

# MessageYou End User License and Support Agreement

## License terms and conditions for use of the MessageYou Application (the “Application”)

**Important:** Read this thoroughly before installing the application. By installing the Application, you consent to the terms of this licence. If you do not agree to the terms of the licence, do not install this Application.

The parties to this licence are **MessageYou LLC** having its registered address at [INSERT ADDRESS] (“**Licensor**”) and **the person who installs the Application** and, where applicable, **the organisation for whom that person works** (together, the “**Licensee**”)

Whereas the Licensor owns licences, copyright and other intellectual property rights associated with the Application and the Licensee wishes to use the Application [indefinitely/for the defined term of [xx] years], subject to the terms and conditions of this licence, NOW THE PARTIES AGREE as follows:

### **PRELIMINARY MATTERS**

- A. Where applicable, the person installing this Application acknowledges that he or she has the authority to bind the organisation for which he or she works to the terms of this licence.
- B. The **Application** includes: the program files, help files, manuals, tutorial material and all other ancillary documents

This agreement is in three (3) parts:

**PART A – END USER LICENSE TERMS & CONDITIONS**

**PART B – APPLICATION SUPPORT TERMS & CONDITIONS**

**PART C – DEFINITIONS**

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### ***PART A – END USER LICENSE TERMS & CONDITIONS***

#### **1. End User Licence**

- 1.1 The Licensor grants to the Licensee a non-exclusive licence to:
  - (a) install on, give access to the Application from, and operate the Application on, no more than the Maximum Number of Computers;
  - (b) make bona fide back up copies as long as:
    - (i) they are clearly labelled as a back up copy;
    - (ii) they are only used for back up purposes;
    - (iii) they are kept securely under the Licensee’s control; and
    - (iv) a full copy of these terms is attached to it;
  - (c) make further copies in the course of bone fide back up of the Licensee’s hard drive, as long as:
    - (i) those copies are only ever used to restore the hard drive on that machine or, if it is taken out of service, its replacement; and
    - (ii) they are kept securely under the Licensee’s control;
  - (d) create interfaces between the Application and other software for the purpose of cooperation (but the Licensor continues to own the whole of the Application, including any modifications the Licensee makes under this clause).
- 1.2 This Agreement starts on the Commencement Date.
- 1.3 This Agreement applies to any upgrades, patches or modifications the Licensor provides in the future.

#### **2. Licensee’s Obligations**

- 2.1 The Licensee must:
  - (a) pay the Licence Fees and all other monies that are owed by it, whether or not under these terms within seven (7) days of delivery of the Invoice to the Licensee, unless the Licensee is in default of payment of another Invoice, in which case, Invoices are payable immediately until all defaults are rectified;
  - (b) use reasonable endeavours to prevent or stop anyone from making unauthorised use of the Licensee’s copies of the Application, or from doing anything that would be a breach of this Agreement;
  - (c) if there is evidence of a breach of these terms, allow the Licensor to enter the Licensed Premises to investigate; and
  - (d) indemnify the Licensor, its employees and agents against all liability for loss or damage (including indirect or consequential loss, damage and/or loss of profits) or liability that it or anyone else may suffer as a result of the Licensee’s use of the Application, or its performance, or any user modifications.
- 2.2 The Licensee **must not**, without the express consent of the Licensor in writing:
  - (a) copy the Application except as permitted in clause 1.1 above;
  - (b) allow more than the Maximum Number of Computers to access and or run the Application, whether or not simultaneously;
  - (c) run the Application at a separate geographical site without a separate licence for that site;
  - (d) use the Application within a third party’s organisation without that third party organisation obtaining a separate licence;

