSES

The term of each individual License granted under this Agreement begins on the date of installation of the Software and shall terminate on the date set forth on the Software

License and Software Maintenance Order which requested such License, unless earlier terminated as provided in this Agreement.

5. LICENSE FEES

The price schedule for the License fees for Software, Software Products, Software Maintenance and Support Services ordered hereunder, including any applicable discount and payment schedules, is detailed in Appendix D, attached hereto.

6. CUSTOMER PREPARATION

If the Software or Software Products are to be installed by Licensor, the Customer shall have all things in readiness for installation, including, but not limited to, other equipment, connections and facilities for installation at the time the Software or Software Products are delivered. Licensor will provide to Customer in writing at least thirty (30) calendar days in advance of the scheduled date for Software installation a list detailing all other equipment, connections and facilities which Licensor requires for installation. In the event the Customer shall fail to have all things in readiness for installation on the scheduled installation date, the Customer shall reimburse Licensor for any and all expenses caused by Customer's failure to have things in readiness, unless Customer has notified Licensor at least five (5) business days prior to the scheduled installation date. Customer agrees to provide and bear the cost of a dedicated 56 KB communications line between Customer's Site(s) and Licensor's Champaign, Illinois offices, including all equipment costs directly related to or reasonably required by Licensor for the purposes of remote access and support by the Licensor consultant or phone support group. Licensor shall conform in all respects to Customer's written procedures for remote access to Customer's computer hardware, which Customer shall provide to Licensor prior to any attempt by Licensor to remotely access Customer's computer hardware for support purposes. Customer's procedures for remote access by Licensor may be amended from time to time, and Licensor must be provided with written notification of any changes in Customer's remote access procedures at least five (5) business days before any amended procedures are made effective.

7. REPRODUCTION OF MANUALS, DOCUMENTATION AND OBJECT CODE

7.1 Manuals and Documentation. Customer shall have the right, at no additional charge, to reproduce solely for its own use, all manuals and documentation, including user documentation and all training manuals, furnished by Licensor pursuant to this Agreement and any Order, regardless of whether such manual or documentation is copyrighted or otherwise restricted as proprietary information. All copies of manuals or documentation made by Customer shall include any proprietary notice or stamp that has been affixed by Licensor. Licensor shall furnish for each License obtained by Customer, and at no additional charge to Customer, one (1) copy of the relevant Software documentation and any succeeding changes thereto, sufficient to enable Customer to maintain and operate the Software.

7.2 Object Code. Object Code software may be reproduced by Customer, at no additional charge, only for backup or archival purposes or as otherwise stipulated in this Agreement. Licensor agrees that Customer may also transfer Object Code internally to another computer at no additional License fee only for the purpose of testing and/or for training purposes. However, Licensor shall not be obligated to provide Software Maintenance to Customer under this Agreement for Software transferred for testing and/or for training purposes.

8. RIGHT TO MOVE

Any Software may be temporarily transferred to a backup computer while the Licensed computer is inoperative or for emergency testing purposes. The backup computer may be at the same Site, another Site, or an off-site location under emergency conditions with reasonable notice to Licensor of the name and location of the off-site operator. Customer may redesignate the Site or the computer on which the Software will be used for on-going operation. Customer shall be permitted concurrent operation at the new and old Site or computer for not more than thirty (30) calendar days and such operation will require no additional fees. Customer shall provide Licensor written notice of the redesignation within a reasonable length of time of the Software being moved to the new Site or computer. In the event Customer moves the Software to another Site or computer, Licensor agrees that it shall continue the warranty or the Software Maintenance of the product, and assist in its transfer to such other Site or computer.

9. ACCEPTANCE OF SOFTWARE AND SOFTWARE PRODUCTS

9.1 Customer shall conduct Software and Software Products acceptance tests during the installation process at a Customer designated location(s) in accordance with the Software Acceptance Plan. The acceptance period will commence once the Software is operational in the Customer designated location(s). The Software and Software Products shall: (a) comply with the provisions of the Order; (b) function substantially in accordance with Licensor's specifications; (c) be compatible and conform to user documentation and operating manuals furnished by Licensor; and (d) comply with a mutually agreed upon Software Acceptance Plan which shall be developed and agreed to in writing by Customer and Licensor prior to installation of the Software for which the Software Acceptance Plan has been established.

9.2 If, during the acceptance period, Customer determines that the Software and/or Software Products do not: (a) comply with the provisions of the Order; (b) function substantially in accordance with Licensor's specifications; (c) demonstrate compatibility and conformity to user documentation and operating manuals furnished by Licensor; and (d) comply with a mutually agreed upon Software Acceptance Plan which shall be developed and agreed to in writing by Customer and Licensor prior to installation of the Software for which the Software Acceptance Plan has been established, Customer shall so notify Licensor in writing, specifying the area of noncompliance. In the event that Customer's notification to Licensor identifies any Critical Errors or any Errors which Severely Impact Customer but for which a Bypass or

Work Around exists, Licensor shall use its best efforts to correct all such conditions within ten (10) Business Days from the date of receipt of Customer's notification. Licensor shall use its good faith efforts to correct all other conditions reported by Customer which prevent the Software and/or Software Products from meeting the above requirements within forty-five (45) calendar days following receipt of notice from Customer. If all Customer reported conditions which prevent the Software and/or Software Products from substantially complying with the specific acceptance criteria detailed in the Software Acceptance Plan are not satisfied within this forty-five (45) day period, the Customer will notify Licensor, in writing, within five (5) business days following the end of the forty-five (45) day period, indicating either Customer's acceptance of the Software and/or Software Products, Customer's desire to extend the Software acceptance period, or Customer's intent to terminate this Agreement or any License without penalty or further financial obligation. Failure to notify Licensor in writing within five (5) business days following the end of the forty-five (45) day period or use of the Licensed Software to provide or facilitate commercial services to Customer's Subscribers or to provide ongoing administrative support to Customer's commercial operations will constitute acceptance of the Software.

9.3 As soon as it is feasible after the execution of this Agreement, Licensor and Customer shall conduct tests of the Subscriber Billing Services to be performed under this Agreement as detailed in Appendix D. Licensor shall produce a reasonable number of test billing statements at no charge to Customer so that Customer may verify the accuracy and adequacy of the Subscriber Billing Services.

10. SOFTWARE MAINTENANCE IMPLEMENTATION

Licensor shall be responsible for performing and Customer desires Licensor to perform Software Maintenance beginning with the expiration of the warranty period and ending with the termination of this Agreement. Such Software Maintenance shall include providing Customer with Fixes, regardless of how the need for such Fixes is brought to the attention of Licensor.

11. FIXES AND ENHANCEMENTS

11.1 Customer will notify Licensor verbally of Errors, with written notification to Licensor by Customer within three (3) Business Days, of Customer's discovery of the Error(s). Licensor shall provide Customer with a telephone number which is answered from 7:00 A.M. to 8:00 P.M. Champaign, Illinois Time, Monday through Friday, except for Licensor holidays set forth on Appendix E, attached hereto. Customer shall have access via this telephone number to individuals who shall accept Error reports and are qualified to assist Customer with the verification of suspected Errors and who may provide Fixes for said Errors. Customer shall be provided with a telephone number which is answered for all hours outside of Monday through Friday, 7:00 A.M. to 8:00 P.M. Champaign, Illinois Time by individuals who shall accept Error reports.

11.2 Licensor shall use its best efforts to immediately correct any Critical Errors affecting Customer's continued business use of the Software after Licensor's notification of the Error. Licensor shall provide an estimate to Customer of the time required by Licensor to correct the Critical Error within twenty-four (24) hours after Licensor's notification by Customer. Licensor will use its good faith efforts to correct all other Errors within forty-five (45) calendar days after Licensor's receipt of notification of the Error(s).

11.3 Licensor agrees to incorporate any Customer specific or other third party Software in any new versions of Licensor's Software, at Licensor's charges to Customer detailed in SUPPORT AND CONSULTING SERVICES of Appendix D.

11.4 Licensor and Customer warrant that each will establish regular and reasonable internal measures to verify the accuracy of all services performed by Licensor on behalf of Customer. Each party shall notify the other party of all errors, omissions or inaccuracies in its Data or in any Data, record, statement or other document processed or delivered by Licensor within forty-five (45) calendar days after such work is delivered to or picked up by Customer, or is delivered according to Customer's instructions. Customer agrees that in the event of any Errors, omissions or inaccuracies in Subscriber Billing Services processing, Licensor shall be given a reasonable period, not to exceed thirty (30) calendar days, in which to run a rebilling to correct such Error. In the event Licensor is unable to rebill the Subscriber, Licensor shall reimburse Customer for all charges billed to Customer by Licensor, detailed in Section 1 of Appendix D. All charges and expenses so reimbursed or paid to Customer shall be subject to the limitations set forth in Section 23. Licensor agrees to take all reasonable steps to rebill in the event of any errors in Subscriber Billing Services processing. Customer agrees to reimburse Licensor for any additional expense incurred if the rebilling is required through no fault of Licensor. The parties agree that the forty-five (45) calendar day limitation period in this Section shall apply only to the matters arising under this Section, while all other matters under this Agreement shall be governed by the limitation periods set out in Sections 21 and 23.

