

# S-PLUS® SOFTWARE LICENSE

## TERMS AND CONDITIONS

### 1. Definitions.

The following definitions apply to these terms and the Packing List:

*Authorized User:* An employee, authorized agent or contractor of Licensee who uses the Software solely in connection with the business activities of the Licensee and who is aware of these terms and the terms of the Packing List and who is bound by such terms. Any such agent or contractor must agree in writing to be bound by such terms, for the benefit of Insightful.

*Client:* A computing unit or terminal (including but not limited to telnet/rlogin, X-windows, Terminal Services; thick client such as the Java GUI; and the S-PLUS® server console) used by an Authorized User to connect to a Server via Network connections.

*Desktop:* A self-contained, micro-computing unit, owned or leased by Licensee, containing no more than two CPUs.

*Documentation:* The standard Insightful-supplied (i) user and system administrator guides and manuals and/or (ii) standard on line help for use by Authorized Users in connection with the Software.

*Educational use:* The Software and Documentation is limited to educational purposes only (including academic research activities); the software may not be used in a commercial, governmental, or (non-educational) non-profit setting and may be used solely for personal or internal purposes or for nonremunerated demonstrations (but not for delivery or sale) in connection with personal or internal purposes. Insightful shall determine in its sole discretion whether use of the Software constitutes Educational Use.

*Named User:* A single Authorized User (as identified by a unique user identifier) who uses the Software solely from one Client.

*Network:* Multiple, interactive Desktops connected to a file-server or database server, in which two or more users have common access to the Software or data.

*Session:* An instantiation of the Software in the memory of a computing unit authorized under this Agreement to run the Software.

*Software:* The series of computer software programs listed on the Packing List, including any Updates thereto, to the extent you are entitled to such Updates as agreed by Insightful.

*University:* An entity qualifying as an academic institution in Insightful's sole discretion.

*Updates:* Periodically released versions of the Software and Documentation that include updates, modifications, and corrections to the Software and Documentation.

### 2. License Grant; Restrictions.

(a) **License types.** The description of each product shown on the Packing List identifies the type of license governing the use of the product. License types are identified as follows:

*Single User License (SU):* A license to install, and for one Authorized User at a time to use, the Software on one Desktop for the exclusive use of one Authorized User at any one time.

*Concurrent User License (CU):* A license to install and for Authorized Users (Concurrent Users) to simultaneously run the Software on the number of Desktops specified in the Packing List, such installation and use to be limited to the geographic area contained within one Time Zone in one country as specified in the Packing List.

*Concurrent Session License (SESS) or Production Session License (PSESS):* A license to install the Software on a Server and for any number of Authorized Users to access the Software via a Client, limited to the number of Sessions on the Server specified in the Packing List.

*Client/Server License (CS):* A license to install the Software on one or more computer(s) ("Server") containing the number of CPUs specified in the Packing List (or fewer) and for the number of Named Users specified in the Packing List to access and use the Software via Network connections.

*Production Server License (PS):* A license to install the Software on one or more Server(s), limited to the aggregate number of CPUs specified in the Packing List, and for an unlimited number of Clients to access and use the Software via Network connections.

*Subscription License (-S):* A license of one or more of the licensed types described in this section, that further limits the installation and use of the Software to the time period ("Subscription Period") commencing on the date specified in the Packing List for the Software, and that allows for optional annual renewals for new Subscription Periods by payment of Insightful's then-current renewal fee prior to the anniversary date of the commencement of the prior Subscription Period. Unless provided elsewhere in these terms or in the Packing List, Subscription Periods are twelve (12) months in duration.

*Academic Professor License (ACA SU):* A Single User License limited to Educational Use.

*Academic Student License (ACA STU):* A Single User License, limited to Educational Use, with a warranty period of 90 days. No Maintenance or Product Support is available for an Academic Student License.

*Academic Lab License-Desktop (ACA LAB -S):* Subscription Single User Licenses in the amount specified in the Packing List, the installation of the Software being limited to University-owned Desktops.

