

***DRAFT SOFTWARE LICENSING AGREEMENT***  
***January 9, 1997***

BETWEEN:

***THE ESYS CORPORATION,***  
***Edmonton, Alberta***

and

***UNIVERSITY OF CALIFORNIA, SANTA BARBARA***  
***Santa Barbara, California***

The quotations contained in this draft software license agreement are valid until  
January 31, 1997

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## 1. INTRODUCTION

- 1.1. This is an Agreement between *THE ESYS CORPORATION* and its customer *University of California, Santa Barbara* under which *THE ESYS CORPORATION* is licensing software on a non-exclusive basis for the customer's own use under the terms and conditions stated below.

## 2. DEFINITIONS

- 2.1. As used in this Agreement, the following definitions shall apply:
- 2.2. "Agreement" shall mean this Agreement between Vendor and Customer.
- 2.3. "Confidential Information" shall mean any information relating to or disclosed in the course of the Agreement, which is or should be reasonably understood to be confidential or proprietary to the disclosing party. "Confidential Information" shall not include information (a) already lawfully known to the receiving party, (b) disclosed in published materials, (c) generally known to the public or (d) lawfully obtained from any third party.
- 2.4. "Customer" shall mean *University of California, Santa Barbara*.
- 2.5. "Delivery Date" shall mean the date that the Customer physically receives the Program or takes possession of the Program by way of download of the Program from the Vendor over the Internet.
- 2.6. "Documentation" shall mean the user manual(s) and any other materials supplied by Vendor for use with the Program or with any Release.
- 2.7. "Effective Date" shall mean the date upon which both parties have signed this Agreement.
- 2.8. "License Fee" shall mean the fee for licensing the Program or Programs specified in the Program Description and Price Schedule attached as Schedule "A" to the Agreement.
- 2.9. "Program" shall mean the machine-readable object code of the computer software program or programs described in the Program Description and Price Schedule attached as Schedule "A" to the Agreement and such additional Releases of such programs as shall be supplied by Vendor to Customer from time to time together with its Documentation.
- 2.10. The term "Release" shall mean any version of a Program or any materials which are supplied by Vendor at or after the delivery of a Program, including any software provided for the purpose of improving the functions or performance of the Program, changing the intellectual property contained in the Program, expanding the capability or ease of operation of the Program, or for the purpose of fixing errors in program logic, together with Documentation.
- 2.11. The term "Software Updates" shall mean updates and technical support services for Programs provided for in this Agreement.
- 2.12. The term "Software Updates Fee" shall mean the applicable annual fee due for Software Updates offered in accordance with Vendor's Software Updates Schedule as specified in the Program Description and Price Schedule attached as Schedule "A" to the Agreement.

- 2.13. The term "Software Updates Schedule" shall mean Vendor's written statement of Software Updates offered as may be in effect from time to time. Vendor reserves the right to change the Software Updates offered without notice.
- 2.14. The term "Supported Products List" shall mean a list of Program versions, together with associated computer hardware and operating system software platforms, for which Vendor provides Software Updates. Vendor reserves the right to change the Supported Products List without notice.
- 2.15. "Vendor" shall mean *The Esys Corporation of Edmonton, Alberta*.

### 3. GRANT OF LICENSE

- 3.1. Vendor hereby grants to Customer, and Customer hereby accepts, a permanent non-exclusive license to use the Program subject to the terms and provisions of this Agreement. Customer does not hereby acquire any right to sub-license the program whatsoever.
- 3.2. The license granted by this Agreement authorizes use of the Program only by those individuals who are eligible for an account on a server within the Customer's Internet Address Domain ("Authorized Users"). For greater certainty, **Authorized Users shall include all users conducting educational business with the customer, including all students, faculty, administration and staff, regardless of their physical location.**
- 3.3. Customer shall take all reasonable steps to inform Authorized Users of the terms of this Agreement generally; such information shall be worded to specifically prohibit Authorized Users from copying or distributing the Program without the prior approval of Customer.

### 4. SCOPE OF THE AGREEMENT

- 4.1. This Agreement shall apply to each Program or Release of a Program that Customer is currently licensing from Vendor or shall license in the future.