11.5 Licensor and Customer acknowledge the periodic need to change and/or provide Enhancements to Licensor's Software to meet the changing needs of Customer. Licensor and Customer hereby agree to the following procedures with regard to changes and Enhancements requested by Customer to Licensor's Software:

a. Changes not Requiring Additional Programming. Many of the Customer-specific parameters used by Licensor in processing Subscriber bills for Customer under this Agreement may be changed by Licensor without additional programming through a procedure referred to as "table maintenance." Customer agrees to notify Licensor in writing a minimum of seven (7) calendar days prior to Customer's desired date of implementation for the change for all such parameter changes to Licensor's Software requiring only table maintenance. In the event Licensor is given at least this minimum time period to implement the desired table maintenance, Licensor will provide these services at no additional charge. In the event that Customer requests that the change be implemented in less than the required seven (7) calendar day implementation period, Licensor will be reimbursed by Customer at Licensor's rates for such services as set forth in Appendix D.

b. Changes and Enhancements Requiring Additional Programming. Changes other than table maintenance and all Enhancements to Licensor's Software cannot be implemented without additional programming on the part of Licensor. Customer's requests for such changes or Enhancements to Licensor's Software must be in writing. As a part of Customer's written request to Licensor, Customer will indicate whether a Planning Estimate is desired or whether a Detailed Bid Proposal is required. Licensor shall then have one (1) Business Day to respond to Customer via facsimile acknowledging the receipt of the request. In the event that Customer seeks only a Planning Estimate, Licensor shall then have seven (7) calendar days from the date of acknowledgment of the Customer's written request to return the Planning Estimate to the Customer via facsimile. In the event a Detailed Bid Proposal is required, Licensor shall have twenty-one (21) calendar days to respond to Customer's request in writing detailing the following:

(i) The feasibility of the request, i.e., whether the requested change or Enhancement can be incorporated into Licensor's Software;

(ii) The approximate implementation date of such change or Enhancement;

(iii) The charge for implementation of the change or Enhancement. Licensor shall have sole discretion as to whether a requested change or Enhancement is implemented on a chargeable basis or is implemented at no additional charge to Customer.

If the nature of the Software Enhancement requested by the Customer is such that Licensor is not able to provide a Detailed Bid Proposal to Customer within twenty-one (21) calendar days, Licensor shall be required to notify Customer within fourteen (14) calendar days of receipt of the Software Enhancement request. As part of this notification, Licensor shall also be required to provide Customer with a date by which Licensor will be able to provide Customer with a Detailed Bid Proposal.

In the event the change or Enhancement will be provided at no additional charge to Customer, Licensor also will inform Customer whether the change or Enhancement would be given a high, medium or low priority designation by Licensor and the estimated implementation date of the change or Enhancement. If the change or Enhancement will be implemented by Licensor at no additional charge but Customer would like it handled on a higher priority basis, Licensor will provide Customer with a quote on the cost to accomplish the change within Customer's desired time frame.

In the event the request will be charged at Licensor's rates detailed in SUPPORT AND CONSULTING SERVICES of Appendix D, Licensor shall also provide Customer with a written estimate of the total charges required to implement the requested change or Enhancement. Customer shall then have fourteen (14) calendar days from the receipt of Licensor's written Detailed Bid Proposal in which to direct Licensor to proceed, and if Customer does not notify Licensor within the fourteen

(14) calendar day period, the estimate shall no longer be effective and Licensor may requote and/or revise the estimated completion date. All written estimates by Licensor to Customer shall be deemed rejected if not accepted in writing within the fourteen (14) calendar day time frame.

11.6 Licensor and Customer agree that the initial Software Enhancements to be provided by Licensor to Customer under this Agreement shall be provided to Customer by Licensor in accordance with the terms and conditions detailed in Appendix C, attached hereto. All future Enhancements to be provided by Licensor to Customer under the terms of this Agreement shall be evidenced by an appendix to be attached to this Agreement outlining the major terms and conditions pertaining to the future Enhancements. This appendix will conform in all material respects to Appendix C.

11.7 Should Customer desire Enhancements which require an estimated time commitment by Licensor in excess of three hundred twenty (320) hours, Licensor and Customer agree to negotiate in good faith, under the premise that Licensor will retain the ownership rights to the Enhancements, to determine both the charges to Customer from Licensor and the estimated completion date for the desired Enhancement.

12. TRAINING

Software orientation and training, including without limitation, explicit installation, operating and support instructions, will be provided by a Licensor representative at Licensor's offices at ____________________________, and at a time mutually convenient to both Customer and Licensor. Customer shall pay for orientation and training in accordance with Appendix D. Licensor will also conduct training at Customer's Site(s) in accordance with the procedures and charges which are further detailed in Appendix D and at a time mutually convenient to both Customer and Licensor.

13. SUBSCRIBER BILLING SERVICES

13.1 The parties agree that the geographic areas to be covered by this Agreement are Customer's calling regions established for the following geographic areas: ____
______. The parties agree that Customer shall be required to have Licensor process all monthly Subscriber Billing Services statements for all of Customer's Subscribers within the geographic areas detailed above. The parties further agree that Customer shall not be required to have any other geographic areas served by Customer processed by Licensor pursuant to this Agreement beyond the geographic area(s) set forth above. The parties agree that new geographic areas may be added to the coverage for services to be provided under this Agreement, pursuant to an Order or a separate written agreement between the parties setting forth the geographic area or areas to be added and detailing any additional matters with regard to the conversion for each such area and how the provision of services for such area will otherwise be accomplished and compensated under this Agreement.

13.2 Customer shall be responsible for entering Customer's Data into Licensor's Software. Customer shall be responsible for delivering to Licensor all Data reasonably required by Licensor to render Subscriber bills on behalf of Customer in a timely fashion to conform to the processing times required by Licensor for each of Customer's billing cycles detailed below. Licensor and Customer agree that Customer will provide all Data required by Licensor for Subscriber Billing Services purposes within twenty four (24) hours, plus or minus, of 12:00 noon CST of the following Data Receipt Dates for each billing cycle:

Geographic Area/Billing Cycle	Licensor Data Receipt Date

In the event that any of these Licensor Data Receipt Dates falls on a Saturday, Sunday or a Licensor holiday as set out in Appendix E, then the Licensor Data Receipt Date for that billing cycle shall be the next Licensor Business Day.

Provided Licensor has received all Data required by Licensor for Subscriber billing purposes within twenty four (24) hours, plus or minus, of 12:00 noon CST of the Licensor Data Receipt Date as determined above, Licensor agrees it will deliver Customer's Subscriber Billing Services statements to the U.S. Postal Service within:

a. Five (5) Business Days or less, excluding all holidays as set out in Appendix E, from the time Licensor receives all of Customer's Data required by Licensor to render Customer's Subscriber Billing Services statements.

b. For the initial billing for each billing cycle within a geographic area, ten (10) Business Days or less, excluding all holidays as set out in Appendix E, from the time Licensor receives all of Customer's Data required by Licensor to render Customer's Subscriber Billing Services statements.

In the event that Licensor has not received the Data within the timeframes detailed above from Customer, Licensor agrees to use reasonable efforts to deliver Customer's Subscriber Billing Services statements to the U.S. Postal Service within the timeframes detailed above in paragraphs a. and b.

Licensor shall have no liability or responsibility for loss or damage due to late entry or late delivery of Data to Licensor or due to any inaccuracy or incompleteness of the Data furnished by Customer. All costs for employee and equipment time expended by Licensor in locating and correcting errors, omissions or inconsistencies in the Data submitted by Customer or Customer's agent shall be additional charges to Customer to be billed at Licensor's fee schedules detailed in Appendix D.

13.3 Customer agrees to prepay Licensor ________________________ as a good faith estimate of the postage cost to be incurred by Licensor in fulfillment of Licensor's obligation to mail Subscriber Billing Services statements for the billing cycles detailed in Section 13.2. It is the intent of the Parties that the postage prepayment by Customer to Licensor will occur monthly, and that the monthly postage prepayment will attempt to closely approximate the monthly postage expenses incurred by Licensor on behalf of Customer relating to the fulfillment of Licensor's obligation to mail Customer's Subscriber Billing Services statements. Licensor and Customer agree to review the amount of prepaid postage costs semi-annually and to adjust the prepaid postage amount as required to reflect the actual postage due from Customer each month.

13.4 If applicable, Licensor shall convert Customer's Data as established and formatted as of ______________________________ under Licensor's TRIS Software and TRIS Enhancements to the TRIS+® Software within the conversion time frame mutually agreed upon by Licensor and Customer, attached hereto and incorporated herein as Appendix H ("Conversion Schedule"). Should Customer require Licensor to convert Customer's Data as established and formatted under Licensor's TRIS Software and TRIS Enhancements to the TRIS+® Software after ________________________, Licensor agrees to provide this service pursuant to the charges detailed in Appendix D. Such conversion service shall include conversion by Licensor of all TRIS Enhancements to TRIS+® Software so that the TRIS+® Software shall have the equivalent functionality of all TRIS Enhancements. Such service shall be provided pursuant to the terms of this Agreement and Appendix D. The Parties shall perform in good faith their respective responsibilities as set forth herein.