*Academic Lab License-Server (ACA CS -S):* A Subscription Client/Server License 1) to install the

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Software on one University-owned Server containing the number of CPUs specified in the Packing List and 2) for the number of Named Users specified in the Packing List to use the Software.

*Academic Site License (ACA SITE -S):* A Subscription License for a University to install the Software on any combination of Clients or Servers on a specific University campus, and for the number of Named Users (faculty, staff, or students combined) specified on the Packing List to use the Software for Educational Use. Licensee may also distribute Single User copies of the Software to affiliated Authorized Users for their own Educational Use during the Subscription Period, provided this license agreement accompanies each distributed copy, and provided Licensee notifies all such Authorized Users upon expiration of the Subscription Period. Each such Authorized User's right to use the Software expires with the earlier of a) the expiration of the Subscription Period or b) the date of the Authorized User's matriculation or other related dissociation with the University. Licensee may not distribute the Software to any person not directly affiliated with the University. Licensee further acknowledges that individual Authorized Users shall not receive product support services under this License. Licensee may designate up to four (4) individuals as Technical Support Contacts, who may call Product Support as needed to help the University provide technical support to Authorized Users.

(b) **License Grant.** Except as otherwise provided in this Agreement, Insightful grants to Licensee, personal, non-exclusive and non-transferable licenses to the Software in the type and of the quantity as specified in the Packing List to: (i) install and use the Software in support of the business activities of Licensee; and (ii) use the Documentation in conjunction with the use of the Software. This license shall be a license to use the machine-readable object code only, excluding any source code. Licensee shall not attempt to disassemble, decompile or reverse-engineer the Software.

(c) **License Term.** Except for Subscription Licenses (which shall expire at the end of the last Subscription Period), or as otherwise limited by agreement, Licenses are granted in perpetuity, subject to revocation upon termination of this Agreement by Insightful for Licensee default in accordance with Section 9.

(d) **Sessions.** Except as permitted under a Production Server License or Production Session License, no license is granted for any Authorized User to initiate a Session by any means other than direct human interaction between the licensed Authorized User and the Software. This includes, but is not limited to, initiating a Session via a Web page or other Web-based interface; scheduling more than one batch-mode Session to be launched with an automated scheduler such as "cron"; and initiation of Sessions by remote third-party client/server applications, provided however, that an Authorized User of a Single User

License or Concurrent User License may launch a single Session using terminal services in accordance with 2(a) above.

### **3. Installation and Additional Services.**

(a) Licensee is responsible for payment for the Software in accordance with the Packing List.

(b) Licensee is responsible for the purchase or licensing of all additional equipment and software necessary to install and properly operate the Software as detailed in the then-current Documentation. Future versions of the Software and new Insightful products may require additional equipment and/or software, as well as updated versions of the additional equipment and software. Purchase or licensing of these items, if required, is solely the responsibility of Licensee at Licensee's expense.

### **4. Updates and Supplements.**

(a) Subject to clause 4(d) below, if Licensee is a participant in the Insightful Maintenance & Product Support Program, as described in clause 11, at the release date of a commercially released Update, Licensee will be entitled to receive that Update. Insightful shall determine, in its sole discretion, whether a given commercial release constitutes an Update.

(b) Use of any Update with or in place of the Software is subject to the terms of this Agreement, except as provided otherwise pursuant to clause 4(d). Any portion of the Software replaced by an Update (except archival copies) shall be destroyed or returned by Licensee.

(c) From time to time, Insightful may make available computer programs which are compatible with and supplement the Software, but which (i) contain material new features not included in Updates, (ii) may be priced and offered separately as optional additions to the Software and (iii) are not made generally available to similarly situated customers without separate charges ("Supplements"). Insightful shall determine, at its sole discretion, what constitutes a Supplement.