- (e) reproduce the Application in any way, shape or form, except as envisaged by the Application itself;
  - (f) alter the Application except as permitted by the normal operation of the Application;
  - (g) produce or manufacture or commission the manufacture or production of, any product or process that is similar to the Application;
  - (h) make any copies of the installation program, Application manual(s) or any written material provided with the package other than as provided above;
  - (i) loan, rent, lease, sub-license, time- or capacity-share or transfer the Application material or programs containing the Application to a third party except as part of a transfer or other use expressly permitted by this Licence;
  - (j) (except as allowed herein or by law) alter, modify, de-compile, disassemble, reverse engineer or change any Application programs or any part thereof, or integrate it with or into any other software, or create a derivative work from any Application programs or any part thereof;
  - (k) transfer this Licence to a third party unless the Licensee first receives the written consent of the Licensor and the third party agrees to a licence in the same terms as this licence;
  - (l) remove or obscure any markings, branding or documentation associated with the Application or the medium it is stored on, that indicate the Licensor's ownership of it; or
  - (m) carry on or be concerned or interested in any business (whether alone; or jointly with or as a director, consultant, manager, servant, agent, or partner of any person, firm, or corporation; or with their respective employees, servants, or agents; or as the trustee or beneficiary of any trust; or otherwise by any means whatsoever) that does any of the things specified in paragraphs 2.2(a) to (l) inclusive.
- 2.3 The Licensee is solely responsible for disseminating data to its designated users, including parents of students at Licensee's school, as well as Licensee is solely responsible for backing up all student data so that no hardware or software error, defect or malfunction, nor any other event will cause the Licensee data loss. Licensor shall own all macro data associated with the use of the Application by the Licensor, which data shall not include any personal details of parents and students, but, rather data in relation to the use of the Application, and the dynamics of the information that Licensee inputs and receives in relation to its use of the Application.

### **3. Licensor's Obligations**

- 3.1 The Licensor hereby represents, warrants and undertakes to the Licensee that:
- (a) it shall make available to the Licensee any minor enhancements, minor updates or bug fixes for the Application that are produced by the Licensor during the term of this licence;
  - (b) the Licensor has full right and title to grant this licence and neither the entering of this licence nor the performance by the Licensor of its obligations will cause it to be in breach of any licence to which it is a party or is subject;
  - (c) the use by the Licensee of the Application shall not infringe any copyright, patent, trade mark, registered design, or similar or other intellectual property rights of any third party, nor give rise to payment by the Licensee of any royalty to any third party or to any liability to pay compensation to a third party.
- 3.2 The Licensee acknowledges that no promise, representation or warranty or undertaking has been made or given by the Licensor, or any person or company on its behalf, in relation to the profitability of, or any other consequences or benefits to be obtained from the delivery or use of the Application or any accompanying manuals, and written materials.
- 3.3 The Licensor cannot and does not warrant that the Application is suitable for all localities in the world. It is the Licensee's responsibility to ensure that the Application is suitable for the locality in which it will be used.
- 3.4 The Licensor cannot and does not warrant that the Application is totally error free or that the Application programs may not, in some circumstances, fail to function. If the Application contains errors or the Application programs fail to function, the Licensor will endeavour to remedy the defects in subsequent upgrades.
- 3.5 To the full extent permitted by the laws applicable to this Licence, any conditions or warranties imposed by such laws are hereby excluded. Insofar as liability under or pursuant to any legislation may not be excluded, such liability is limited to replacement of the Application or correction of the defects in the Application material, at the exclusive option of the Licensor and no licence fees will be refunded to the Licensee, nor any other compensation paid by the Licensor to the Licensee.
- 3.6 Except to the extent provided above, under no circumstances shall the Licensor or any agent, related company or related person be liable for any loss, damage or injury (including without limitation any loss of profit, indirect, consequential or incidental loss, damage or injury) arising from the supply or use of the Application programs and any accompanying materials or any failure by the Licensor or any related company to perform any obligation or observe any terms of this licence.
- 3.7 The Licensor shall not render invoices more often than weekly.

### **4. Limitations of Liability**

- 4.1 As far as the law permits, and other than as set out specifically herein, the Application is provided "as is" and the Licensor:
- (a) gives no warranty or undertaking;
  - (b) makes no representations or promises
- regarding the Application, its characteristics, performance or suitability for the Licensee's purposes, and all implied warranties, undertakings, representations, terms, conditions and promises are excluded. The Licensor's total liability, in all circumstances, shall be capped at the total value of the licensee fees paid by the Licensee to the Licensor at the time the incident which gives rise to the Licensor's liability occurs.

