

SOFTWARE LICENCE AGREEMENT

While Bill Gates was still learning how to turn on a toaster the computer industry made a huge decision that would affect us all.

That decision was that no-one would sell software that they created, unlike any other manufactured product. No, they would licence it instead.

This meant that the licensee could use it but the underlying property right stayed with the author or anyone who bought that underlying right from the author.

The result was to transform property rights and the way that business would be done in the 21st century.

We all sign up to become licensees whenever we use a piece of over-the-counter software. No-one ever bothers to negotiate or for that matter even read the small print in the licence any more than we read or negotiate the terms on an airline ticket, a carpark ticket or a department store docket.

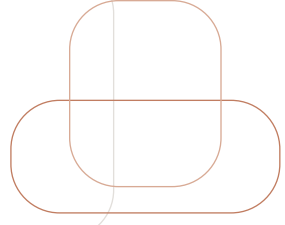
From time to time though we may become either the licensee or the licensor of a piece of so-called specialist software used in business and the terms of the licence become significant.

Software Licence Agreements contain terms and conditions such as:

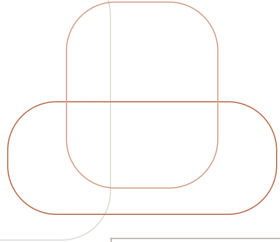
- > A clear description of the software being licensed
- > The term of the licence
- > What does the licence entitle the licensee to do exactly?
- > What payment will be made for licensing the software and how/when?
- > Is the licence exclusive in any way?
- > what happens if that exclusivity is breached?
- > How can the agreement be terminated?
- > Access to the source code and escrow agreement
- > Updates and alterations to the software
- > Is maintenance a part of the licence and if so on what basis?
- > Acknowledgement of licensor's rights and prohibition on reverse engineering
- > Limitation of liability especially in respect of consequential loss

Here's a look at the important features of a software licence from both sides of the fence.

THE SOFTWARE SUPPLIER	THE LICENSEE
Issues Regarding The Software Supplier	
Is the Supplier the actual creator of the software or are they a distributor or subsequent purchaser of it? Has the Supplier taken steps to quarantine ownership of the software in a separate company in case of liability problems down the track. If the Supplier is not the owner - does the Supplier have the right to grant the Licence? - Is the Licence consistent with the rights that the Supplier has with respect to the software? - Has the Supplier obtained the owner's consent?	The Licensee needs a warranty that the Supplier has all the necessary rights to grant the licence. Some evidence in support could also be called for, given that any mistake in this area could prove costly to the Licensee. If the Supplier is also going to maintain and support the software does it have the resources to provide sufficient service in that regard? Does it appear to have sufficient resources to continue to upgrade and develop the software



