

End User License Agreement for Manuscript

Fog Creek Software, Inc.'s ("we", "us", or "our") enterprise software helps you make better software - faster - by enabling collaborative task management for teams of all sizes. Before you download and/or use our Manuscript software, we need you to agree to a special set of terms. Welcome to the Software License Agreement (the "Agreement").

DEFINITIONS

Here are some definitions we use in this Agreement. If you see a capitalized word that isn't listed here, it will be defined somewhere in the Agreement.

The "Agreement Effective Date" is the earlier of the date that you either click "I Accept" to the terms and conditions of this Agreement, or that you first place an order for Software or Services.


"Fees" means both: (i) the fees you're required to pay us to use the Software during the applicable License Term, as such fees are reflected on each applicable Order Form; and (ii) the fees you're required to pay us for any Services you engage us to perform, as such fees are reflected on each applicable Statement of Work.

"License Term" means one (1) year from the applicable Order Effective Date.

The "Order Effective Date" is the effective date of each Order Form.

The "Order Form" is a written or electronic form that we'll give you to order Software (or that we'll use to order Software on your behalf, once we've gotten your authorization). Upon execution by the parties (or, in the case of an electronic orders, confirmation and placement of the order), each Order Form will be subject to the terms and conditions of this Agreement.

"Seats" mean the number of User accounts for the Software that you're authorized to create. The number of Seats is specified in the applicable Order Form. Only one User can use a Seat at a time. Multiple Users aren't allowed to use the same Seat.

 "Services" means training, consulting, or implementation services that we provide to you pursuant to a mutually executed Statement of Work. Services do not include support.

"Software" means the object-code/obfuscated source code version of our proprietary enterprise software application referred to herein means the Fog Creek Software "Manuscript", a server based software product. Software includes any applicable Documentation, as well as any Updates to the Software that we provide you or that you can access under this Agreement.

"Statement of Work" or "SOW" means a mutually executed statement of work detailing the Services we'll perform for you, their price, and your related obligations (if any).

An "Update" is a Software release that we make generally available to our customers, along with any corresponding changes to Documentation. An Update may be an error correction or bug fix, or it may be an enhancement, new feature, or new functionality.

"User" is a single person or machine account that initiates the execution of the Software and/or interacts with or directs the Software in the performance of its functions. The number of Users shouldn't exceed the number of Seats you've licensed from us.

LICENSE GRANT

"You" or "your" as used herein means the person or company who is being licensed to use the Software, as defined below.


Subject to your compliance with the terms of this Agreement (including, among other things, paying the Fees you owe us), we hereby grant you a non-exclusive, non-transferable, worldwide, royalty-free, revocable, limited-term license to execute and use a single instance of the Software on any single computer, provided the Software is in use on only one computer at any time during the applicable License Term, in accordance with the Documentation, and only for the number of Seats that you've paid for. The Software is "in use" on a computer when it is loaded into temporary memory (RAM) or installed into the permanent memory of a computer--for example, a hard disk, or other storage device. Your agents and contractors can use the Software too, so long as they're using it on your behalf, and provided that you agree to be fully responsible for their behavior under this Agreement.

TITLE

The Documentation as referred to herein shall mean the written materials that you may receive in connection with the Software. We will remain the sole and exclusive owners of all right, title and interest in and to the Software and the Documentation.

SEATS

Remember, only one User can use a Seat at a time. Multiple Users aren't allowed to use the same Seat, and only one human being can be associated with a particular User account. If you want to swap out, delete, or suspend a User, you can do that, and then assign a new User to the open Seat. If you find that you need more Seats, that's great – we're here to help! Just submit a new request through our website or via our sales team, and pay for the additional Seats (a new Order Form will be generated). If and when you add additional Seats to your subscription, you'll pay Fees for those seats at the then-current price, prorated

 for the balance of the applicable License Term. When the time comes to renew your Seats for another year-long License Term, we'll invoice you for all of your Seats at once, at the then-current price (we reserve the right to change our prices at any time, but the new prices won't affect you until it's time to renew your license for another year). You agree that any orders that you make (or that you authorize us to make on your behalf) for additional Seats during the term of this Agreement will be governed by this Agreement.