- 4.2 Where Antitrust laws or any other state or federal law implies into this Agreement any condition or warranty that cannot be limited or excluded, then it is included, but the Licensor's liability for breach of such a condition or warranty is limited, at the Licensor's option, to one or more of the following:
- (a) if the breach relates to goods – their replacement or re-supply of the same or equivalent goods, or their repair, or payment to the Licensee of the cost of replacing the goods with the same or equivalent ones; and
  - (b) if the breach relates to services – re-supplying them, or payment of the cost of having them supplied again.
- 4.3 The Licensor is not responsible for:
- (a) any statement or representation concerning the Application made by any other person and the Licensee acknowledges that it has not relied on any such statements or representations;
  - (b) the consequences of any user modifications, and the Licensor is not obliged to support them.
- 4.4 The Licensor does not promise that the Application will operate continuously or be free of errors.
- 4.5 The Licensor may assign its interest in this Agreement; which assignment shall take effect of giving notice to the Licensee.

## **5. Intellectual Property**

The Licensor warrants that it has the necessary authority to grant the licences that are granted in this Agreement.

## **6. Confidentiality**

- 6.1 Subject to the provisions of this clause, the parties must:
- (a) keep the terms of this Agreement and all Confidential Information, confidential and secure; and
  - (b) not use, disclose, or permit the use or disclosure of, the terms of this Agreement or any part of the Confidential Information to any third party, other than for the purpose of properly exercising its rights or discharging its obligations under this Agreement.
- 6.2 The parties may disclose the Confidential Information to, or permit the use of the Confidential Information by, those of its officers, employees and advisers who:
- (a) have a specific need to have access to the Confidential Information; and
  - (b) have been made aware of the terms upon which the Confidential Information has been disclosed to the party.
- 6.3 Each party must, upon request of the other party, provide details of the third parties to whom disclosure has been made, and why such disclosure or use was necessary.
- 6.4 The provisions of clause 6.1 do not apply in circumstances where a party discloses the terms of this Agreement or any part of the Confidential Information to comply with any applicable law or legally binding order of any court or governmental agency. The parties must only disclose the minimum required to comply with the applicable law or order.
- 6.5 The parties' obligations under this clause:
- (a) will survive the termination or expiration of this Agreement; and
  - (b) will continue until the Confidential Information disclosed to it, falls into the public domain other than by the that party's breach of this Agreement.

## **7. Breach and Termination**

- 7.1 If the Licensee breaches this Agreement, the Licensor may terminate this Agreement by notice in writing. In that event, the Licensee must:
- (a) cease using the Application;
  - (b) uninstall the Application;
  - (c) remove all copies of the Application material from any storage medium upon which it has been installed;
  - (d) destroy or remove all copies of the Application material from any backup medium on which it has been stored; and
  - (e) destroy or send all copies/backups of the original installation disks and manuals to the Licensor.
- 7.2 When this Agreement terminates, the Licensor's rights arising from any prior breach of these terms continue.

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## **PART B – APPLICATION SUPPORT TERMS & CONDITIONS**

### **8. Licensor's Obligations**

- 8.1 The Licensor will provide telephone and e-mail Support in response to calls and e-mails from an Administrator to the MessageYou Support telephone number and the MessageYou Support e-mail address during Business Hours.
- 8.2 The Licensor does not promise to provide Support outside Business Hours. If the Licensee requests the Licensor to do so, and it agrees, the Licensor will charge fees at its prevailing after-hours rates.
- 8.3 The Licensor shall address issues raised with the MessageYou Support without unnecessary delay, taking into account the severity of the issue, the time required to deal with it, and the workload of the Licensor's Support staff.
- 8.4 Support will be undertaken exclusively from the Licensor's premises unless the Licensor agrees to attend the Licensed Premises and the Licensee agrees to pay the Licensor's prevailing fees and out of pocket expenses for doing so. Where the Licensor, or anyone acting on its behalf, attends the Licensed Premises in connection with this Agreement, the Licensee must provide them with safe and convenient access and conditions.

