

# Software Licensing

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Software is governed by copyright law. In Canada, a software program is a “work” recognized and protected by the *Copyright Act* (Canada). As a result, the owner of the copyright has the sole right to control use and reproduction of the software.

Software owners can grant licenses. A license is a transfer of less than all the owner’s rights. A license is simply a limited right to use the property of another. In the case of software, it is the right to use the software. A license to use is purely contractual and there are no implied rights of use, so if a license agreement doesn’t grant a particular right, then the licensee (user) doesn’t have that right.

## Who can use software?

Properly describing whose use is permitted, and whose use isn’t permitted, is critical to a software license. Is use limited to one computer, or can it be used on multiple computers in a network? Is the license count based on total “seats” or total “users” (and can the licensee change users)? Is there a limit on multiple concurrent users? Instead of controlling seats or users, is the license available to everyone at one physical site (a site license) or is it available to everyone in the business (an enterprise license)?

## Other important license terms

The owner and user should clearly state the license fee, and whether the license is time-limited or perpetual, transferable or restricted, and irrevocable or revocable.

The owner will want limitations on the user’s ability to transfer the software (either by assignments or sublicenses). Some licenses state that a merger or change of corporate control in user triggers license termination, or a substantial transfer fee.

Owners often include a covenant by the user to not copy the software (other than perhaps one backup copy). Due to the many variables which can adversely affect the expected performance of software, owners usually will not give any performance representations. Owners typically require that the licensee

covenant to not reverse engineer the software, and will prohibit user modifications.

The user, on the other hand, will want performance representations, representations by the owner about the owner’s right to grant the license, and indemnities against software infringement by the owner.

For customized software or where the user is making a substantial financial investment by licensing the software, it might be appropriate that the owner place the source code in the hands of an escrow agent, and keep the source code with that agent updated over time. If the owner fails (bankruptcy, etc.), the user can then access the source code and continue to use the software in which it has invested so much.

## Maintenance

Users often will require maintenance services, which typically are priced as a percentage of the original license price. Users should seek to ensure that they get value for the fees they pay, which can include basic help services (whether online or by help desk telephone) with specified response times and escalation of response, bug fixes, updates and upgrades, and support and correction for major errors and significant problems.

It is a matter of negotiation whether and for how long the owner must offer continued maintenance support, and whether the user must upgrade to the current version of the software (presumably, for a fee) in order to continue to receive maintenance.

## Software Infringement

Much software is now purchased online, with users blithely clicking the “I Agree” button without reading and considering the terms of purchase. This can be risky, because a breach of license terms can be an offence under the Copyright Act, leading to prosecution for copyright infringement. In similar fashion, business users with existing software licenses often assume they have more rights than are in fact granted by the license, and run the risk of being prosecuted for copyright infringement because they have installed unauthorized copies of software on workplace computers. Under the Copyright Act, under-licensing can result in fines of up to \$20,000 for

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201, 5120 - 49TH STREET  
YELLOWKNIFE, NT X1A 1P8  
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each software title illegally copied.

The Business Software Alliance (formerly known as the Canadian Alliance Against Software Theft) actively searches out and prosecutes software license infringement, often based on tips from disgruntled employees and others wishing to harm a user organization).

### **We recommend...**

- Owners should ensure that they have well-drafted, suitable licenses for use with their customers
- Users know the limitations on their scope of use, copying and transfer of the software
- Users should monitor and police their own use, so as to avoid inadvertently exposing themselves to copyright infringement prosecution

Field Law can assist in software license preparation, negotiation, and compliance issues.

### **DISCLAIMER**

This article should not be interpreted as providing legal advice. Consult your legal adviser before acting on any of the information contained in it. Questions, comments, suggestions and address updates are most appreciated and should be directed to:

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