VERIFICATION

From time to time, we may have reason to make sure that you're not using extra Seats without paying for them. You agree to cooperate with us to achieve that goal. To help us verify the number of Seats you're actually using, you agree to promptly give us any usage files and reports that your instance of the Software generates, if and when we ask for them. We might also (or instead) ask one of your officers to certify the number of Seats that you're actually using. You agree to provide such a certification if we ask for it. If we determine that you're using more Seats than you've paid for, in addition to any other remedies we might have at law or in equity, you agree to pay us the then-current Fees for the additional Seats you're using, starting from the date you began using each Seat.

ARCHIVAL OR BACKUP COPIES

You may copy the Software for back-up and archival purposes only, provided however, that at all times herein, the original and each copy is kept in your possession and that your installation and use of the Software does not exceed that allowed in the "License Grant" section above.

SUPPORT

Support Times. Provided that you've paid us the Fees you owe us, we'll provide you with technical support for the Software eight (8) hours per day, five (5) days per week, excluding weekends and national U.S. holidays, from 9 AM to 5 PM Eastern Time (UTC-5). We currently offer support via email (write to us at customer-service@fogcreek.com) or web-based ticketing (through contact.fogcreek.com), or via a scheduled phone call to 1-866-FOG-CREEK (866-364-2733) or +1 (212) 279-2335. You can contact our amazing support team to help answer your questions on using the Software, identifying and verifying the causes of suspected errors in the Software, and helping you find workarounds for Software malfunctions. Though we'll do our best to respond to automated support requests, we typically need more information than an automated ticketing system can give us to solve your issue. Whenever possible, please initiate any support requests from a person or machine that our support team can interact with. We like the personal touch.

Updates. We'll make Updates available to you on the same secure website where you downloaded the Software.

Exclusions. We might not be able to correct every problem we find, but we'll use our reasonable efforts to correct any material, reproducible errors in the Software that you make us aware of. We might ask for your help in reproducing the error for us. Please - don't do things with our Software that would make it harder for us to help you. We won't be responsible for supporting you in those circumstances, which include, among other things: (i) someone (other than us) modifying the Software; (ii) changing your operating system or environment in a way that adversely affects the Software or its performance; (iii) using the Software in a manner for which it was not designed, or other than as authorized under this Agreement; or (iv) accident, negligence, or misuse of the Software.

We're only required to support a given version of the Software for a one (1) year from the date of its commercial release, or one (1) year from the commercial release of the next Update, whichever is longer. If you want support for earlier versions of the Software, we'll try to help you if we can, but you'll need to pay us for that help at our then-current rates.

THINGS YOU MAY NOT DO

You agree and acknowledge that the Software and Documentation are proprietary works that may be protected by the copyright laws of various nations. You may only use the Software and Documentation for the purposes and in accordance with the terms of this Agreement. You may not, without limitation:

- ... copy the Documentation,
- ... copy the Software except to make archival or backup copies as provided above,
- ... place the Software onto a server so that it is accessible via a public network such as the Internet, except as provided for above in "LICENSE GRANT,"
- ... sublicense, rent, lease or lend any portion of the Software or Documentation.

You acknowledge that any violation of this paragraph will cause us immediate and irreparable harm and that the damages which we will suffer may be difficult or impossible to measure. Therefore, upon any actual or impending violation of this paragraph, we shall be entitled to the issuance of a restraining order, preliminary and permanent injunction without bond, restraining or enjoining such violation by you, your successors or assigns or any entity or person acting in concert with you. Such remedy shall be additional to and not in limitation of any other remedy which may otherwise be available to us by law.

TRANSFERS


You may assign all your license to use the Software and Documentation to another person or legal entity (the "Assignee"), provided however, that prior to such assignment, the Assignee undertakes in writing to be bound by your obligations under this Agreement. Any attempt to assign or transfer the license to the Software, the Documentation or this Agreement shall be ineffective, unless the assignment complies with the terms of this paragraph. Upon assignment of your license hereunder, you agree to transfer to the Assignee all of your copies of the Software and Documentation, including all copies of Updates and prior versions of the Software and Documentation and you further agree and that you will retain no copies, including, without limitation, electronic copies stored on computer discs or drives.

