

Pervasive Software Inc. Pervasive.SQL 9 Server Edition License Agreement

IMPORTANT: DO NOT INSTALL THE ENCLOSED SOFTWARE UNTIL YOU HAVE READ THIS PERVASIVE.SQL LICENSE AGREEMENT ("AGREEMENT"). BY INSTALLING THE SOFTWARE, OR AUTHORIZING ANY OTHER PERSON TO DO SO, YOU, AND SUCH OTHER PERSON, IF APPLICABLE, ACCEPT THE TERMS AND CONDITIONS OF THIS AGREEMENT. IF YOU DO NOT AGREE TO THE TERMS OF THIS AGREEMENT, RETURN THE ENTIRE PACKAGE WITHIN TEN DAYS OF PURCHASE FOR A REFUND.

1. DEFINITIONS.

- 1.1 "Pervasive" means Pervasive Software Inc., a Delaware corporation, 12365 Riata Trace Parkway, Building B, Austin, Texas (U.S.A.) 78727.
- 1.2 "You" or "Your" means the person or business entity which is licensing the Software pursuant to this Agreement.
- 1.3 "Communications Network" means a data communication system, which allows a number of independent devices to communicate with each other, including its internal bridges and the workstations physically attached to it.
- 1.4 "Local Area Network" or "LAN" means privately accessible Communications Network for information distribution within Your company but does not include Your Intranet or the Internet.
- 1.5 "Client Software" means the portions of the Software (if included) that operate on a device and allow the device to be incorporated into a Communications Network and access the Host Software through the Communications Network.
- 1.6 "Host Software" means the portions of the Software (if included) that operate on a Network Host which is incorporated into a Communications Network.
- 1.7 "Software" means all of the software You have received from Pervasive with this Agreement.
- 1.8 "Network Host" or "Network Server" means a single computing system that runs Host Software to permit access by Client Software located either on the Network Host or remotely over a Communications Network.
- 1.9 "Documentation" means the manuals and any other material provided by Pervasive with the Software in electronic or print form.
- 1.10 "Intranet" means a privately accessible Communications Network for information distribution within Your company, its subsidiaries or remote offices, and does not include connection to the Internet.
- 1.11 "Internet" means the publicly accessible computer Communications Network for information distribution.
- 1.12 "Internet/Intranet License" means the license separately purchased and granted upon Your payment of the then-current applicable license fees that permits access to the Network Host through a web server or other multiplexing device that acts as a single connection to the Network Host, but allows for multiple Concurrent Users to access the Network Host through that connection ("Multiplexing Device"). An Internet/Intranet License is only available if You cannot count the number of Concurrent Users at the front end of one or more Multiplexing Devices.
- 1.13 "Concurrent User" means an end user authorized by You to access and use the Host Software or a non-human operated device configured by or for You to access and use the Host Software.

1.14 "User Count" means the number of Concurrent Users specified for the license purchased by You that are authorized to simultaneously access and use the Host Software, whether such Concurrent Users access the Network Host via a LAN, Intranet, the Internet, or otherwise. If You cannot count the number of Concurrent Users at the front end of any Multiplexing Devices, then You must purchase an Internet/Intranet License, and the number of Concurrent Users that may access the Host Software via such Multiplexing Devices will be unlimited.

2. LICENSE AND PROTECTION.

2.1 License Grant. Subject to the terms and conditions of this Agreement, Pervasive grants to You a nonexclusive, nontransferable right to (i) use the Host Software on a single Network Server; (ii) use and reproduce the Client Software on one or more devices solely for the purpose of accessing and using the Host Software; (iii) permit a total number of Concurrent Users that is not greater than the User Count to simultaneously access and use the Host Software; and (iv) use the Documentation in connection with Your use of the Software.

2.2 Protection of Software. You agree to take all reasonable steps to protect the Software and Documentation from unauthorized copying or use. The Software source code represents and embodies trade secrets of Pervasive or its licensors. The source code and embodied trade secrets are not licensed to You and any modification or addition thereto, or deletion therefrom is strictly prohibited. You agree not to disassemble, decompile, or otherwise reverse engineer the Software in order to discover the source code or the trade secrets contained in the source code. To the extent European Union law is applicable, the foregoing restrictions on disassembly, decompilation and reverse engineering are limited so that they restrict such activities only to the maximum extent allowed without violating European Union law on the legal protection of computer programs.

2.3 Installation of Host Software on a Standby Network Server. If the Network Server on which the Host Software is installed fails, You may install and use the Host Software on a temporary basis on a single standby Network Server that is employed only for fail-over support.