13.5 Customer acknowledges and agrees that all third party costs associated with the purchase, license, or ongoing maintenance of software run-time licenses required in connection with the operation of the TRIS+® Software shall be borne solely by Customer. If requested by Customer, Licensor shall provide written estimates of all such charges at least thirty (30) days prior to the installation of the TRIS+® Software.

14. RISK OF LOSS

Risk of loss or damage to Software and/or Software Products licensed by Customer under this Agreement shall vest in Customer when the Software and/or Software Products have been accepted by Customer, or its representative, pursuant to Section 9, provided that such loss or damage is not caused by Licensor, employees or its agents.

15. TRANSPORTATION OF DATA

Customer shall, at its cost and expense, transport and deliver to and/or pick up from Licensor all Data unless Licensor otherwise agrees in writing. Customer agrees that in either event it shall bear all risk of loss or damage to such Data that may occur during transportation thereof, unless such damage shall be the result of Licensor's grossly negligent acts or omissions or willful misconduct.

16. SUPPLIES

If Licensor, with Customer's written approval, has purchased any specialized or preprinted forms or documents, which are not considered "Confidential Information" as defined herein, to be used in providing services solely to Customer hereunder, and if any of these forms or documents shall remain unused at the end of the term or at the termination of this Agreement, Customer shall, within sixty (60) calendar days of such termination or the end of the term, reimburse Licensor on a pro rata basis for Licensor's cost of all such unused forms or documents, including all shipping and handling costs. Within thirty (30) calendar days of such reimbursement, Customer shall either direct that said forms or documents be sent to Customer at Customer's expense, or shall abandon same and thereafter Licensor shall destroy such forms or documents.

17. AUDITING

The Subscriber Billing Services provided by Licensor hereunder are subject to audit at the discretion of the Customer or Customer's authorized agent. Licensor agrees that any and all information of Customer maintained by Licensor shall be available for inspection by Customer or its internal auditors, independent public accountants or other authorized agents during Licensor's regular business hours upon reasonable prior written notice to Licensor. Customer agrees to reimburse Licensor for its out-of-pocket expenses and employee time involved with such audits at Licensor's charges detailed in Appendix D. Licensor agrees to provide a prior estimate of these charges upon request.

18. TERM OF AGREEMENT

If Licensor converts Customer's Data from another third party supplier of subscriber billing services, this Agreement shall become effective on the execution hereof and shall continue in effect for a period of five (5) years after the conversion and billing cycle cutoff and actual Subscriber Billing Services statement shipment by Licensor for the last of Customer's billing cycles to be converted to Licensor's Subscriber Billing Services processing system under this Agreement. If conversion is not required, this Agreement shall become effective upon the execution hereof and shall continue in effect for a period of five (5) years after actual Subscriber bill shipment to the last of Customer's billing cycles detailed in Section 13.2 of this Agreement. At the end of the five (5) year term or any subsequent renewal term, this Agreement shall, subject to the right of either party to terminate the Agreement as provided herein, be automatically renewed for subsequent three (3) year periods at Licensor's then-current rates. Either party shall have the right, at least one hundred twenty (120) days prior to the expiration of the initial or any renewal term of this Agreement, to notify the other party in writing that it elects to terminate this Agreement effective on the expiration of the current term, whether that is the initial or any renewal term. Such termination by Customer shall not in any way relieve Customer of the obligation to pay for all services previously performed or then in process by Licensor.

19. TERMS OF PAYMENT

In consideration for the Software, Software Products, Software Maintenance, and Subscriber Billing Services provided by Licensor to Customer, Customer agrees to pay for all such Software, Software Products, Software Maintenance, and Subscriber Billing Services at the rates set forth in Appendix D. Licensor shall provide, in accordance with its invoicing schedule, however in no event less frequently than monthly, a complete list of the Software, Software Products, Software Maintenance, and Subscriber Billing Services provided by Licensor, and Customer agrees to make payment in full for the amount of such invoice within thirty-five (35) calendar days from the date of the invoice. Licensor has agreed to provide services on a credit basis only so long as Customer's bills are promptly paid in full when due. In the event any amount due Licensor based on its invoices shall remain unpaid more than thirty-five (35) calendar days past the date of such invoice, Customer hereby agrees to pay Licensor simple interest on such unpaid balance at the rate of one and one-half percent (1-1/2%) per month until paid in full. In no event shall any interest charged exceed the maximum allowed by law.

In the event Customer claims any amount is due from Licensor, as a credit or otherwise, and whether or not related to the services performed by Licensor hereunder, Customer shall in all events pay all invoices under this Agreement properly when due and may not set off against such invoices any amounts claimed due.

20. PRICE

All charges set out in Appendix D shall be subject to adjustment on an annual basis effective January 1st of each year based upon the Consumer Price Index All-Urban Consumers, U.S. City Average for All-Items with a 1982-1984 standard reference base published by the Bureau of Labor Statistics as revised from time to time, or any direct replacement of such index (the "CPI"). The adjustment shall be made by comparing the CPI for the month of October of the year prior to the year in which the adjustment is to be made with the CPI for the month of October two (2) years prior to the year in which the adjustment is to be made, and the percentage of adjustment as so determined, if any, shall be the percentage adjustment to be applied to all charges set out in Appendix D. The first adjustment in the CPI as noted above shall become effective January 1, __________.

21. TERMINATION OF AGREEMENT AND/OR LICENSE

21.1.1 Licensor shall have the right to terminate this Agreement and, at its option, take possession of the Software and Software Products, if: (a) Customer makes an assignment for the benefit of creditors, or a receiver, trustee in bankruptcy or similar officer is appointed to take charge of all or any part of Customer's property or business; (b) Customer is adjudicated bankrupt; or (c) Customer fails to perform or observe any of its obligations hereunder and such condition is not remedied within thirty (30) calendar days after written notice to Customer.

21.1.2 If Licensor elects not to terminate the Agreement after a default by Customer, it may by written notice to Customer thereafter require that Customer pay cash, cashier's check or certified funds for the performance of services by Licensor.

21.1.3 Customer shall have the right to terminate this Agreement if: (a) Licensor makes an assignment for the benefit of creditors, or a receiver, trustee in bankruptcy or similar officer is appointed to take charge of all or any part of Licensor's property or business; (b) Licensor is adjudicated bankrupt; (c) Licensor fails to perform or observe any of its obligations hereunder and such condition is not remedied within thirty (30) calendar days, except as otherwise provided herein, after written notice is received by Licensor; or (d) Licensor shall cease to conduct business as a going concern.

21.2 In the event either party shall be in breach or default of any of the terms, conditions, or covenants of this Agreement or any Orders, and such breach or default shall continue for a period of thirty (30) calendar days after the giving of written notice to the party in default, then in addition to all other rights and remedies of law or equity or otherwise, the injured party shall have the right to cancel this Agreement or any such Orders placed by Customer effective within five (5) business days of such notification without any charge, obligation, or liability whatsoever, except as to the payment for Software, Software Products, Software Maintenance, and/or Subscriber Billing Services already received and accepted by Customer. NEITHER CUSTOMER NOR LICENSOR SHALL BE LIABLE FOR ANY SPECIAL, INDIRECT, CONSEQUENTIAL OR SIMILAR DAMAGES ARISING FROM A BREACH OF THIS AGREEMENT OR OF ANY ORDER HEREUNDER.

21.3 Upon the effective date of termination, cancellation or expiration of this Agreement, each party shall, without request by the other party, immediately return all papers, materials and property of the other party including any Subscriber Billing Services statements completed or in progress by Licensor and paid for by Customer, and without regard for whether or not such property is "Confidential Information" as defined herein. In lieu of the returning party physically returning the property to the receiving party and at the receiving party's option, the receiving party may instruct that any of its property which is "Confidential Information" be immediately shredded by the returning party. In addition, each party will assist the other in the orderly termination of this Agreement and in the transfer of all property, tangible and intangible, as may be necessary for the orderly, non-disrupted business continuation of each party.

21.4 Within ten (10) calendar days after the effective date of termination, cancellation or expiration of this Agreement, Customer shall, upon Licensor's request, certify in writing that to the best of its knowledge all copies of the Software, in whole or in part, have been removed from its production libraries. Concurrent with this certification, Customer will return to Licensor all of Licensor's "Confidential Information" relating to the Software License(s), including Software Products, required by Licensor to be returned and Customer will certify to Licensor that such Software has been destroyed or deleted and that all "Confidential Information" of Licensor relating to the Software License(s), including Software Products, have been returned to Licensor.

21.5 In the event Licensor elects to terminate this Agreement as a result of a default by Customer, Licensor shall be entitled to recover immediately from Customer all sums due for services provided prior to such termination, together with liquidated damages in a sum equal to the lesser of: (1) the product of the average monthly charges to Customer for all services performed under this Agreement, including all Appendices attached hereto, times the number of months remaining in the initial or any renewal term of this Agreement; or (2) the product of the average monthly charge billed to Customer for all services performed under this Agreement, including all Appendices attached hereto, times twelve (12). If Licensor elects not to terminate the Agreement after a default by Customer, it may by written notice to Customer thereafter require that Customer pay cash, cashier's check or certified funds for the performance of services by Licensor.