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THE SOFTWARE AND SERVICES OFFERED BY US ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS WITHOUT WARRANTIES OF ANY KIND,

 EXPRESS, IMPLIED OR STATUTORY, INCLUDING BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF TITLE, NONINFRINGEMENT MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. WE DO NOT WARRANT THAT THE SOFTWARE WILL BE UNINTERRUPTED, TIMELY, RELIABLE, SECURE OR ERROR-FREE AND EXPRESSLY DISCLAIM ANY WARRANTIES AS TO THE MATERIALS CONTAINED THEREIN, THE SERVERS USED OR THE GOODS OR SERVICES OFFERED BY US.

INSTALLATION

Within two (2) business days after the applicable Order Effective Date or as Updates become available approximately every 6 months during your License Term, we will contact you to engage in the process of making the Software available for use on your server. The server must have internet access. The Software is installed by our assigned personnel remotely via (i) GoToAssist and/or GoToMeeting, or (ii) your preferred remote assistance software. You will make available all resources and credentials required by the Software during the remote session for our personnel.

DELIVERY

We will contact you and will make the Software available for you to download on a secure, password-protected website. As Updates become available approximately every 6 months during your License Term, we'll make those available for you to download on the same website. You're responsible for maintaining the confidentiality of all of your usernames and passwords, including the ones you use to download the Software. Take good care of them, because you agree that you'll be responsible for any activity that takes place using your usernames and passwords (whether you knew about it or not).

SERVICES

Our Services can help you get the most out of the Software. If you want Services, let us know, and we'll work with you to prepare a SOW that describes the date, time, location, and objectives of the Services, as well as the price. Each SOW will be binding once we both sign it, and you agree that any Services we provide to you (whether pursuant to a SOW or not) will be governed exclusively by the terms of this Agreement. In the event of any conflict between the terms of this Agreement and any SOW, the terms of this Agreement will control. Provided you comply with the terms of this Agreement (including, among other things, paying us the Fees you owe us), we'll perform the Services described in each SOW, according to the timeframes set forth in that SOW. We'll control the manner and means by which the Services are performed, and we reserve the right to determine which personnel we assign to perform Services for you. Provided we remain responsible for all of their acts and omissions, we can use third parties to help us perform the Services. You acknowledge that we will retain all right, title and interest in and to anything we use or develop in connection with performing Services for you, including, among other things, software programs, tools, specifications, ideas, concepts, inventions, processes, techniques, and know-how. To the extent we deliver anything to you during the course of performing Services, we grant you a non-exclusive, non-transferable, worldwide, royalty-free, limited-term license to use those deliverables during the term of this Agreement, solely in conjunction with your use of the Software.

PAYMENT

You agree to pay the Fees to us in full, without deduction or setoff of any kind, in U.S. Dollars (unless the Order Form says otherwise), within 30 days of the date of

the invoice we send you related to the applicable SOW or Order Form. Amounts payable under this Agreement are nonrefundable, except as provided in "Disclaimer of Warranty". If you don't pay us on time, we reserve the right, in addition to taking any other action that we see fit, to charge you interest on past due amounts at 1.0% per month or the highest interest rate allowed by law, whichever is less, and to additionally charge all expenses of recovery. You are solely responsible for all taxes, fees, duties and governmental assessments (except for taxes based on Fog Creek's net income) that are imposed or become due in connection with the subject matter of this Agreement.

TERM AND TERMINATION

Term. This Agreement starts on the Agreement Effective Date and will continue in effect for one (1) year (the "Initial Term"), at which time, so long as you choose to renew your Software license for additional License Terms (which, to be clear, you're under no obligation to do), this Agreement will automatically continue in effect for additional one (1) year terms (each, a "Renewal Term") until this Agreement is terminated by either party in accordance with this Agreement. We'll notify you at least sixty (60) days before the end of the Initial Term and each Renewal Term that it's time for you to renew your Software license. If you want to renew, let us know. We'll generate a new Order Form for you that will let you use the Software for another License Term.

Termination for Convenience; Automatic Expiration. Either of us can terminate this Agreement for our convenience at the end of the Initial Term or any Renewal Term by providing written notice to the other at least thirty (30) days before the end of the Initial Term or any Renewal Term. This Agreement will automatically expire without the requirement of notice if, at the end of the Initial Term or any Renewal Term, you decide not to pay the Fees required to renew your Seats for an additional License Term.