- 8.5 If support is required outside normal business hours the Licensor will charge fees at its prevailing hourly rates for the support provided to the Licensee, and the Licensee agrees to pay for those services within 7 days of receipt of a tax invoice for those services.
- 8.6 The Licensor will include a remedy for that Defect in the next Maintenance Upgrade that it is feasible or as soon as reasonably possible should the problem cause the system to be incapable of operation.
- 8.7 The Licensor may change the specifications or functionality of future versions of the Application without notice.

## **9. Enhancement Requests**

- 9.1 The Licensee may lodge with the Licensor a request from the Licensee to enhance or otherwise improve the Application.
- 9.2 The Licensor promises to consider such requests in good faith, but any decision as to whether, when or how to include them in the Application is the Licensor's alone.
- 9.3 Such requests and any materials associated with them become the sole property of the Licensor on creation of the same.

## **10. Licensee's Obligations**

- 10.1 The Licensee must pay any additional Invoice within 7 days of delivery of the Invoice to the Licensee, unless the Licensee is in default of payment of another Invoice, in which case, Invoices are payable immediately until all defaults are rectified.
- 10.2 The Licensee must also:
- (a) appoint an Administrator who must:
    - (i) be knowledgeable about computers generally and the Licensee's computer system in particular;
    - (ii) be familiar with and competent in the use of the Application;
    - (iii) be reasonably contactable and available; and
    - (iv) be able and authorised to follow the Licensor's instructions regarding Support issues.
  - (b) keep the Licensor informed of full contact details for a representative to serve as Administrator for the purpose of dealing with the Licensor.
  - (c) use reasonable endeavours to solve problems and issues itself before requesting Support including reviewing relevant support information on the messageyou.com website;
  - (d) provide the Licensor with any cooperation or information that it reasonably requires to provide Support;
  - (e) ensure that only the Administrator contact the Licensor regarding Support issues;
  - (f) hold the Application and Confidential Information in trust for the sole benefit of the Licensor during the term and after the termination of this Agreement under all circumstances;
  - (g) back up all its data so that no hardware or software error, defect or malfunction, nor any other event, will cause data loss; and
  - (h) indemnify the Licensor, its employees and agents against all liability for loss or damage (including indirect or consequential loss and loss of profits) or liability that it or anyone else may suffer as a result of the Support or the Licensee's use of the Application, or its performance, or any user modifications.

## **11. Limitations and Exceptions**

- 11.1 The Licensor is not obliged to provide Support for as long as:
- (a) the Licensee has not paid any other Invoices in accordance with the terms of this Agreement;
  - (b) the Licensee is substantially in breach of this Agreement;
  - (c) the Licensor reasonably suspects that the Licensee is substantially in breach of this Agreement, and the Licensee has not satisfied the Licensor (acting reasonably) that there is no such breach;
  - (d) the Licensee has not supplied the Licensor with a copy of this Agreement duly executed by the Licensee, or
- 11.2 During any time when the Licensor is not obliged to provide Support, the Term continues to run.
- 11.3 Support does not extend to issues or problems that are mainly caused by or relate to one or more of the following:
- (a) user modifications (even if made with the Licensor's approval) and their consequences;
  - (b) any software or hardware supplied by someone other than the Licensor;
  - (c) changes made without the Licensor's approval to the Licensee's hardware, software or network after the Application was installed;
  - (d) installation or use of the Application otherwise than in accordance with the Licensor's instructions;
  - (e) data loss or corruption other than due to a defect in the Application;
  - (f) damage by virus, Trojan horse or other malicious code; or
  - (g) Administrator or user error.
- 11.4 As far as the law allows and other than as provided in this Agreement, the Licensor gives no warranty or undertaking, and makes no representations or promises, regarding:
- the Support,
  - its characteristics,
  - performance,