### 5. RESTRICTION AGAINST THIRD PARTY USE

- 5.1. The Program may not be used by any person or entity who is not an Authorized User.

### 6. COPIES OF THE PROGRAM

- 6.1. Vendor shall furnish to Customer a reasonable number of copies of the Program.
- 6.2. Customer shall be entitled to make additional copies of the Program and Documentation to the extent necessary for use of the Program by Authorized Users. Customer shall reproduce and include copyright, trademark or trade secret notices on any copies in the same text as stated in the copies provided to Customer.

### 7. INSTALLATION

- 7.1. Vendor shall provide on-site installation assistance for 5 working days at a date determined by Customer.

**8. PAYMENT OF FEES**

- 8.1. In consideration of the license granted under this Agreement, Customer shall pay to Vendor the Program License Fee, the Software Updates Fee and the Technical Support Fee in accordance with the Program Description and Price Schedule attached as Schedule "A" to the Agreement.

**9. ACKNOWLEDGMENT OF VENDOR'S OWNERSHIP RIGHTS**

- 9.1. Customer acknowledges that it obtains no ownership rights in the Program under the terms of this Agreement. All rights in the Program including but not limited to Confidential Information, trade secrets, trademarks, service marks, patents, and copyrights are, shall be and will remain the property of Vendor or any third party from whom vendor has licensed software or technology. All copies of the Program delivered to Customer or made by Customer remain the property of Vendor.

**10. CONFIDENTIAL INFORMATION**

- 10.1. Customer acknowledges that the Program and the Documentation contain proprietary and Confidential Information of Vendor. Customer agrees to keep the Program and Documentation in confidence and to take all reasonable precautions to ensure that no unauthorized persons have access to the Program and Documentation and that no unauthorized copies are made provided however, that any liability of Customer on account of unauthorized copies shall be limited to an amount equal to the number of unauthorized copies multiplied by the then existing full, non-discounted, commercial retail price of the Program. Breach of this provision shall be grounds for immediate termination of this Agreement without further obligation to Customer, at Vendor's option.
- 10.2. Customer may not alter any proprietary markings on the Program, including copyright, trademark, trade secret, and patent legends.
- 10.3. Customer may not decompile, disassemble, or reverse engineer the Program.

**11. WARRANTY**

- 11.1. Vendor warrants that it has the right to grant this license.
- 11.2. Vendor warrants that the Program will perform substantially in accordance with Vendor's published Documentation. In the case of conflicts the documents and any amendments thereto shall take precedence and govern in the following order:
- a) This document including schedules "A" and "B".
  - b) Vendor Product Manuals Literature.
- 11.3. VENDOR AND ANY THIRD PARTY FROM WHOM VENDOR HAS LICENSED SOFTWARE OR TECHNOLOGY DISCLAIM ALL OTHER WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT, WITH RESPECT TO THE PROGRAM AND THE ACCOMPANYING WRITTEN MATERIALS.

- 11.4. VENDOR AND ANY THIRD PARTY FROM WHOM VENDOR HAS LICENSED SOFTWARE OR TECHNOLOGY WILL NOT BE LIABLE FOR LOST PROFITS, LOST OPPORTUNITIES, OR INCIDENTAL OR CONSEQUENTIAL DAMAGES UNDER ANY CIRCUMSTANCES.
- 11.5. EXCLUSIVE REMEDY: CUSTOMER'S EXCLUSIVE REMEDY AGAINST ANY PARTY FOR BREACH OF THIS AGREEMENT SHALL BE, AT VENDOR'S CHOICE, (A) CORRECTION OF ANY ERROR OR DEFECT IN THE PROGRAM AS TO WHICH CUSTOMER HAS GIVEN NOTICE (B) REPLACEMENT OF THE PROGRAM INVOLVED.
- 11.6. If any problem, operational failure or error of the Program has resulted from any alteration of the Program, accident, abuse, misapplication or use of the Program not authorized by Vendor, then this warranty shall be null and void, at Vendor's option.