Termination for Breach. We can terminate this Agreement immediately upon notice to you if you breach any part of it, and you fail to cure the breach within thirty (30) days of us notifying you of it. That said, there are certain kinds of breaches that we take much more seriously, and that can really damage us. We therefore reserve the right to terminate this Agreement immediately upon written notice to you, but without giving you a cure period, if you breach any of the terms of this Agreement relating to our intellectual property (including your compliance with the license grant and any license restrictions) or our Confidential Information (defined below).

Effect of Termination. When this Agreement terminates or expires: (i) the License Term for any Software in your possession will immediately end; (ii) you'll no longer have the right to use the Software and Documentation, and any licenses we grant you in this Agreement will automatically cease to exist as of the date of termination/expiration; (iii) if you owed us any money prior to termination/expiration, you'll need to pay us all that money immediately; (iv) you'll destroy all copies of the Software and Documentation or other materials provided to you hereunder, if any, in your possession or control, and certify in writing to us that you've done so; and (v) each of us will promptly return to the other (or, if the other party requests it, destroy) all Confidential Information belonging to the other. The following sections will survive the termination or expiration of this Agreement for any reason: "Definitions", "Things You May Not Do", "Verification", "Services", "Termination for Convenience; Automatic Expiration" of "Term and Termination", "Termination for Breach" of "Term and Termination", "Effect of Termination" of "Term and Termination", "Payment", "Disclaimer Of Warranty", "Exclusion of Certain Damages", "Confidentiality", and "General Provisions".

 **CONFIDENTIALITY**

Non Disclosure. You agree and acknowledge that the Software, its algorithms, protocols or interfaces, and the Documentation constitute proprietary and confidential information that belong to us (the "Confidential Information"). You also understand and agree that misuse and/or unauthorized disclosure of our Confidential Information could adversely affect our business. Accordingly, you agree that at all times you will (a) use and reproduce the Confidential Information only for the purposes of this Agreement and only to the extent necessary for such purpose; (b) restrict disclosure of the Confidential Information to your employees, consultants or independent contractors with a need to know and (c) not disclose the Confidential Information to any third party without our prior written approval. Notwithstanding the foregoing, it shall not be a breach of this Agreement for You to disclose Confidential Information if required to do so under law or in a judicial or other governmental investigation or proceeding, provided however, that You give us prior notice of the disclosure sought and You seek all reasonably available safeguards against widespread dissemination prior to such disclosure.

Remedies. You acknowledge that any violation of this paragraph will cause us immediate and irreparable harm and that the damages which we will suffer may be difficult or impossible to measure. Therefore, upon any actual or impending violation of this paragraph, we shall be entitled to the issuance of a restraining order, preliminary and permanent injunction without bond, restraining or enjoining such violation by you, your successors or assigns or any entity or person acting in concert with you. Such remedy shall be additional to and not in limitation of any other remedy which may otherwise be available to us by law.

GENERAL PROVISIONS

1. This Agreement constitutes the entire agreement between you and us concerning the Software and Documentation and supersedes any prior or contemporaneous negotiations, discussions, understandings, purchase orders, communications, advertising or representations concerning the subject matter hereof.
2. This Agreement may be modified only by a writing signed by you and us.
3. In the event of litigation between you and us concerning the Software or Documentation, the prevailing party in the litigation will be entitled to recover attorneys' fees and expenses from the other party.
4. This Agreement shall be governed by the laws of the state of New York, excluding its choice of law rules.
5. You agree that the Software will not be shipped, transferred or exported into any country or used in any manner prohibited by the United States Export Administration Act or any other export laws, restrictions or regulations.
6. All disputes arising out of or in connection with this Agreement shall be submitted to arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the "ICC"). The arbitrator or arbitrators shall be chosen in accordance with the ICC rules. The arbitration proceedings shall take place in New York City, Borough of Manhattan. Unless otherwise agreed between the parties, the language of all arbitration proceedings shall be English. Judgment on the award of the arbitrator (s) may be entered in any court of competent jurisdiction.

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