(d) UPDATES AND SUPPLEMENTS MAY INCLUDE LICENSE AND MAINTENANCE TERMS DIFFERENT FROM OR IN ADDITION TO THOSE OF THIS AGREEMENT.

### **5. Ownership; Copies.**

(a) Except for the license rights expressly granted to Licensee hereunder, all right, title and interest in and to the Software and Documentation, and all copyrights, patents, trademarks, service marks or other intellectual property or proprietary rights relating thereto, and the media on which same are furnished to Licensee, belong exclusively to Insightful or its suppliers.

(b) Licensee is prohibited from distributing, transferring possession of, or otherwise making the Software or Documentation or any portion thereof available to any person other than Authorized Users under the terms of this Agreement.

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(c) If Licensee wishes to create any interface to the Software that increases the number of users able to use the Software beyond the scope of the licenses specified in the Packing List and paid for by Licensee, Licensee must purchase additional licenses from Insightful at then-current pricing levels.

### **6. Warranties.**

(a) Insightful warrants that it has the right to enter this Agreement and to grant the rights and licenses herein.

(b) Insightful warrants that the media on which the Software is furnished will be free from any material defect in workmanship and material.

(c) Insightful does not warrant that the functions contained in the Software will meet the requirements of Licensee or Authorized Users or that the operation of the Software will be uninterrupted or error-free. Insightful is not responsible for problems caused by changes in, or modifications to, the operating characteristics of any computer hardware or operating system for which the Software is procured, nor is Insightful responsible for problems which result from the use of the Software in conjunction with software of third parties or with hardware which is incompatible with the operating system for which the Software was developed, as stated in the Documentation.

(d) No one other than an authorized officer of Insightful may grant any additional warranties, and such additional warranties, if any, must be specifically stated in a signed writing.

### **7. WARRANTY DISCLAIMER.**

TO THE MAXIMUM EXTENT PERMISSIBLE UNDER APPLICABLE LAW, AND EXCEPT AS EXPRESSLY STATED IN SECTION 6 OF THIS AGREEMENT, INSIGHTFUL, ON BEHALF OF ITSELF AND ITS SUPPLIERS, EXPRESSLY DISCLAIMS ALL WARRANTIES AND INDEMNITIES, WHETHER EXPRESS, IMPLIED OR BY OPERATION OF LAW, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT.

### **8. Limitation of Remedies.**

(a) The entire liability of Insightful and its suppliers, and Licensee's SOLE AND EXCLUSIVE REMEDY for the breach of the warranty shall be the following: Insightful or its representatives shall, at their option, use commercially reasonable efforts to provide maintenance modifications or fixes with respect to any demonstrated and reproducible error in the Software, replace the Software, or refund to Licensee the amount it paid in license fees for the Software which gave rise to such claim. Insightful, however, shall not be obligated to correct, cure or otherwise remedy any error (i) if Licensee has made or permitted any modification of the Software or has misused or damaged the Software, or if Licensee has failed to notify Insightful of the existence and nature of such error promptly upon its discovery; or (ii) if the

Software has been used in an operating environment not compatible with the specifications in the Documentation.

(b) TO THE MAXIMUM EXTENT PERMISSIBLE UNDER APPLICABLE LAW, INSIGHTFUL, ON BEHALF OF ITSELF AND ITS SUPPLIERS, DISCLAIMS ANY AND ALL LIABILITY FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING LOSS OF PROFITS) ARISING OUT OF THIS AGREEMENT OR WITH RESPECT TO THE INSTALLATION, IMPLEMENTATION, CUSTOMIZATION, USE, OPERATION, TRAINING OR SUPPORT OF THE SOFTWARE, EVEN IF INSIGHTFUL OR ITS SUPPLIERS HAVE BEEN APPRISED OF THE POSSIBILITY OF SUCH DAMAGES.