## **12. OVERALL LIMITATION OF DAMAGES**

- 12.1. IN NO CASE SHALL THE AGGREGATE AMOUNT OF DAMAGES PAYABLE TO CUSTOMER FROM ANY AND ALL PARTIES FOR ANY CLAIM ARISING FROM THE PROGRAM OR THIS AGREEMENT (INCLUDING, WITHOUT LIMITATION, ITS WARRANTY AND INDEMNIFICATION PROVISIONS) EXCEED THE AMOUNTS PAID BY CUSTOMER TO VENDOR UNDER THIS AGREEMENT.

## **13. INDEMNIFICATION**

- 13.1. Vendor agrees to indemnify and hold Customer harmless against any loss, damage, expense, or cost, including reasonable attorneys' fees, arising out of any claim, demand, or suit asserting that the Program infringes or violates any copyright, patent, trade secret, trademark, or proprietary right existing under the laws of the United States or Canada or any state or territory thereof ("Claim"), subject to the overall limitation of damages hereunder.
- 13.2. The indemnification obligation in this section shall be effective only if (1) at the time of the alleged infringement, Customer was using either a purchased or currently in use version of the Program listed in Vendor's then current Supported Products List, (2) Customer gave prompt notice of the Claim and permitted Vendor to defend, and (3) Customer has reasonably cooperated in the defense of the claim. Vendor shall have no obligation to Customer to defend or satisfy any claims made against Customer that arise from the use, sale, licensing or other disposition of the Program by Customer other than as permitted by this Agreement or from the Customer's modification of the Program.
- 13.3. To reduce or mitigate damages, Vendor may at its own expense procure the right for Customer to continue licensing and distributing the Program or replace it with a non-infringing product. If Vendor supplies a non-infringing Release of the Program, Customer shall promptly install it on its computer system, and terminate use of prior infringing Releases of the Program. If, in its judgment,

Vendor deems that, due to the Claim or for any other reason, it is not in Vendor's practical interest to continue distributing an infringing Program, Vendor may require customer, upon thirty (30) days written notice, to terminate use of an infringing Program. THE FOREGOING IS CUSTOMER'S EXCLUSIVE REMEDY AGAINST ANY AND ALL PARTIES FOR ANY CLAIM ARISING FROM OR RELATING TO LOSS OF USE OF THE PROGRAM OR TO ANY OTHER DAMAGE ARISING AS A RESULT OF THIS PROVISION.

#### **14. SOFTWARE UPDATES**

- 14.1. Software Updates for the Program shall consist of the services set forth on Schedule "B" hereto.
- 14.2. The Software Updates Fee shall be sent to Vendor at the address set forth above, or such other address as Vendor may designate. Information as to the amount of the currently applicable Software Updates Fee for the Program is available from the Vendor on request.
- 14.3. Customer agrees that in order to receive Software Updates for a Program, Customer must use a currently supported version of the Program, as listed in Vendor's Supported Products List, which is available from Vendor. Customer acknowledges and agrees that it may be necessary to update its computer hardware and/or operating system to achieve compatibility with the currently supported version. Customer acknowledges and agrees that if it has allowed its subscription to Software Updates to lapse, and if its version of the Program is not currently supported, it may have to obtain a current version to obtain Software Updates, as is discussed below.
- 14.4. If Customer is not using a currently supported version of a Program as listed in Vendor's Supported Products List, Vendor may suspend provision of Software Updates for the Program until Customer cures this condition without refunding the Software Updates Fee.
- 14.5. Customer may terminate right to Software Updates by written notice to Vendor prior to any Anniversary of the Delivery Date. However, Vendor shall not be required to refund any Software Updates Fee.
- 14.6. If right to Software Updates has been terminated or has lapsed, Customer may reinstate its subscription to Software Updates upon payment of (1) the annual Software Updates Fee in effect at the time, plus (2) a reinstatement fee equal to the aggregate of the Software Updates Fees for the periods of time since Software Updates had terminated or lapsed. Upon reinstatement of right to Software Updates, Customer will be upgraded to the current version of the Program.