- nor suitability for the Licensee's purposes,
- and all implied warranties, undertakings, representations, terms, conditions and promises are excluded.
- 11.5 Where Antitrust law or any other state and federal law implies into this Agreement any condition or warranty that cannot be limited or excluded, then it is included, but the Licensor's liability for breach of such a condition or warranty is limited, at the Licensor's option, to one or more of the following:
- (a) if the breach relates to goods – their replacement or re-supply of the same or equivalent goods, or their repair, or payment to the Licensee of the cost of replacing the goods with the same or equivalent ones; and
  - (b) if the breach relates to services – re-supplying them, or payment of the cost of having them supplied again.
- 11.6 The Licensor may put the Licensee on notice at any time in the course of investigating an issue that the Licensor considers is not of a kind covered by this Agreement. If the Licensee continues to request the Licensor to work on the issue after that point and it is established that the issue is not covered by this Agreement, the Licensor may charge the Licensee for time expended after it gave notice, at its prevailing hourly rates.
- 11.7 The Licensor is not responsible for:
- (a) any statement or representation concerning the Support made by any other person, and the Licensee acknowledges that it has not relied on any such statements or representations;
  - (b) the consequences of anything that is beyond the Licensor's reasonable control, or
  - (c) the consequences of any user modifications, and the Licensor is not obliged to Support them.

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## **PART C - DEFINITIONS**

### **12. Definitions and Interpretation**

12.1 Unless the context otherwise requires, the following terms have the following meanings:

**Administrator** means a person appointed by the Licensee pursuant to clause 10.2(a), and where the Licensee is a person, then **Administrator** means the Licensee.

**Agreement** means this agreement, together with any variations to this agreement that are made from time to time.

**Business Hours** means weekdays (excluding public holidays) between 9.00a.m and 5.00p.m in San Francisco, California.

**Commencement Date** means the date upon which this Application is installed.

**Confidential Information** means the Application contents whether in whole or in part, the Related Materials and the Source Code as well as financial information, technical information and other commercially valuable information in whatever forms, which the Licensor identifies as confidential, but excluding the following:

- (a) Information that is already in the public domain;
- (b) Information which subsequently is in the public domain other than as a result of an unauthorised disclosure by the receiving party or its representatives; or
- (c) Information which is or becomes available to the receiving party from a third party who is legally entitled to possess and provide the information to the receiving party without a confidentiality restriction.

**Invoice** means an invoice for any fees payable by the Licensee to the Licensor in accordance with the terms of this Agreement.

**Licence Fees** means the fees paid as a condition to the Licensee being granted the right to use and access the Application.

**Licensed Premises** means the address at which the Licensee resides or carries on business.

**Licensee** means the person who installs the Application.

12.2 **Licensor** means MessageYou LLC a duly registered company having its place of business at [INSERT ADDRESS]. Licensor contact details will be published on the messageyou.com website

**Maintenance Upgrade** means a patch, upgrade or enhancement to the Licensee's version of the Application, as and when released by the Licensor.

**Maximum Number of Computers** means the maximum number of computers that may operate the Application. Where the licensee has purchased a single user licence, the maximum number of computers is one (1). Where the licensee has purchased a site licence, the maximum number of computers is [INSERT THE RELEVANT MAXIMUM NUMBER]. With a site licence all computers must reside at the same geographical site.

**Related Materials** means user manuals, operator manuals, technical manuals, file structure and database documentation, published from time to time by the Licensor.

**Application** means the MessageYou Application developed by the Licensor and includes any upgrades, patches or modifications provided by the Licensor from time to time as well as all Related Materials, in whatever format. A reference to the Application includes any part of it, as well as its functionality.

**Source Code** means each source code or any part of such source code relevant to each of the Application and each later version thereof.