(c) To the maximum extent permissible under applicable law, and except as provided in clause 8(a) of this Agreement, Licensee agrees that any liability on the part of Insightful and its suppliers, arising out of this Agreement or with respect to the installation, implementation, customization, use, operation or support of the Software based upon any legal theory, including but not limited to breach of warranty, breach of contract, negligence, other tort claims or strict liability shall not exceed the amount paid by Licensee in license fees for the Software which gave rise to such claim.

### **9. Term, Default and Termination.**

(a) In the event either party defaults in any material obligation in this Agreement, the other party shall give written notice of such default, and, if the party in default has not cured the default within thirty (30) days of the notice (or as soon thereafter as commercially practicable if the default cannot be cured within thirty (30) days), the other party shall have the right to terminate this Agreement.

(b) Upon termination of this Agreement, regardless of the cause, or upon lapse of a Subscription Period without renewal under a Subscription License, the license granted under this Agreement is immediately revoked. Within ten (10) business days after the termination of this Agreement, Licensee shall return to Insightful all copies of the Software and Documentation in Licensee's possession. In the event of termination as a result of Licensee's failure to comply with any of its obligations under this Agreement, Licensee shall continue to be obligated for any payments due as of the date of termination.

### **10. Miscellaneous.**

(a) Each party acknowledges that it has read and understands this Agreement, including the Packing List, and further agrees that it is the complete and exclusive statement of the agreement between the parties which supersedes and merges all prior proposals, understandings, and all other agreements, oral and written, between the parties relating to the subject matter of this Agreement. This Agreement may not be modified or altered except by written instrument duly executed by both parties. The terms

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and conditions of any purchase order, acceptance, or other instrument issued by Licensee in connection with this Agreement which are in addition to or inconsistent with the terms and conditions of this Agreement are hereby objected to and shall not be binding on Insightful.

(b) Any notice or other communication required or permitted in this Agreement shall be in writing and shall be deemed to have been duly given on the day of service if served personally or by facsimile transmission with confirmation, or three (3) days after mailing if mailed by registered or certified mail, postage prepaid, and addressed to the respective parties at their respective corporate headquarters.

(c) This Agreement and performance under this Agreement shall be governed by the laws of the State of Washington.

(d) If any provision of this Agreement is invalid under any applicable statute or rule of law, it shall be enforced to the maximum extent possible and otherwise is deemed omitted. The remainder of the Agreement shall be valid and enforceable to the maximum extent possible.

(e) Licensee may not assign or sub-license, without the prior written consent of Insightful, its rights, duties, or obligations under this Agreement to any person or entity, in whole or in part, provided, however, that this Agreement may be assigned by Licensee without the consent of Insightful to a corporate successor as part of a corporate reorganization or merger or to a purchaser of all or substantially all of the assets of Licensee, provided that (i) neither the successor or assignee nor its affiliates is engaged in any business or business preparations in direct or indirect competition with Insightful, (ii) Licensee and the successor or assignee are current in all license and maintenance fee payments due to Insightful, and (iii) the successor or assignee agrees in writing to be bound by and subject to all of the terms and provisions of this Agreement.

(f) The waiver or failure of either party to exercise in any respect any right provided for in this Agreement in any instance or instances shall not be deemed a waiver of such right in any other instance nor a waiver of any further right under this Agreement.

(g) Both parties agree to comply with all export and re-export restrictions and regulations (Export Restrictions) imposed by the government of the United States, or corresponding or similar laws of other countries where Licensee is using the Software.

(h) Nothing in this Agreement shall be construed to create an agency, joint venture, partnership, or other relationship between the parties. No agent, employee, or representative of either party has the authority to bind the other party in any manner. The parties are independent contractors with respect to each other under this Agreement.

(i) Neither party shall be responsible for failure to perform in a timely manner under this Agreement when its failure results from any of the following

causes; Acts of God or public enemies, terrorism, civil war, insurrection or riot, fire, flood, explosion, earthquake or serious accident, strike, labor trouble or work interruption or any cause beyond its reasonable control whether similar or dissimilar to the foregoing.