21.6 Upon termination of this Agreement as a result of a default by Licensor, Licensor agrees to convert Customer's Data into a machine readable, non-proprietary format within a reasonable time period at no cost to Customer upon Customer's request. Upon the expiration of the term of this Agreement or upon termination of this Agreement as a result of a default by Customer, Licensor shall convert Customer's Data as described above, and Customer shall reimburse Licensor in accordance with Appendix D for all time and expense involved.

22. INDEMNITY

Licensor agrees to indemnify and save harmless Customer, and Customer agrees to indemnify and save harmless Licensor respectively, from any liabilities, lawsuits, penalties, claims or demands finally awarded or settled (including the costs, expenses and reasonable attorney's fees on account thereof) that may be made: (a) by any third party for injuries, including death to persons, resulting from the indemnifying party's negligent or willful acts or omissions or those of persons employed by the indemnifying party, its agents or subcontractors ; or (b) by any employee or former employee of the indemnifying party or any of its subcontractors for which the indemnifying party or subcontractor's liability to such employee or former employee would otherwise be subject to payments under state worker's compensation or similar laws. Licensor agrees to defend Customer, at Customer's request, and Customer agrees to defend Licensor, at Licensor's request, against any such liability, claim, or demand. Customer and Licensor respectively agree to notify the other party promptly of any written claims or demands against the indemnified party for which the indemnifying party is responsible hereunder. The foregoing indemnity shall be in addition to any other indemnity obligations of Licensor or Customer set forth in this Agreement.

23. LIMITATION OF LIABILITY

23.1 LICENSOR SHALL NOT BE LIABLE FOR ANY: (A) SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF PROFITS, ARISING FROM OR RELATED TO THE OPERATION OR USE OF THE SOFTWARE, SOFTWARE PRODUCTS, AND SUBSCRIBER BILLING SERVICES INCLUDING SUCH DAMAGES, WITHOUT

LIMITATION, AS DAMAGES ARISING FROM LOSS OF DATA OR PROGRAMMING, LOSS OF REVENUE OR PROFITS, FAILURE TO REALIZE SAVINGS OR OTHER BENEFITS, DAMAGE TO EQUIPMENT, AND CLAIMS AGAINST CUSTOMER BY ANY THIRD PERSON, EVEN IF LICENSOR HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES; (B) DAMAGES (REGARDLESS OF THEIR NATURE) FOR ANY DELAY OR FAILURE BY LICENSOR TO PERFORM ITS OBLIGATIONS UNDER THIS AGREEMENT DUE TO ANY CAUSE BEYOND ITS REASONABLE CONTROL; OR (C) CLAIMS MADE A SUBJECT OF A LEGAL PROCEEDING AGAINST LICENSOR MORE THAN TWENTY-FOUR (24) MONTHS AFTER ANY SUCH CAUSE OF ACTION FIRST AROSE.

NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, LICENSOR'S LIABILITIES UNDER THIS AGREEMENT SHALL NOT, EXCEPT FOR THE SOFTWARE AND SOFTWARE ENHANCEMENTS, EXCEED THE LESSER OF: (A) THE AVERAGE MONTHLY CHARGE, OR EQUIVALENT THEREOF, TO CUSTOMER FOR THE SERVICES PERFORMED UNDER THIS AGREEMENT FOR THE ACTUAL NUMBER OF MONTHS DURING WHICH THE PROBLEM EXISTED, OR (B) THE ACTUAL AMOUNT OF MONEY DAMAGES INCURRED BY CUSTOMER. IN THE CASE OF THE SOFTWARE AND SOFTWARE ENHANCEMENTS, LICENSOR'S LIABILITY UNDER THIS AGREEMENT SHALL NOT EXCEED THE AMOUNT RECEIVED BY LICENSOR FROM CUSTOMER FOR THE SOFTWARE OR SOFTWARE ENHANCEMENTS.

CUSTOMER AGREES IT SHALL TAKE ALL REASONABLE STEPS TO COLLECT ALL AMOUNTS DUE AFTER ANY REBILLING, SUPPLEMENTAL BILLING OR ANY OTHER ACTION BY LICENSOR TO RESOLVE ANY ERROR, OMISSION, INTERRUPTION, DELAY OR OTHER PROBLEM. IN THE EVENT SUCH AMOUNTS CANNOT BE RECOVERED AFTER TAKING SUCH REASONABLE EFFORTS, LICENSOR, SUBJECT TO THE LIMITATIONS CONTAINED HEREIN, SHALL MAKE PAYMENT TO THE CUSTOMER IN THE AMOUNT CLAIMED, AND CUSTOMER SHALL PROVIDE LICENSOR WITH ALL DOCUMENTATION REASONABLY REQUIRED BY LICENSOR TO ESTABLISH THE AMOUNT OF LOSS CLAIMED, INCLUDING RECORDS OF ALL PAYMENTS RECEIVED BY CUSTOMER AFTER THE REMEDIAL ACTION TAKEN BY LICENSOR AND SHALL ASSIGN ALL SUCH CLAIMS TO LICENSOR. IN THE EVENT OF ANY PAYMENT OF MONEY DAMAGES BY LICENSOR HEREUNDER TO CUSTOMER, CUSTOMER AGREES TO EXECUTE AND DELIVER TO LICENSOR ANY AND ALL DOCUMENTS AS MAY BE REQUIRED TO SUBROGATE LICENSOR TO ALL OF THE RIGHTS OF CUSTOMER TO COLLECT ANY AND ALL AMOUNTS DUE WHICH CONSTITUTE THE LOSS FOR WHICH DAMAGES ARE PAID.

23.2 Customer shall not be liable for any: (a) special, indirect, incidental, or consequential damages, including loss of profits, arising from or related to operation or use of the Software, Software Products, Software Maintenance, or Subscriber Billing Services, including such damage, without limitation, as damages arising from loss of data or programming, loss of revenue or profits, failure to realize savings or other benefits, damage to equipment, and claims against Licensor by any third person, even if

Customer has been advised of the possibility of such damages; (b) damages (regardless of their nature) for any delay or failure by Customer to perform its obligations under the Agreement due to any cause beyond its reasonable control; or (c) claims made a subject of a legal proceeding against Customer more than twenty-four (24) months after such cause of action first arose.

24. PATENT AND OTHER PROPRIETARY RIGHTS INDEMNIFICATION

24.1 Licensor warrants to Customer that the Software and Software Products do not infringe on any United States patent, copyright, trade secret or other proprietary interest of any third party.

24.2 The following terms apply to any infringement or claim of infringement of any patent, trademark, copyright, trade secret or other proprietary interest based on the licensing, use, or sale of any Software, Software Products, Software Maintenance and/or Subscriber Billing Services furnished to Customer under this Agreement or in contemplation hereof. Licensor shall indemnify Customer, its officers, directors, employees and agents for any loss, damage, expense or liability finally awarded, including costs and reasonable attorney's fees in defending or appealing such claims, that may result by reason of any such infringement or claim, except where such infringement or claim arises solely from Licensor's adherence to Customer's written instructions or directions which involve the use of merchandise or items other than: (a) commercial merchandise which is available on the open market or is the same as such merchandise; or (b) items of Licensor's origin, design or selection, and Customer shall so indemnify Licensor in such excepted cases. Customer shall notify Licensor promptly of any claim of infringement for which Licensor is responsible, and shall cooperate with Licensor in every reasonable way to facilitate the defense of any such claim.

24.3 In addition, in the event an injunction or order shall be obtained against Customer's use of any item by reason of any such infringement allegation or if, in Licensor's sole opinion, the item is likely to become the subject of a claim of infringement or violation of patent, copyright, trademark, trade secret, or other proprietary right of a third party, Licensor will, without in any way limiting the foregoing, in Licensor's sole discretion and at Licensor's expense either: (a) procure for Customer the right to continue using the item; (b) replace or modify the item so that it becomes non-infringing, but only if the modification or replacement does not, in Licensor's reasonable opinion, adversely affect the functional performance or specifications for the item or its use by Customer; or (c) if neither (a) nor (b) above is financially reasonable, remove the item from Customer's Site and refund to Customer any charges paid by Customer for periods subsequent to removal, and release Customer from any further liability under the applicable Order.

24.4 In no event shall Customer be liable to Licensor for any charges after the date that Customer no longer uses the item because of actual or claimed infringement.

25. WARRANTY

25.1 Except as provided below, Licensor warrants that it owns all rights, title and interest in and to the Software and Software Products, except for any third party database software, that it has the right to grant the licenses granted hereunder, that all Software and Software Products shall: (a) substantially comply with the provisions of the Order; (b) function substantially in accordance with Licensor's specifications; (c) be compatible and substantially conform to user documentation and operating manuals furnished by Licensor; and (d) comply with a mutually agreed upon Software Acceptance Plan which shall be developed and agreed to in writing by Customer and Licensor prior to installation of the Software for which the Software Acceptance Plan has been established. This warranty coverage shall include all Software Maintenance performed and any Enhancements or Fixes to the Software by Licensor. Such warranty shall extend for ninety (90) calendar days from the date of acceptance except for the warranty of title which shall extend for the duration of this Agreement. Licensor does not warrant that Customer's use of the Software will be uninterrupted or error free.