#### **15. TERM AND TERMINATION**

- 15.1. The term of this Agreement shall commence upon the Effective Date and shall continue in effect until terminated as provided for herein.
- 15.2. It is agreed that either party may terminate this Agreement immediately upon written notice to the other party in the event that such other party (a) becomes

insolvent or makes an assignment for the benefit of creditors; (b) files or has filed against it any petition under any applicable bankruptcy, insolvency, reorganization or similar debtor relief law which is not discharged within thirty (30) days of said filing, or (c) requests or suffers the appointment of a trustee or receiver, or the entry of an attachment or execution as to a substantial part of its business or assets.

- 15.3. Vendor may terminate this Agreement in the event Customer (a) fails to make when due any License Fee payment or other payment required under this Agreement; (b) commits a material breach of any of its obligations concerning scope of use or the protection of the Program, Documentation, intellectual property of Vendor, and Confidential Information; or (c) materially breaches any of its other obligations under any provision of this Agreement, which breach is not remedied within thirty (30) days after notice thereof by Vendor to Customer, or, in its discretion, upon the occurrence of any of the foregoing conditions, Vendor may terminate the Agreement as to any or all Programs covered by this Agreement.

## **16. RIGHTS UPON TERMINATION**

- 16.1. Upon termination of this Agreement by Customer prior to Acceptance, Customer's license to use the Program shall terminate, and Customer shall immediately turn over to Vendor all copies of the Program and Documentation, and any other Confidential Information relating to the Program and Documentation and shall remove and erase completely any copies of the Program installed or recorded on any hard disk or other storage medium. Customer shall promptly certify to Vendor in writing that it has complied with this requirement.
- 16.2. Upon termination of this Agreement by Customer for reasons pursuant to Article 16.2 hereabove, the Grant of License to Customer shall become perpetual.
- 16.3. Upon termination of this Agreement, Customer shall pay to Vendor all fees due through the effective date of such termination. Unless otherwise specified herein or otherwise agreed in writing, all fees collected or accrued prior to the date of termination shall be retained by Vendor without any pro rata refund to Customer.
- 16.4. The termination of this Agreement shall not extinguish any rights or obligations of the parties relating to protection of Confidential Information.

## **17. AUDIT**

- 17.1. During the term of this Agreement and for a term of one year after termination, upon reasonable notice, Vendor may enter the premises of Customer and perform reasonable audit and inspection procedures to confirm that Customer is in compliance with the terms and conditions of the Agreement, including, but not limited to, provisions relating to scope of use of the Program, protection of Confidential Information, and termination. Customer shall cooperate in any such inquiry.

**18. ASSIGNMENT**

- 18.1. Customer may not sell, pledge, assign, sublicense, or otherwise transfer or share its rights or delegate its obligations under this Agreement without the prior written consent of Vendor, which Vendor may withhold in its sole discretion. Any attempted sale, pledge, assignment, sublicense or other transfer in violation hereof shall be void and of no force or effect. Vendor may assign its rights and delegate its duties hereunder at any time without the consent of Customer.
- 18.2. Vendor may assign all of its rights granted in the Agreement as part of the sale or transfer to an acquiring entity of substantially all the assets of that party's business operations in which the Program is employed. Vendor agrees to provide Customer with written notice of such sale or transfer as soon as reasonably possible. Otherwise, either party may assign some or all of its rights and/or obligations under this Agreement only with the express prior written consent of the other party, and that consent may be granted or withheld in the other party's sole discretion. Any purported assignment, except as provided for in this paragraph, shall be null and void and a material breach of this Agreement.
- 18.3. The Customer's assignment of this Agreement shall not discharge Customer from its obligations, but shall make Customer's assignee an additional obligor under this Agreement. Any assignment by Customer will be invalid unless the assignee agrees in a writing delivered to Vendor to be bound by and perform all obligations and terms of this Agreement.