THE SOFTWARE SUPPLIER	THE LICENSEE
Issues Regarding The Licensee	
<p>You should find out as much about the Licensee as possible particularly if the Licence fee is in any way linked to their performance.</p> <p>If the Licensee is a company you might want to ask the directors to provide personal guarantees to ensure that the Licensee's obligations will be performed.</p>	<p>Be prepared to provide your details to the Supplier to give them confidence in your ability to continue to pay licence fees.</p> <p>If you are a company your directors may have to provide personal guarantees that the obligations under the agreement will be performed</p>
The Software	
<p>A careful description of the software is important in ensuring that the licence is broad enough and will provide sufficient protection for the Supplier, particularly in respect of limitations on the Licensee in such areas as reverse engineering.</p> <p>Be careful what representations you make about the software as you may be liable for misleading and deceptive conduct under the Trade Practices Act. Attaching copies of marketing material could prove useful in clarifying exactly what you have been saying about the software.</p>	<p>It is essential that you know as much as possible about the software before entering the license.</p> <p>In particular it is important that you have some kind of specification to rely on so that you are sure that the software does what they said it would. For big systems you may want to test the system first before signing up. If the supplier provides you with information about the software make sure that there is reference in the agreement to that information. In the event that the information is false or misleading you may have a claim under the Trade Practices Act.</p>
Protecting the Software	
<p>The supplier must be sure that the software is protected from unauthorised use by the licensee or anyone who has access to the software through the licensee.</p>	<p>You will be asked to agree</p> <ul style="list-style-type: none"> - not to challenge the ownership of the software - not to reverse engineer the software - not to copy the software - not to use the software except as agreed in the licence agreement - not to lay claim to any part of the software - not to give the software to anyone else - not to modify the software without permission - not to use the software on any unauthorised equipment
Installation Testing and Acceptance	
<p>Will you be installing the software or will it be installed by your subcontractor or by the licensee?</p> <p>Is the software subject to testing and acceptance by the licensee. If so then specifications need to be drawn up so that it is quite clear what the software must achieve if it is to be accepted.</p>	<p>If the supplier is installing the software you will need to give them access to your system. Will this cause disruption in your workplace? Will special arrangements need to be made?</p> <p>Are you capable of testing and assessing the software?</p>
Escrow	
<p>The licensee wants to be sure that if anything happens to your enterprise they can still get access to the source code in order to maintain and upgrade the software.</p> <p>You are probably happy with this but do not want them having access that could enable them to rip-off the code.</p> <p>Have you considered who will hold the source code in escrow? What is the cost and who will pay?</p> <p>The agreement needs to set out clearly the terms on which the source code can be accessed. Some suppliers require a specific source code licence and that the licensee actually pay for that licence, perhaps after a certain emergency period.</p>	<p>You will want to be sure that you can get access to the source code under certain conditions.</p> <p>If you alter or modify the code who owns that alteration?</p> <p>Are you happy with the entity who is holding the source code. You don't want the situation where the escrow holder refuses to give you access for some reason.</p> <p>Some licenses actually attach a separate escrow agreement as an annexure so that the escrow holder's obligations are spelled out also.</p>



THE SOFTWARE SUPPLIER	THE LICENSEE
Warranties	
<p>As the supplier you will be required to warrant, at least:</p> <ul style="list-style-type: none"> · that the information you have provided the licensee is accurate · that the software is as described by you · that you have the right to grant the license <p>You should include an indemnity clause so that the licensee indemnifies you in the event a third party customer suffers any loss or damage from the use of the goods.</p> <p>It is essential that you check these warranties to make sure you are not warranting something that is incorrect..</p>	<p>You should obtain the usual basic warranties that the software is fit for the purpose described by you to the Supplier.</p> <p>It is essential that you check the warranties given by the Supplier to make sure that your interests are protected.</p>
Licence Fee	
<p>Is the Licence Fee connected to the number of users?</p> <p>How will you check that number of users?</p> <p>Is the date for payment of Licence fees instalments related to testing and acceptance?</p>	<p>Is the fee conditional on testing and acceptance?</p> <p>Is the fee relative to the delivery of certain modules of the software?</p> <p>Is the fee connected to the licensee's performance or use of the software in which case how is this measured and checked?</p>
Termination of the Licence	
<p>A breach of the licence agreement by either side usually gives the other party the right to terminate.</p> <p>Either party should be given time to fix a breach if it can be fixed before the contract can be terminated. Anywhere from 14 to 30 days.</p> <p>Do you want to have a clause in the agreement so that you can terminate the licence on giving written notice?</p> <p>On termination of the agreement you must make sure you will be paid any outstanding fees or moneys by the licensee and that this right remains after termination.</p>	<p>Once the licence is terminated the licensee must immediately stop using the software and deliver to the supplier all copies of the software</p> <p>Include a dispute resolution clause in the agreement so that you and the supplier can sort out any disputes rather than terminate the agreement.</p> <p>You should always make sure that you can terminate the agreement (for no particular reason) by giving the supplier some written notice (usually 14 – 28 days).</p> <p>But you may not want the supplier to have similar rights because of the damage it could do to your business if the software were withdrawn at short notice.</p> <p>On termination you will usually be required to pay any outstanding fees or moneys due to the supplier. However make sure your other rights to sue for breach of contract or misrepresentation remain after termination.</p>