25.2 Licensor's responsibility under this warranty shall be to correct or replace, at no additional charge to Customer, any part of the Software or Software Products found to be defective. Licensor further warrants that any services provided by Licensor under this Agreement shall be performed in a fully workmanlike manner and in accordance with the prevailing professional standards of the software industry. This warranty shall survive inspection, test, acceptance, use and payment.

25.3 LICENSOR FURNISHES THE ABOVE WARRANTIES IN LIEU OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

25.4 EXCEPT AS PROVIDED IN SECTIONS 24.1 AND 25 OF THIS AGREEMENT, LICENSOR MAKES NO EXPRESS OR IMPLIED REPRESENTATIONS OR WARRANTIES WITH RESPECT TO THE SOFTWARE, SOFTWARE PRODUCTS, OR SUBSCRIBER BILLING SERVICES OR THEIR CONDITION, MERCHANTABILITY, FITNESS FOR ANY PARTICULAR PURPOSE OR USE BY CUSTOMER.

25.5 Any and all warranties shall be void as to Software or Software Products damaged or rendered unserviceable by: (a) the acts or omissions of non-Licensor personnel except when Licensor instructs or requires Customer to perform any modifications with respect to the Software; (b) misuse by Customer, its employees or agents, theft, vandalism, fire, water, or other peril; (c) moving, relocation, alterations or additions not performed in accordance with this Agreement.

26. TAXES

There shall be added to the charges provided for in this Agreement amounts equal to any taxes, whether federal, state, or local, however designated, which may be validly levied or based upon this Agreement or upon the Software, Software Products, Software Maintenance, and Subscriber Billing Services furnished hereunder, excluding, however, ad valorem personal property taxes, if any, state and local privilege, excise, or use taxes based on gross revenue, taxes based on or measured by Licensor's net income, and any taxes or amounts in lieu thereof paid or payable by Licensor in respect of the foregoing excluded items. Taxes payable by Customer shall be billed as separate items on Licensor's invoices and shall not be included in Licensor's prices. Licensor agrees to notify Customer in advance of any taxes incurred by Licensor for which Customer will be invoiced under this Section, and Customer shall have the right to have Licensor contest with the imposing jurisdiction, at Customer's expense, any such taxes that Customer deems are improperly levied.

27. CONFIDENTIAL INFORMATION

Each party acknowledges and agrees that any and all information emanating from the other's business in any form, including the terms of this Agreement, is "Confidential Information," and each party agrees that it will not, during or after the term of this Agreement, permit the duplication, use, or disclosure of any such Confidential Information to any person (other than an employee, agent or representative of the other party who must have such information for the performance of its obligation hereunder), unless such duplication, use or disclosure is specifically authorized by the other party in writing. Each party shall: (a) not disclose any Confidential Information to any third person without the express written consent of the disclosing party; (b) not use, directly, indirectly or in concert with any other person, any Confidential Information for any purpose other than the performance of their obligations under this Agreement; (c) use reasonable diligence, and in no event less than that degree of care which such party uses in respect to its own confidential information of like nature, to prevent the unauthorized disclosure or reproduction of such information. Without limiting the generality of the foregoing, to the extent that this Agreement permits the copying of Confidential Information, all such copies shall bear the same confidentiality notices, legends, and intellectual property rights designations that appear in the original versions.

For the purposes of this Section, the term "Confidential Information" shall not include: information which is in the public domain; information known to the recipient party as of the date of this Agreement as indicated by the recipient's written records, unless the recipient party agreed to keep such information in confidence at the time of its receipt; and information properly obtained hereafter from a source who is not under an obligation of confidentiality with respect to such information; is independently developed by the receiving party through persons who have not had, either directly or indirectly, access or knowledge of such Confidential Information which can be verified by independent evidence; or is obligated to be produced under a court order of competent jurisdiction or a valid administrative or congressional subpoena.

Apart from Licensor's obligations to Customer under this Section 27 concerning confidentiality, Licensor shall have no obligation to delete or destroy Customer's information, including Customer's Subscriber listings, from its computer systems or backup and archival libraries until such time as Licensor's regular procedures for elimination of such data would normally delete or destroy such information. Licensor's procedure for the elimination of data from its backup and archival libraries is detailed in

Appendix F. Customer shall have the right to require the elimination of its Data maintained within Licensor's backup and archival libraries prior to the time the Data would normally be deleted or destroyed by Licensor, and Customer shall pay for all expenses associated with the early deletion or destruction of all such Data in accordance with Appendix D.

Any logo, program names, trademarks, service marks, programs, manuals, documentation, and other support materials which are covered under this Agreement or otherwise provided by one party to the other are either copyrighted, trademarked, or are held as proprietary by the providing party. The receiving party agrees not to remove any such notices and product identification and additionally agrees to take all action necessary to protect the providing party's rights thereto.

28. SECURITY, ACCESS AND SAFETY REQUIREMENTS

Customer shall provide to Licensor in writing Customer's security, access, and safety requirements for the protection of the Software and Customer's software, data, facilities, and employees and Licensor agrees to instruct its employees, agents and subcontractors concerning all such requirements.

29. NOTICES

With the exception of invoices, insurance papers, shipping papers, reports, and correspondence in the normal course of business, all notices, demands, or other communications herein provided to be given or which may be given by any party to the other shall be deemed to have been duly given when made in writing and delivered in person, or upon receipt, if deposited in the United States mail, postage prepaid, certified mail, return receipt requested or via overnight courier, as follows:

Notices to Licensor: Notices to Customer:

With a required copy to:

or to such address as the parties may provide to each other in writing from time to time.

30. ASSIGNMENT

Neither party may assign or transfer its interests, rights or obligations under this Agreement by written agreement, merger, consolidation, operation of law or otherwise, without the prior written consent of an authorized executive officer of the other party, which consent may not be unreasonably withheld. All assignments in contravention of this Section 30 shall be null and void.

31. FORCE MAJEURE

Neither party shall be responsible for any delay or failure in performance of any part of this Agreement to the extent that such delay or failure is caused by fire, flood, explosion, war, embargo, government requirement, civil or military authority, act of God, act or omission of carriers or other similar causes beyond its control. If any such event of force majeure occurs, the party delayed or unable to perform shall give immediate notice to the other party, and the party affected by the other's delay or inability to perform may elect at its sole discretion to: (a) terminate this Agreement or the affected Order; (b) suspend such Order for the duration of the condition and obtain or sell elsewhere Software, Software Products, or Subscriber Billing Services comparable to the Software, Software Products, or Subscriber Billing Services that have been obtained under the Order; or (c) resume performance of such Order once the condition ceases with an option in the affected party to extend the period of this Agreement up to the length of time the condition endured. Unless written notice is given within thirty (30) calendar days after the affected party is notified of the condition, this option (c) shall be deemed selected.

32. PUBLICITY

Each party agrees to submit to the other all advertising, sales promotions, press releases and other publicity matters relating to the Software, Software Products, or Subscriber Billing Services provided under this Agreement wherein the other party's corporate or trade names or trademarks are mentioned or language from which the connection of said names or trademarks therewith may be inferred or implied. Each party further agrees not to publish or use such advertising, sales promotions, press releases or publicity matters without the other party's prior written approval, which approval may be unreasonably withheld. Unless specifically permitted within this Agreement, neither party to this Agreement shall disclose the terms, conditions, or provisions of this Agreement without the prior written consent of the other party.

33. INDEPENDENT CONTRACTOR

All work performed by Licensor in connection with the Software, Software Products, Software Maintenance, and/or Subscriber Billing Services described in this Agreement shall be performed by Licensor as an independent contractor and not as the agent or employee of Customer. All persons furnished by Licensor shall be for all purposes solely Licensor's employees or agents and shall not be deemed to be employees of Customer for any purpose whatsoever. Licensor shall furnish, employ and have exclusive control of all persons to be engaged in performing services under this Agreement and shall prescribe and control the means and methods of performing such services by providing adequate and proper supervision. Licensor shall be solely responsible for compliance with all rules, laws and regulations relating to employment of labor, hours of labor, working conditions, payment of wages, and payment of taxes, such as employment, Social Security, and other payroll taxes including applicable contributions from such persons when required by law.

34. NON-HIRING OF EMPLOYEES

Unless agreed to in writing in advance by both Licensor and Customer, neither party to this Agreement shall solicit or hire employees of the other party during the term of this Agreement and for a period of one (1) year after termination hereof.

35. CONFLICT OF INTEREST

Licensor stipulates no officer or employee of Customer has been employed, retained, induced or directed by Licensor to solicit or secure this Agreement with Customer upon agreement, offer, understanding or implication involving any form of remuneration whatsoever. Licensor agrees, in the event of an allegation of substance that there has been a violation hereof, Licensor will cooperate in every reasonable manner with Customer in establishing whether the allegation is true. Notwithstanding any provisions of this Agreement to the contrary, if a violation of this provision is found to have occurred and is deemed material by Customer, Customer may request that Licensor take the appropriate legal action to discipline the responsible party.