(j) On Insightful's request, no more frequently than annually, Licensee shall furnish Insightful with a signed certification (i) verifying that the Software is being used pursuant to the terms of this Agreement, including any user limitations and (ii) listing the locations where the Software is stored and/or being used.

(k) The Software and documentation are provided with restricted rights. Use, duplication, or disclosure by the Government is subject to restrictions as set forth in subparagraph (c)(1)(ii) of the Rights in Technical Data and Computer Software clause at DFARS 252.227-7013 or subparagraphs (c)(1) and (2) of the Commercial Computer Software--Restricted Rights at 48 CFR 52.227-19, as applicable. Manufacturer is Insightful Corporation, 1700 Westlake Ave. N., Fifth Floor, Seattle WA 98109.

(m) The terms of Sections 1, 5, 7, 8 and 10 and the Packing List shall survive termination of this Agreement.

### **11. Maintenance and Product Support**

(a) During the 12-month period commencing on the date specified in the Packing List, and provided that the license for the Software remains in effect, Insightful will furnish Maintenance and Product Support ("MPS") as described below without additional charge. MPS for additional 12-month terms (each, an "MPS Term") shall be at Insightful's then current maintenance rates, which shall be payable on or before the start of the next MPS Term unless Licensee notifies Insightful in writing prior to such time that Licensee no longer desires to participate in the Insightful Maintenance & Product Support Program. In no event shall Insightful be responsible for providing maintenance services for a period during which maintenance coverage lapsed due to such election or by Licensee's failure to pay such current maintenance rates. All support services provided under this Agreement shall be conducted in the English language.

(b) During the term of the support program, Insightful shall make available technical staff to assist with questions about the Software and to assist Licensee in solving problems with the Software. Insightful shall provide telephone support during its normal business hours (6:00 AM to 5:00 PM Pacific time in North America or 9:00 AM to 5:00 PM Central European Time in Europe), Monday through Friday, excluding public holidays. Under the Product Support Program, Insightful agrees to provide a response, but not necessarily a solution, to Licensee within three (3) business days, as defined in this Agreement, upon notification by Licensee to Insightful (via the telephone, email or the Internet) of problems or defects with the Software. Insightful's Technical

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Support Policy is available at <http://www.insightful.com/support/policyservices.asp>.

(c) Insightful shall use reasonable efforts to contact and provide Licensee with any Updates to the Software and Documentation released during the MPS term. Licensee shall provide prompt written notice to Insightful of any change in the designated Licensee product support contact during the MPS term. Insightful shall have no obligation to furnish Updates to Licensee if Insightful is unable to contact Licensee's MPS contact.

(d) Support is available only for the current release of the Software and all other releases whose version number begins with either the same number, or the previous number. For example, if the current release is Version 7.2, Insightful will support only those versions numbered between 6.0 and the current release. If Licensee desires support for earlier versions of the Software, such support will be treated as a consulting project, and Licensee will be billed according to Insightful's then current consulting rates.

(e) Insightful will use commercially reasonable efforts to assist Licensee in its attempts to remedy any problems with the Software resulting from any customizations, modifications, or extensions to the Software, regardless of by who such customizations, modifications, or extensions were performed. Insightful will treat such problems as consulting projects and shall bill for its services as requested by Licensee at Insightful's then current professional services rates.

(f) If Licensee elects to resume maintenance on perpetual licenses after a lapse of MPS coverage, Licensee shall pay Insightful for the period of time in which maintenance coverage lapsed. Licensee's payment for the lapsed period shall be the then current annual maintenance fee, plus 10% late fee for each lapsed month. If the maintenance contract has lapsed for longer than 6 months, then the Licensee must purchase a new license in order to receive the current version of the software, and another 12 months of MPS.

(g) Any revisions or changes in the terms of the maintenance and product support program shall occur only at the end of Licensee's then current annual MPS Term, and Insightful shall give Licensee no less than thirty (30) days written notice prior to such change.