3. COPIES. You may make a reasonable number of copies of the Client Software for use in accordance with the rights granted under this Agreement, and a single copy of the Host Software for archival purposes only. You may make one (1) copy of user Documentation provided in electronic form for each authorized copy of Client Software that You make which will be distributed with each such copy of Client Software. All proprietary rights notices must be faithfully reproduced in unaltered form and included on all permitted copies of Software and Documentation. You may not make copies of any Documentation provided to You in print form.

4. OWNERSHIP. Ownership of all right, title, and interest in and to the Software and Documentation (including any copies) and any and all intellectual property rights embodied therein will be vested solely in Pervasive. Copies are provided to You only to allow You to exercise Your rights under this Agreement. The Software is being licensed, not sold. Pervasive reserves all rights not expressly granted to You.

5. RESTRICTIONS. Except as expressly authorized in this Agreement, You agree not to use, rent, lease, sublicense, distribute, transfer, copy, reproduce, display, modify, create derivative works of, time share or dispose of the Software or Documentation or any part thereof. You may use the Software and Documentation solely for Your internal business purposes in accordance with the Documentation. Except with the express written consent of Pervasive, notwithstanding anything to the contrary herein, You agree that You may not use the Software to host applications for third parties or to provide service bureau, time-sharing or other computer services to third parties.

6. ASSIGNMENT. You may not assign or otherwise transfer in whole or in part or in any manner any rights, obligations, or any interest in or under this Agreement without Pervasive's prior written consent and any attempted assignment will be void. A merger or other acquisition by a third party will be treated as an assignment. Pervasive may at any time and without Your consent assign all or a portion of its rights and duties under this Agreement to a company or companies wholly owning, owned by, or in common ownership with Pervasive.

7. TERM AND TERMINATION. This Agreement is effective from the date You open the software envelope ("Effective Date") and will remain in force until terminated. You may terminate this Agreement at any time by destroying the Documentation and the Software together with all copies and adaptations thereof. This Agreement will automatically terminate if You breach any of the terms or conditions of this Agreement. You agree to destroy the original and all copies of the Software and Documentation, or to return them to Pervasive upon termination of this Agreement. Sections 2.2, 4, 6, 7, 8.2, 8.3, 9 and 10 of this Agreement will survive any termination hereof.

8. LIMITED WARRANTY.

8.1 Magnetic Media and Documentation. Pervasive warrants that if the magnetic media or Documentation are in a damaged or physically defective condition at the time that the Software is delivered to You and if they are returned to Pervasive within 90 days of delivery, then Pervasive will provide You with replacements at no charge.

8.2 DISCLAIMER OF WARRANTY. PERVASIVE LICENSES THE SOFTWARE TO YOU UNDER THIS AGREEMENT SOLELY ON AN "AS IS" BASIS. EXCEPT AS EXPRESSLY PROVIDED IN SECTION 8.1, PERVASIVE MAKES NO REPRESENTATIONS, CONDITIONS OR WARRANTIES WHATSOEVER, EITHER EXPRESS OR IMPLIED, REGARDING THE SOFTWARE AND DOCUMENTATION; PERVASIVE EXPRESSLY STATES AND YOU ACKNOWLEDGE THAT PERVASIVE DOES NOT MAKE ANY REPRESENTATIONS, CONDITIONS OR WARRANTIES, INCLUDING, FOR EXAMPLE, WITH RESPECT TO MERCHANTABILITY, TITLE, NONINFRINGEMENT, FITNESS FOR ANY PARTICULAR PURPOSE, OR ARISING FROM COURSE OF DEALING OR USAGE OF TRADE, AMONG OTHERS.

8.3 High Risk Activities. The Software is not fault-tolerant and is not designed, manufactured or intended for use or resale as on-line control equipment in hazardous environments regarding fail-safe performance, such as in the operation of nuclear facilities, aircraft navigation or communication systems, air traffic control, direct life support machines, or weapons systems, in which the failure of the Software could lead directly to death, personal injury, or severe physical or environmental damage ("High Risk Activities"). Pervasive and its suppliers specifically disclaim any express or implied warranty of fitness for High Risk Activities.

9. LIMITATION OF LIABILITY.

9.1 PERVASIVE'S AGGREGATE LIABILITY ARISING FROM OR RELATED TO THIS AGREEMENT OR THE SOFTWARE OR DOCUMENTATION IS LIMITED TO THE TOTAL OF ALL PAYMENTS MADE BY OR FOR YOU FOR THE SOFTWARE UNDER THIS AGREEMENT.