36. WAIVER OF BREACH

No waiver of breach or failure to exercise any option, right or privilege under the terms of this Agreement by either party on any occasion or occasions shall be construed to be a waiver of the same or any other option, right or privilege on any other occasion.

37. RELEASES VOID

Neither party shall require waivers or releases of any personal rights from representatives of the other in connection with visits to Licensor's and Customer's respective premises. No such releases or waivers shall be pleaded by Licensor or Customer or third persons in any action or proceeding against an employee.

38. APPLICABILITY OF UNIFORM COMMERCIAL CODE

To the extent this Agreement or any Order entails the delivery of Software, Software Products or Subscriber Billing Services, such Software, Software Products, or Subscriber Billing Services shall be deemed "goods" within the meaning of the UCC, except when deeming services as "goods" would cause an unreasonable result. This Agreement or an Order shall control where there is a conflict with the UCC.

39. GOVERNING LAW

The validity, construction, interpretation and performance of this Agreement shall be governed by and construed in accordance with the domestic laws of the State of Maryland except as to its principals of conflicts of laws.

40. COMPLIANCE WITH LAWS

Licensor and Customer each shall comply with the provision of all applicable federal, state, county and local laws, ordinances, regulations, and codes, including, but not limited to, Licensor's and Customer's obligations as an employer with regard to the health, safety and payment of its employees, and identification and procurement of required permits, certificates, approvals, and inspections in Licensor's and Customer's performance of this Agreement.

41. OBLIGATIONS WHICH SURVIVE TERMINATION

Each party recognizes and agrees that its obligations under Sections 6, 21.4 ,22, 23, 24 and 27 of this Agreement survive the cancellation, termination or expiration of this Agreement for any reason. These same Sections shall apply for the duration of Customer's use of Software licensed under the License granted in Section 3 hereof.

42. SEVERABILITY

If any of the provisions of this Agreement shall be invalid or unenforceable under the laws of the State of Maryland applicable to the entire Agreement, such invalidity or unenforceability shall not invalidate or render unenforceable the entire Agreement but rather the entire Agreement shall be construed as if not containing the particular invalid or unenforceable provision or provisions, and the rights and obligations of Licensor and Customer shall be construed and enforced accordingly.

43. INCORPORATION OF APPENDICES

Appendices A through _____, referred to in this Agreement and attached hereto, are integral parts of this Agreement and are incorporated herein by this reference.

44. ENUMERATIONS, BACKGROUND AND HEADINGS

The enumerations, "Background" and headings contained in this Agreement are inserted for convenience only and are not intended to have any substantive significance in interpreting this Agreement.

45. AMENDMENTS, MODIFICATIONS OR SUPPLEMENTS

Amendments, modifications or supplements to this Agreement shall be permitted, provided: (a) changes shall be in writing signed by the authorized representatives of both parties; (b) changes shall reference this Agreement and identify the specific articles or sections contained herein which are amended, modified or supplemented; (c) changes shall not adversely affect vested rights or causes of action which have accrued prior to the effective date of such change.

46. AUTHORITY AND NO CONFLICTING AGREEMENT

The officers signing on behalf of the parties to this Agreement acknowledge that they have read and understand this Agreement and hereby warrant that each has full power and authority to execute this Agreement and bind the respective parties hereto. Each party further represents that it is not bound by any other contract or agreement that would prevent full performance of this Agreement.

47. ENTIRE AGREEMENT

This Agreement, the Orders, appendices, and subordinate documents referenced in such Orders constitute the entire agreement between the parties with respect to the subject matter contained herein, superseding all previous agreements pertaining to such subject matter, and may be modified only by an amendment executed in writing by authorized representatives of both parties hereto. All prior agreements, representations, statements, negotiations, understandings and undertakings are superseded hereby. Both parties hereto represent that they have read this Agreement, understand it, agree to be bound by all terms and conditions stated herein, and acknowledge receipt of a signed, true and exact copy of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement under seal as of the day and year first written above.

ATTEST:	**[LICENSOR]**
______________________	By:______________________(SEAL)
ATTEST:	**[CUSTOMER]**
______________________	By:______________________(SEAL)

[4.30.98]

Section VIII. G.

Model Year 2000 Warranties

A. 1. Licensor represents and warrants that the software is designed to be used prior to, during, and after the calendar year 2000 A.D., and that the Software will operate during each such time period without error relating to date data, specifically including any error relating to, or the product of, date data which represents or references different centuries or more than one century.

2. Without limiting the generality of the foregoing, Licensor further represents and warrants:

(a) That the software will not abnormally end or provide invalid or incorrect results as a result of date data, specifically including date data which represents or references different centuries or more than one century;

(b) That the Software has been designed to ensure year 2000 compatibility, including but not limited to, date data century recognition, calculations which accommodate same-century and multi-century formulae and date values, and date data interface values that reflect the century;

(c) That the software includes "year 2000 capabilities". For the purposes of this Agreement, "year 2000 capabilities" means the software:

(i) will manage and manipulate data involving dates, including single-century formulae and multi-century formulae, and will not cause an abnormally ending scenario within the application or generate incorrect values or invalid results involving such dates; and

(ii) provides that all date-related user interface functionalities and data fields include the indication of century; and

(iii) provides that all date-related data interface functionalities include the indication of century.

B. 1. *Definitions:*

"Four Digit Year Format" shall mean a format that allows entry or processing of a four-digit year date: the first two digits will designate the century and the second two digits shall designate the year within the century. As an example, 1996 shall mean the 96th year of the 20th century.

"Leap Year" shall mean the year during which an extra day is added in February (February 29th). Leap Year occurs in all years divisible by 400, or evenly divisible by 4 and not evenly divisible by 100. For example, 1996 is a Leap Year since it is divisible by 4 and not evenly divisible by 100. 2000 is a Leap Year since it is divisible by 400.

"Year 2000 Compliant" shall mean that the data outside the range 1990 to 1999 will be correctly processed in any level of computer hardware or software including, but not limited to, microcode, firmware, application programs, files and databases.

2. **Year 2000 Compliance Performance Warranty.** Licensor further warrants and represents that the Product is and will continue to be Year 2000 Compliant. All date processing by Product will include Four Digit Year Format and recognize and correctly process dates for Leap Year. Additionally, all date sorting by Product that includes a "year category" shall be done based on the Four-Digit Year Format code.

3. **Remedies for Non-Compliance of Warranty.** Licensor agrees to pay liquidated damages in the amount of $________ per day for each day the Product fails to maintain and uphold the Year 2000 Compliance Performance Warranty described in Section _____ ______ of this Agreement.

C. Year 2000 Warranties.

Licensor represents and warrants that:

A. The Software will function without error or interruption related to Date Data, specifically including errors or interruptions from functions which may involve Date Data from more than one century;

B. The Software requires that all Date Data (whether received from users, systems, applications or other sources) includes an indication of century in each instance;

C. All date output and results, in any form, shall include an indication of century in each instance.

When used in this Section _________, the term "Date Data" shall mean any data or input which includes an indication of or reference to date. The foregoing is in addition to the other representations and warranties set forth herein.

Standard Year 2000 Clause for Purchase Orders

Vendor warrants that each product supplied within the fulfillment of this Purchase Order shall, in handling any calendar dates (including leap years) or any truncated portions thereof:

(a) within a continuous range of dates before, during and after January 1, 2000 function accurately, without interruption or premature termination, and without requiring any intervention, modification or alteration; and

(b) shall accurately process date data correctly provided by other sources in the format required by the product; and

(c) in a disclosed, defined and predetermined manner, input, accept, process, store and output 4-digit year dates and/or truncated date fields and date-related information accurately and without ambiguity, i.e., the information technology shall accurately process date data (including but not limited to, calculating, comparing, and sequencing) from, into and between the 20th and 21st centuries and the years 1999 and 2000 and leap year calculations. Notwithstanding anything to the contrary contained herein, the above warranty shall apply for as long as vendor's product is used by [CSC/ Customer] and shall include, at not cost to [CSC/Customer], the correction of any errors in data or programs caused by the failure of vendor's product to perform in conformity with such warranty.

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June 9, 1996

company xyz
john doe
year 2000 blvd.
dreamsville, ca 90240

Dear *john doe,*

With the Year 2000 rapidly approaching, I'm sure you can appreciate Computer Sciences Corporation's (CSC) urgency in bringing our computer hardware and software products to a level that insures a transparent transition from December 31, 1999 to January 1, 2000 and beyond for our clients and ourselves.

CSC is in the process of assessing and evaluating its entire inventory of products for year 2000 compliance. We ask that you please assist us with this effort by supplying us with written verification indicating your company's intentions for achieving year 2000 compliance for the products you provide. With this information CSC will then be in a position to plan a strategy for repairing/replacing the affected hardware and/or software components. Please recognize that if we cannot assess your products' year 2000 compliance we may have to plan to stop using and have our clients stop using these products as rapidly as possible.