**19. GENERAL PROVISIONS**

- 19.1. **Applicable Law.** This Agreement shall be construed pursuant to substantive law of the Province of Alberta.
- 19.2. **Taxes.** Customer shall pay, in addition to the other amounts payable under this Agreement, all local, state, and federal excise, sales, use, personal property, gross receipts and similar taxes (excluding taxes imposed on or measured by Vendor's net income) levied or imposed in the United States of America by reason of the transactions under this Agreement. Customer shall, upon demand, pay to Vendor an amount equal to any such tax(es) actually paid or required to be collected or paid by Vendor. Vendor shall pay all local, provincial and federal excise, sales, use, personal property, gross receipts and similar taxes levied and imposed in Canada, and shall also pay taxes imposed on or measured by Vendor's net income levied or imposed in the United States of America by reason of the transactions under this Agreement.
- 19.3. **Public Reference.** Vendor shall not make any public use of Customer name other than usual commercial customer references without prior written approval of Customer.
- 19.4. **Modification.** This Agreement may not be modified or amended except by a writing which is signed by authorized representatives of each of the parties. No purported modification or amendment shall be binding until approved in writing by an authorized representative of Vendor at Vendor's head office.

- 19.5. **No Waiver.** The failure of either party to exercise any right or the waiver by either party of any breach, shall not prevent a subsequent exercise of such right or be deemed a waiver of any subsequent breach of the same of any other term of the Agreement.
- 19.6. **Notice.** Any notice required or permitted to be sent hereunder shall be in writing and shall be sent in a manner requiring a signed receipt, such as Federal Express, courier delivery, or if mailed, registered or certified mail, return receipt requested. Notice is effective upon receipt.
- 19.7. **Force Majeure.** Neither party shall be deemed in default of this Agreement to the extent that performance of their obligations or attempts to cure any breach are delayed or prevented by reason of any act of God, fire, natural disaster, accident, act of government, shortages of materials or supplies or any other cause beyond the control of such party ("Force Majeure") provided that such party gives the other party written notice thereof promptly and, in any event, within fifteen (15) days of discovery thereof and uses its best efforts to cure the delay. In the event of such Force Majeure, the time for performance or cure shall be extended for a period equal to the duration of the Force Majeure but not in excess of three (3) months.
- 19.8. **Entire Agreement.** This Agreement constitutes the sole and entire agreement of the parties with respect to the subject matter hereof and supersedes any prior oral or written promises or agreements. There are no promises, covenants or undertakings other than those expressly set forth in this Agreement.
- 19.9. **Equitable Remedies.** The parties recognize that money damages is not be an adequate remedy for any breach or threatened breach of any obligation hereunder by Customer involving intellectual property, Confidential Information or use of the Program beyond the scope of the license granted by this Agreement. The parties therefore agree that in addition to any other remedies available hereunder, by law or otherwise, Vendor [and any third party from whom vendor has licensed software or technology] shall be entitled to an injunction against any such continued breach by Customer of such obligations.
- 19.10. **Late Fees, Costs and Attorneys Fees.** A late payment charge of 1.5% per month, compounded monthly, shall apply to any payment due from Customer that is in arrears for a period exceeding thirty (30) days. In any legal action or proceeding brought on account of a breach, the prevailing party shall recover from the other party the cost of litigation, including reasonable lawyers' fees.
- 19.11. **Exclusive Jurisdiction and Venue.** Any cause or action arising out of or related to this Agreement may only be brought in the courts of applicable jurisdiction in Province of Alberta, and the parties hereby submit to the jurisdiction and venue of such courts.

So agreed between the parties signing below.

*The  
Corporation*

*Esys*

\_\_\_\_\_

BY:

\_\_\_\_\_

NAME

Robert A. Park

\_\_\_\_\_

TITLE:

Chief Financial Officer

\_\_\_\_\_

Date:

\_\_\_\_\_

*Customer*

\_\_\_\_\_

BY:

\_\_\_\_\_

NAME

\_\_\_\_\_

TITLE:

\_\_\_\_\_

Date:

\_\_\_\_\_

**SCHEDULE A: PROGRAM DESCRIPTION AND PRICE SCHEDULE****1. PRICE SCHEDULE**

1.1. The License Fee for the Program shall be:

Description	Price (US \$)
Simeon mail clients (for entire campus) including support for: <ul style="list-style-type: none"> <li>• Macintosh</li> <li>• Motif</li> <li>• Windows 3.1 (16 bit)</li> <li>• Windows 95 (32 bit)</li> <li>• Windows NT (32 bit)</li> <li>• Lightweight Directory Access Protocol (LDAP)</li> </ul> 3 Simeon mail servers each including: <ul style="list-style-type: none"> <li>• IMAP4 daemon</li> <li>• IMSP daemon</li> <li>• POP3 daemon</li> <li>• MTA (SMTP daemon)</li> <li>• Miscellaneous Proxies</li> </ul>	135,000
Annual technical support and maintenance at @ 15% of license fees including: <ul style="list-style-type: none"> <li>• 1-800 telephone service</li> <li>• Same day response time</li> <li>• Software updates</li> <li>• Support is available Monday through Friday, 7am to 6 pm MST</li> </ul>	20,250
On-site installation (5 days @ \$1,200 per day) including: <ul style="list-style-type: none"> <li>• Installation of Simeon Mail Server</li> <li>• Configuration of Mail server</li> <li>• User account creation</li> <li>• Orient system administrators on system management</li> <li>• Consult on campus-wide distribution issues of Simeon mail client</li> </ul>	6,000
Simeon Mail Training including: <ul style="list-style-type: none"> <li>• 2 User Help Desk sessions @ \$750 each</li> <li>• 1 Train the Trainer session @ \$2500</li> <li>• Right to copy training guide</li> </ul>	4,000
<b>Sub Total</b>	<b>165,250</b>
<b>Less Credit on invoice 10410</b>	<b>(23,875)</b>
<b>Total</b>	<b>141,375</b>

**SCHEDULE B: SOFTWARE UPDATES AND TECHNICAL SUPPORT****2. SERVICES PROVIDED**

Software Updates and Technical Support shall consist of the following services:

- 2.1. Vendor shall assist customer in diagnosing errors and malfunctions which occur when the Program is used by Customer. Vendor is not responsible for errors or malfunctions caused by any hardware or any third party operating system. Vendor shall attempt to assist Customer in using the Program in a way that can avoid diagnosed errors, malfunctions and defects.
- 2.2. Vendor shall provide Updates services to Customer to attempt to keep the Program compatible with the then current version of the operating system of the computer hardware.
- 2.3. Vendor may provide Customer with new Releases for the Program licensed to Customer. Releases may include new features and functions added to the Program and/or may provide corrections to errors or malfunctions. The timing and content of Releases will be at the sole discretion of Vendor.
- 2.4. Vendor will effect delivery of each Release to Customer. All deliveries and shipments of Releases will be at Vendor's expense. The Customer will install each Release.
- 2.5. All Services Provided shall be performed during the Service Hours unless other arrangements are mutually agreed to by the parties in writing. "Service Hours" shall mean the hours of on-call service coverage under this Agreement which are from 8:30 a.m. to 5:30 p.m. MST during normal working business days.
- 2.6. Vendor will provide reasonable technical support by telephone concerning use of the Programs and diagnosis of problems or errors.
- 2.7. Vendor shall provide Customer with telephone number(s) and/or other contact information in order to allow Customer to accomplish the required notification and request information.
- 2.8. Software Updates does not entitle Customer to Software Modules available from Vendor which are designed to add additional applications or to cover business functions that are not included in the Program currently licensed to Customer. Such Software Modules may be licensed from Vendor. If such additional Software Modules are licensed by Customer, Releases relating to them will be available as part of Software Updates under this Agreement upon current payment of the then current Software Updates Fees for such Modules.

**3. CONDITIONS OF SOFTWARE UPDATES**

The following terms and conditions shall apply at all times while Software Updates are in effect:

- 3.1. Customer shall designate in writing an individual who shall be the System Manager. The System Manager must have a working knowledge of the Program and the system hardware and will be responsible for the computer system backups, user access, and for recording and reporting errors and malfunctions.

Customer shall designate in writing no more than 5 individuals who are authorized to deal directly with the Vendor for the purpose of reporting errors and malfunctions or to receive advice about or directions on how to use the Program. Customer shall designate in writing any individual authorized to incur additional expense for services of the Vendor not included in the Software Updates.