9.2 CONSEQUENTIAL DAMAGES. IN NO EVENT WILL PERVASIVE BE LIABLE TO YOU FOR INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR RELATING TO THIS AGREEMENT, WHETHER UNDER THEORY OF WARRANTY, TORT, PRODUCTS LIABILITY OR OTHERWISE.

10. GENERAL CONDITIONS.

10.1 Governing Law. This Agreement will be governed by, and interpreted in accordance with, the laws of the State of Texas (U.S.A.) exclusive of its choice of law provisions. This Agreement expressly excludes the United Nations Convention on Contracts for the International Sale of Goods.

10.2 Complete Understanding. This Agreement sets forth the entire understanding and agreement between You and Pervasive with respect to the subject matter hereof and may be amended only in writing signed by both parties. NO VENDOR, DISTRIBUTOR, DEALER, RETAILER, SALES PERSON OR OTHER PERSON IS AUTHORIZED TO MODIFY THIS AGREEMENT OR TO MAKE ANY WARRANTY, REPRESENTATION OR PROMISE WHICH IS DIFFERENT THAN, OR IN ADDITION TO, THIS AGREEMENT ABOUT THE SOFTWARE.

10.3 Waiver. No waiver of any right under this Agreement will be effective unless in writing, signed by a duly authorized representative of Pervasive. No waiver of any past or present right arising from any breach or failure to perform will be deemed to be a waiver of any future right arising under this Agreement.

10.4 Audit. You are responsible for ensuring that the number of Concurrent Users accessing the Host Software does not exceed the User Count, and You agree to maintain sufficient records, logs and other materials ("Records") sufficient to document that Your use of the Software is in accordance with the terms of this Agreement. Pervasive may audit such Records upon reasonable notice.

10.5 Severability. If any provision in this Agreement is held invalid or unenforceable, that provision will be construed, limited, modified or, if necessary, severed, to the extent necessary, to eliminate its invalidity or unenforceability, and the other provisions of this Agreement will remain unaffected.

10.6 Export Controls. None of the Software or underlying information or technology may be downloaded or otherwise exported or reexported (i) into (or to a national or resident of) Cuba, Iraq, Libya, North Korea, Iran, Syria, Sudan or any other country to which the U.S. has embargoed goods; or (ii) to any person or entity on the U.S. Treasury Department's list of Specially Designated Nationals or the U.S. Commerce Department's Table of Denial Orders, or the U.S. Commerce Department's Entity List of Missile, Nuclear, and Chemical and Biological Weapons Proliferators, or the U.S. Department of State's Foreign Terrorist Organization List. You agree to the foregoing and You represent and warrant that You are not located in, under the control of, or a national or resident of such country or on any such list. The Software may also be subject to U.S. laws and export regulations of the U.S. government that require an explicit export license before any export or reexport of the Software. You agree to obtain any such explicit export license that may be required.

10.7 U.S. Government End Users. If You are an agency, department, or other entity of the United States Government ("Government"), the use, duplication, reproduction, release, modification, disclosure or transfer of the Software and Documentation is restricted in accordance with Federal Acquisition Regulation ("FAR") 12.212 for civilian agencies and Defense Federal Acquisition Regulation Supplement ("DFARS") 227.7202 for military agencies. The Software and Documentation are commercial computer software and commercial computer software documentation. The use of the Software and Documentation is further restricted in accordance with the terms of this Agreement, or any modification thereto. The Contractor/Manufacturer is Pervasive Software Inc., 12365 Riata Trace Parkway, Building B, Austin, Texas, 78727.

10.8 Operating System. It is Your responsibility to fully comply with applicable license agreements for any operating systems or other software You may use with the Software.

10.9 Results of benchmark tests or other performance tests run on the Software may not be disclosed to any third party without Pervasive's prior written consent.

10.10 English will be the controlling language of this Agreement.

11. JAVA RUNTIME ENVIRONMENT. Depending on installation options, the Pervasive.SQL 9 software may include the JAVA 2 PLATFORM STANDARD EDITION RUNTIME ENVIRONMENT 5.0 from Sun Microsystems, Inc. The Binary Code License Agreement from Sun Microsystems, Inc. governs the JAVA 2 PLATFORM STANDARD EDITION RUNTIME ENVIRONMENT 5.0. By accepting the Pervasive.SQL 9 Server Edition License Agreement, you also agree to accept the terms and conditions of the Binary Code License Agreement and the Supplemental License Terms from Sun Microsystems, Inc. for the JAVA 2 PLATFORM STANDARD EDITION RUNTIME ENVIRONMENT 5.0.