**Support** means the Support of the Application by the Licensor, consisting solely of:

- (a) telephone Support;
- (b) e-mail Support;
- (c) Maintenance Upgrades, which will be provided free of charge (but the Licensor reserves the right to charge for new versions of the Application).

and extends to any upgrades, patches or modifications provided by the Licensor to the Licensee during the Term, as well as all Related Materials, in whatever format.

12.3 Unless expressed to the contrary:

- (a) words importing:
  - (i) the singular include the plural and vice versa;
  - (ii) any gender include the other genders;
- (b) if a word or phrase is defined cognate words and phrases have corresponding definitions;
- (c) a reference to:
  - (i) a person includes a firm, unincorporated association, corporation and a government or statutory body or authority;
  - (ii) a person includes its legal personal representatives, successors and assigns;
  - (iii) a statute, ordinance, code or other law includes regulations and other statutory instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
  - (iv) a right includes a benefit, remedy, discretion, authority or power;
  - (v) an obligation includes a warranty or representation and a reference to a failure to observe or perform an obligation includes a breach of warranty or representation, and
  - (vi) time is to local time in San Francisco, California.

**13. Severability**

The invalidity or enforceability of any one or more of the provisions of this Agreement will not invalidate, or render unenforceable, the remaining provisions of this Agreement. Any illegal or invalid provisions of this Agreement are severable and all other provisions will remain in full force and effect.

**14. Notices**

14.1 Any notice or other communication required under this Agreement:

- (a) must be addressed to the addressee at the addressee's address;
- (b) where the sender is a company, must be signed by an officer or under the common seal of the sender;
- (c) will be regarded as being given by the sender and received by the addressee:
  - (i) if by delivery in person, when delivered to the addressee;
  - (ii) if by normal post, ten (10) business days from and including the date of postage; or
  - (iii) if by facsimile transmission, when received by the addressee; or
  - (iv) if by e-mail, when received by the addressee.
- (d) A facsimile transmission sent to the addressee is regarded as legible and received unless the addressee telephones the sender within two (2) business hours during business hours after transmission is received or regarded as received under this clause and informs the sender that it is not legible.

**15. Proper Law/Jurisdiction**

This Agreement will for all purposes be governed by, construed and enforced solely in accordance with the laws of the State of California, without reference to its conflict of laws rules. The parties irrevocably submit to the non-exclusive jurisdiction of the courts of the State of California and the 9<sup>th</sup> Circuit of the Federal Court. All disputes arising out of or relating to this Agreement will be settled first by informal, good faith confidential negotiation between the parties, within 7 days of the dispute first being notified between the parties. Where the parties cannot resolve the dispute within this time frame, either party may submit the dispute for binding arbitration, which will be held within 45 days of the dispute first being notified between the parties, to be carried out in San Francisco County. Any final arbitration decision will become binding on both parties and will be enforceable in any court of law in the Territory. If, within 15 days of initiation of the arbitration procedure, the parties have not agreed upon an arbitrator, either party may petition the Superior Court in San Francisco for the appointment of a neutral arbitrator. A written decision of the arbitrator will be final, legally binding, enforceable by a court with proper jurisdiction and be rendered within thirty (30) days after the conclusion of the arbitration hearings and will set forth in detail the reasons for such decision, which will be based on applicable law.

**16. Entire Agreement**

This Agreement supersedes all previous agreements in respect of its subject matter and embodies the entire agreement between the parties. This Agreement incorporates by reference documents listed in the Agreement, and any schedules hereto, that the Licensor may amend from time to time in writing.

**17. Waiver**

- 17.1 A failure or delay in exercise, or partial exercise, of a right, power, authority, discretion or remedy created or arising upon breach of this Agreement, does not result in a waiver of that right, power, authority, discretion or remedy.
- 17.2 A party is not entitled to rely on a delay in the exercise or non-exercise of a right, power, authority, discretion or remedy arising from a breach of this Agreement as constituting a waiver of that right, power, authority, discretion or remedy.

- 17.3 A party may not rely on any conduct or any other party as a defence to exercise of a right, power, authority, discretion or remedy of that other party.
- 17.4 This clause may not itself be waived except in writing.