Attached you will find an inventory of the products we understand your organization provides CSC and the guidelines for determining year 2000 compliance levels. For components that you classify as **NON-COMPLIANT**, please indicate the date by which the compliant versions/model will be made available. For those components that are believed to be compliant, either **FULL** or **PARTIAL**, please provide appropriate documentation (test script) to support your position. Additionally, if you believe your company provides products not listed in the attached inventory, please list and highlight these with any information you may have regarding their location.

Your response is requested by **XX/XX/XXXX**. Please contact me at (xxx) xxx-xxxx telefax (xxx) xxx-xxxx with any questions you may have or if you anticipate any difficulties with responding by that date. Thanks in advance for your timely assistance in this matter.

Sincerely,

Computer Sciences Corporation

ATTACHMENT 1

PRODUCT COMPLIANCE LISTING

INSTRUCTIONS: Please indicate the following:

(1) **Component "IS/IS NOT" DATE DEPENDENT.**

Date Dependent Component Definition: A component is date dependent if it processes, stores, or displays time and date information; or if system/component processing is affected in any way by the storage of or access to correct time/date data.

(2) If date dependent, the **CURRENT LEVEL OF COMPLIANCE** (see Attachment 2 for Compliance descriptions and guidelines) for each hardware/software component that your company provides to CSC.)

F = Fully Compliant **P = Partially Compliant** **N = Non Compliant**

(3) If classified as currently **Non Compliant,** the **DATE** by which compliance will be attained and the respective **VERSION/RELEASE NUMBER.**

(4) **Supported Date Range (See Attachement 2)**

Component/ Model #	Version	(1) Date Dependent? (Y = Yes, N = No)	(2) Current Compliance Level (F, P, N)*	(3) If Non Compliant: Commit Date & Version/Release	(4) Supported Date Range
HP Model 715/33					
HP Model 715/80					
HP Model 15/100					

Please enter any/all addtional components not found under "Component/Model #" Section of Product Compliance List. .

* **Written Documentation to Support Compliance Level must be Submitted**

PROPRIETARY INFORMATION AGREEMENT

THIS PROPRIETARY INFORMATION AGREEMENT is made this ____ day of ____________, 1997 by and between CSC Intelicom, Inc., a Delaware corporation, with its principal place of business at 6707 Democracy Boulevard, Suite 1000, Bethesda, Maryland 20817 ("CSC"), and ______________, [a ____________ corporation][individually], with [its][his] principal place of business at ____ ____________________ ("Covenantor").

BACKGROUND

1. CSC has extensive expertise in the creation and development of technical information, ideas and concepts relating to software for the communications industry including consulting, pricing, marketing and implementation and system designs for such software, including without limitation, copyrights, trade secrets, plans, source codes, object codes, prototypes, working models and production models (the "Confidential Information").

2. Covenantor has extensive expertise in ____________________ ____________________ (collectively referred to with CSC's expertise as the "Confidential Information").

3. The parties desire to exchange the Confidential Information in conjunction with ____ **[give detailed description as to why the parties are exchanging information].**

4. The "Furnishing Party" will be furnishing the other party, the "Recipient", with information and or other materials, in writing, orally, and in other tangible form, regarding the Furnishing Party. Such information, in whole or in part, together with any analyses, compilations, studies or other documents prepared by the Recipient, the Recipient's agents or employees, which contain or otherwise reflect such information and Recipient's review or interest in the Furnishing Party, shall be considered Confidential Information.

5. The Confidential Information of CSC and Covenantor is proprietary, secret and confidential, and is only being disclosed to the other party in conjunction with CSC's business relationship or potential business relationship with Covenantor and for no other reason.

NOW THEREFORE, in consideration of the mutual covenants herein contained, the parties intending to be legally bound, agree as follows:

1. CSC and Covenantor shall disclose to the other such Confidential Information as such party deems appropriate.

2. CSC and Covenantor shall review and maintain the Confidential Information in accordance with the following terms and conditions:

(a) CSC and Covenantor agree to treat all Confidential Information as defined above as confidential and not to disclose the same to any third party. The documents containing such information should be designated "Confidential" or "Proprietary" and shall be so marked by the Furnishing Party provided, however, that all software provided to Covenantor hereunder shall be deemed to be proprietary and confidential regardless of whether it is marked "Confidential" or "Proprietary".

(b) No copies of the Confidential Information shall be made, unless agreed to in writing by the Furnishing Party.

(c) All of the Confidential Information shall be kept and maintained in a safe and secure place with adequate safeguards to ensure that unauthorized persons do not have access to the Confidential Information. CSC and Covenantor shall, at all times, keep the other informed in writing of the location of the Confidential Information.

(d) Only representatives of CSC and Covenantor whose review of the Confidential Information is necessary and appropriate for the purpose set forth in Paragraph 3 of the Background above shall have access to the Confidential Information. The Confidential Information shall be used by the Receiving Party solely for the purpose stated in Paragraph 3 of the Background above.

(e) Any oral discussions between CSC and Covenantor which relate to the Confidential Information shall be kept secret and confidential and are deemed to be Confidential Information.

(f) Upon the request of the Furnishing Party or after the termination of this Agreement, the Recipient shall promptly return all of the Confidential Information to the Furnishing Party or destroy all such Confidential Information including all work products of the Recipient containing Confidential Information. The returning party shall certify that all Confidential Information and copies or extracts thereof have been returned or destroyed.

(g) The Recipient agrees to immediately notify the Furnishing Party in writing of any misuse or misappropriation of the Confidential Information or violation of this Agreement which may come to its attention.

3. Neither party, its agents, employees, representatives, subsidiaries, affiliated or parent companies shall, for themselves or for the benefit of any person or entity other than the Furnishing Party, use or disclose the Confidential Information of the other whether written or

oral, software technology or otherwise for any purpose, at any time or in any place, without the express prior written approval of the Furnishing Party.

4. Notwithstanding anything to the contrary herein, the Recipient shall have no obligation to preserve the confidentiality of any information which:

(a) Was previously known to the Recipient free of any obligation to keep it confidential as shown by the Recipient's written records, so long as the Recipient did not receive such information directly or indirectly from the Furnishing Party; or

(b) Is or becomes publicly available, by other than unauthorized disclosure; or

(c) Other than for patents, is independently developed by Recipient without knowledge of the Confidential Information as shown by the Recipient's written records; or

(d) Is disclosed to third parties by the Furnishing Party without restriction; or

(e) Is lawfully received from a third party whose disclosure would not violate any confidentiality or other legal obligation.

5. No liability shall arise under this Agreement due to the Recipient's disclosure of Confidential Information made pursuant to judicial or governmental order, provided the Recipient notifies the Furnishing Party as soon as possible and in any event prior to such disclosure and cooperates with the Furnishing Party in the event the Furnishing Party elects to legally contest and avoid such disclosure.

6. CSC and Covenantor agree that neither party acquires any title, ownership or other intellectual property right or license under this Agreement.

7. The obligations of this Agreement with respect to the disclosure of Confidential Information shall survive for a period of seven (7) years from the date of last disclosure or for as long as CSC or Covenantor is commercially marketing the Confidential Information, whichever is longer.

8. CSC and Covenantor recognize and agree that their obligations under Sections 2, 3 and 7 of this Agreement shall survive the termination of this Agreement and CSC and Covenantor shall be bound by such obligations after termination hereof.

9. This Agreement may be terminated by either party upon thirty (30) days prior written notice provided, however, that this Agreement may be terminated immediately and the return of all Confidential Information may be demanded upon written notice in the event that the other party breaches any material term of this Agreement, is declared bankrupt, creates or

permits an assignment for the benefit of its creditors, is dissolved, or ownership and control of said party is transferred to a third party.

10. CSC and Covenantor acknowledge their obligations to control access to technical data under the U.S. Export Laws and Regulations and agrees to adhere to such laws and regulations with regard to any technical data received under this Agreement.

11. In the event either party breaches, or threatens to breach any of the covenants expressed herein, the damages to the non-threatening or non-breaching party will be great and irreparable and difficult to quantify; therefore, the non-threatening or non-breaching party may apply to a court of competent jurisdiction for injunctive or other equitable relief to restrain such breach or threat of breach, without disentitling such party from any other relief in either law or equity.

12. Covenantor and CSC agree they will indemnify and hold harmless the other party from all losses, damages, causes of action and attorneys' fees incurred by the other party arising from the breach of this Agreement by Covenantor or CSC as the case may be.

13. This Agreement merges and supersedes all prior Agreements between the parties hereto, and shall be governed construed in accordance with, the domestic laws of the state of Maryland, of the United States of America, excluding its principles of conflicts of laws. The parties hereto agree that any action related to this Agreement shall solely be venued in the Federal District Court for the District of Maryland and the parties hereby irrevocably submit to the jurisdiction and venue of said court.

14. This Agreement shall not be assigned by any party hereto without the express prior written consent of the other party.

15. In the event that the Confidential Information is or becomes the subject of a patent application, patent, copyright application or copyright, the Recipient agrees and understands that the Furnishing Party will have all the rights and remedies available to it under the law as a result of said patent applications, patents, copyright applications or copyrights, and that disclosure of such Confidential Information to the Recipient does not in any way effect those rights and remedies.

16. It is understood by the Recipient that the Confidential Information disclosed hereunder may relate to products that are under development or planned for development. THE FURNISHING PARTY DISCLAIMS ANY IMPLIED WARRANTY OF MERCHANTABILITY, ANY IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE, ANY IMPLIED WARRANTY OF NON-INFRINGEMENT, AND ANY EXPRESS WARRANTY WITH RESPECT TO ANY OF THE CONFIDENTIAL INFORMATION AND DOCUMENTATION DISCLOSED HEREUNDER. The Furnishing Party accepts no responsibility as a result of any expenses, losses, damages or actions incurred or undertaken by the Recipient as a result of the Furnishing Party's receipt or use of any Confidential Information or Documentation.

17. The waiver by either party hereto of any breach of the terms and conditions hereof will not be considered a modification of any provision, nor shall such a waiver act to bar the enforcement of any subsequent breach.

IN WITNESS WHEREOF, the parties have executed this Proprietary Information Agreement under seal effective the date first written above.

ATTEST:	**CSC INTELICOM, INC.**
______________________	**By:** ______________________**(SEAL)**
WITNESS/ATTEST:	**COVENANTOR**
______________________	**[By:]**______________________ **(SEAL)**

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PROPRIETARY INFORMATION AGREEMENT

THIS PROPRIETARY INFORMATION AGREEMENT is made this ___ day of ________________, 1996, by and between CSC Intelicom, Inc., a Delaware corporation, with its principal place of business at 6707 Democracy Boulevard, Suite 1000, Bethesda, Maryland 20817 ("CSC"), and ____________________________, [a ______________ corporation] [individually], with [its][his] principal place of business at ______________________ ________________________("Covenantor").

BACKGROUND

1. CSC has extensive expertise in the creation and development of technical information, ideas and concepts relating to software for the telecommunications industry including consulting, pricing, marketing, and implementation and system designs for such software, including without limitation, copyrights, trade secrets, plans, source codes, object codes, prototypes, working models and production models (the "Confidential Information").

2. Covenantor desires to enter or has entered into a business relationship with CSC, and has requested that it review the Confidential Information in conjunction with ____ **[give a detailed description as to why the parties are exchanging information].**

3. CSC will be furnishing to Covenantor information and/or other materials, in writing, orally, and in other tangible form, regarding CSC. Such information, in whole or in part, together with any analyses, compilations, studies or other documents prepared by the Covenantor, the Covenantor's agents or employees, which contain or otherwise reflect such information and Covenantor's review or interest in CSC, shall be considered Confidential Information.

4. The Confidential Information of CSC is proprietary, secret and confidential, and is only being disclosed to Covenantor in conjunction with CSC's business relationship or potential business relationship with Covenantor and for no other reason.

NOW THEREFORE, in consideration of the mutual covenants herein contained, the parties intending to be legally bound, agree as follows:

1. CSC shall disclose to Covenantor such Confidential Information as CSC deems appropriate.

2. Covenantor shall review and maintain the Confidential Information in accordance with the following terms and conditions.

(a) Covenantor agrees to treat all Confidential Information (as defined above) as confidential and not to disclose the same to any third party. The documents containing such information should be designated as "Confidential" or "Proprietary" and shall be so marked by CSC provided, however, that all software provided to Covenantor hereunder shall be deemed to be proprietary and confidential regardless of whether it is marked "Confidential" or "Proprietary".

(b) No copies of the Confidential Information shall be made, unless agreed to in writing by CSC.

(c) All of the Confidential Information shall be kept and maintained in a safe and secure place with adequate safeguards to insure that unauthorized persons do not have access to the Confidential Information. Covenantor shall, at all times, keep CSC informed in writing of the location of the Confidential Information.

(d) Only representatives of Covenantor whose review of the Confidential Information is necessary and appropriate for the purposes set forth in Paragraph 2 of the Background above shall have access to the Confidential Information. The Confidential Information shall be used solely by Covenantor for the limited purpose stated in Paragraph 2 of the Background above.

(e) Any oral discussions between CSC and Covenantor which relate to the Confidential Information shall be kept secret and confidential and are deemed to be Confidential Information.

(f) Upon the request of CSC or after the termination of this Agreement, Covenantor shall promptly return all of the Confidential Information including all work products of Covenantor containing Confidential Information to CSC. Covenantor shall certify that all Confidential Information and copies or extracts thereof have been returned or destroyed.

(g) Covenantor agrees to immediately notify CSC in writing of any misuse or misappropriation of the Confidential Information or violation of this Agreement which may come to its attention.

3. Covenantor, its agents, employees, representatives, subsidiaries, affiliated or parent companies shall not, for themselves or for the benefit of any person or entity, other than CSC, use or disclose the Confidential Information whether written or oral, software technology or otherwise or any portion thereof, for any purpose, at any time or in any place, without the express prior written approval of CSC.

4. Notwithstanding anything to the contrary herein, Covenantor shall have no obligation to preserve the confidentiality of any information which:

(a) Was previously known to Covenantor free of any obligation to keep it confidential as shown by the Covenantor's written records, so long as the Covenantor did not receive such information directly or indirectly from CSC; or

(b) Is or becomes publicly available, by other than unauthorized disclosure; or

(c) Other than for patents, is independently developed by Covenantor without knowledge of the Confidential Information as shown by the Covenantor's written records; or

(d) Is disclosed to third parties by CSC without restriction; or

(e) Is lawfully received by Covenantor from a third party whose disclosure would not violate any confidentiality or other legal obligation.

5. No liability shall arise under this Agreement due to the Covenantor's disclosure of Confidential Information made pursuant to judicial or governmental order, provided the Covenantor notifies CSC as soon as possible and in any event prior to such disclosure and cooperates with the CSC in the event the CSC elects to legally contest and avoid such disclosure.

6. Covenantor agrees that it does not acquire any title, ownership or other intellectual property right or license under this Agreement.

7. The obligations of this Agreement with respect to the disclosure of Confidential Information shall survive for a period of seven (7) years from the date of last disclosure or for as long as CSC is commercially marketing the Confidential Information, whichever is longer.

8. Covenantor recognizes and agrees that its obligations under Sections 2, 3 and 7 of this Agreement shall survive the termination of this Agreement and Covenantor shall be bound by such obligations after termination hereof.

9. This Agreement may be terminated by either party upon thirty (30) days prior written notice provided, however, that this Agreement may be terminated immediately and the return of all Confidential Information may be demanded by CSC upon written notice in the event that Covenantor breaches any material term of this Agreement, or either party is declared bankrupt, creates or permits an assignment for the benefit of its creditors, is dissolved, or ownership and control of said party is transferred to a third party.

10. Covenantor acknowledges its obligations to control access to technical data under the United States Export Laws and Regulations and agrees to adhere to such laws and regulations with regard to any technical data received under this Agreement.

11. In the event Covenantor breaches, or threatens to breach any of the covenants expressed herein, the damage to CSC will be great and irreparable and difficult to quantify; therefore, CSC may apply to a court of competent jurisdiction for injunctive or other equitable relief to restrain such breach or threat of breach, without disentitling CSC from any other relief in either law or equity.

12. Covenantor and CSC agree they will indemnify and hold harmless the other from all losses, damages, causes of action and attorneys' fees incurred by the other arising from the breach of this Agreement by Covenantor or CSC as the case may be.

13. This Agreement merges and supersedes all prior Agreements between the parties hereto, and shall be governed by, and construed in accordance with, the domestic laws of the State of Maryland, of the United States of America, excluding its principles of conflicts of laws. The parties hereto agree that any action related to this Agreement shall solely be venued in the Federal District Court for the District of Maryland and the parties hereby irrevocably submit to the jurisdiction and venue of said court.

14. This Agreement shall not be assigned by any party hereto without the express prior written consent of the other party.

15. In the event that the Confidential Information is or becomes the subject of a patent application, patent, copyright application or copyright, the Covenantor agrees and understands that CSC will have all the rights and remedies available to it under the law as a result of said patent applications, patents, copyright applications or copyrights, and that disclosure of such Confidential Information to the Covenantor does not in any way effect those rights and remedies.

16. It is understood by the Covenantor that the Confidential Information disclosed hereunder may relate to products that are under development or planned for development. CSC DISCLAIMS ANY IMPLIED WARRANTY OF MERCHANTABILITY, ANY IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE, ANY IMPLIED WARRANTY OF NON-INFRINGEMENT, AND ANY EXPRESS WARRANTY WITH RESPECT TO ANY OF THE CONFIDENTIAL INFORMATION AND DOCUMENTATION DISCLOSED HEREUNDER. CSC accepts no responsibility as a result of any expenses, losses, damages or actions incurred or undertaken by the Covenantor as a result of the Covenantor's receipt or use of any Proprietary Information or documentation.

17. The waiver by either party hereto of any breach of the terms and conditions hereof will not be considered a modification of any provision, nor shall such a waiver act to bar the enforcement of any subsequent breach.

IN WITNESS WHEREOF, the parties have executed this Proprietary Information Agreement under seal effective the date first written above.

ATTEST: CSC INTELICOM, INC.

_________________________ [By:] _________________________ (SEAL)

WITNESS/ATTEST: COVENANTOR

_________________________ [By:] _________________________ (SEAL)