



## **XANDROS PRESTO SOFTWARE**

### **LICENSE AGREEMENT**

**IMPORTANT: CAREFULLY READ THIS LICENSE AGREEMENT BEFORE USING THIS PRODUCT.**

CLICKING ON THE “ACCEPT” OR “YES” BUTTON IN RESPONSE TO THE ELECTRONIC LICENSE AGREEMENT ENQUIRY AS TO ACCEPTANCE OF THE TERMS OF THIS LICENSE AGREEMENT, INSTALLING OR DOWNLOADING THE SOFTWARE, INDICATES ACCEPTANCE OF AND AGREEMENT TO, AND LEGALLY BINDS YOU (“CUSTOMER”) AND XANDROS, INC, (ON ITS OWN BEHALF AND ON BEHALF OF ITS SUBSIDIARY, XANDROS CORPORATION) (COLLECTIVELY “XANDROS”) TO THE TERMS AND CONDITIONS OF THIS LICENSE AGREEMENT (INCLUDING ANY TERMS, CONDITIONS AND RESTRICTIONS CONTAINED IN ANY QUOTE ISSUED BY XANDROS RELATING TO THE SOFTWARE). IF THE CUSTOMER DOES NOT ACCEPT AND AGREE TO THE TERMS AND CONDITIONS OF THIS LICENSE AGREEMENT THEN EITHER DO NOT DOWNLOAD, INSTALL OR OTHERWISE USE THE SOFTWARE.

#### **1. Definitions**

The following terms shall have the following meanings when used herein:

- (a) “Bankruptcy Event” means the occurrence of any one or more of the following events in respect of party hereto:
- (i) a receiver, liquidator or agent or similar officer is appointed for its business, property, affairs or revenues and such proceedings continue for 60 days; or
  - (ii) it admits in writing its inability to pay its debts generally as they come due, becomes insolvent, files a petition in bankruptcy or is adjudicated bankrupt, or enters or commences composition, restructuring, debt settlement, rearrangement, liquidation, winding up or similar proceedings, makes an assignment for the benefit of its creditors or another arrangement of similar import; or
  - (iii) proceedings under bankruptcy, composition, restructuring, rearrangement, liquidation (if commenced against it) or similar insolvency laws are commenced and are not dismissed within 60 days; or
  - (iv) it ceases to carry on business in the ordinary course.

(b) “Documentation” means the user manuals and other written materials which describes the Software, its operation and matters related to its use and which Xandros generally makes available to its commercial licensees for use with the Software, including any updated, improved or modified version(s) of such materials, whether provided in published written material, on magnetic media or communicated by electronic means.

(c) “Software” means Xandros’ proprietary “Presto” software.

(d) “Third Party Software” means software programs included with the Software but which are licensed under a separate license agreement.

(e) “Use” means installing all or any portion of the Software onto a computer and/or loading data into or displaying, viewing or extracting output results from or otherwise operating any portion of the Software in accordance with the terms and conditions hereof.

## 2. **License**

(a) Subject to Customer’s payment of the Fees in accordance with Section 5 hereof, and subject to the terms, conditions, restrictions and limitations set forth herein, Xandros hereby grants to the Customer a perpetual, non-exclusive, worldwide right and license to access and Use the Software and the Documentation relating thereto as is reasonably necessary for Customer’s productive Use of the Software. The Software may only be installed on a single computer.

(b) If You are using a trial version of the Software, You are hereby granted a license to install and use the Software for evaluation purposes only. If You desire to continue to use the Software following the end of the evaluation period, You must either purchase a commercial license or cease to use the software.

(c) In addition to the freely distributable Third Party Software, some versions of the Software may also include Third Party Software that is not distributed under the terms of the GPL or similar licenses that permit modification and redistribution. Generally, each of these Third Party Software programs is distributed under the terms of a license agreement that grants the licensed user a license to install each of the Third Party Software on a single computer for the user’s own individual use. Copying, redistribution, reverse engineering, decompiling and/or modification of these Third Party Software programs is prohibited. Any violation by the user of the applicable license terms shall immediately terminate the license to use such Third Party Software. In order to view the complete terms and conditions that govern the use of Third Party Software, please consult the license agreement that accompanies each of the Third Party Software programs. If You do not agree to comply with and be bound by the terms of the applicable license agreements, do not install, distribute or otherwise use the relevant Third Party Software. If You wish to install these Third Party Software programs on more than one computer, please contact the vendor of the program to inquire about purchasing additional licenses.

## 3. **Restrictions**

(a) The Software, whether provided in source code or object code form, including without limitation, the specific design, structure and logic of individual programs, their interactions both internal and external, and the programming techniques employed therein are considered

confidential and trade secrets of Xandros and/or its licensors (the “Confidential Information”), the unauthorized disclosure of which would cause irreparable harm to Xandros. The Customer shall use the same degree of care and means that it uses to protect its own information of a similar nature, and in any event, shall use reasonable efforts to prevent the disclosure of Confidential Information to any third parties. The Customer shall not use, reproduce or distribute the Confidential Information other than for the purposes authorized by this agreement. This confidentiality obligation shall continue to apply to the Confidential Information following the termination hereof, provided that the confidentiality provisions contained herein shall not apply to Confidential Information which (i) was known by the Customer prior to disclosure, as evidenced by its business records; (ii) was lawfully in the public domain prior to its disclosure, or becomes publicly available other than through a breach of the confidentiality provisions contained herein; (iii) was disclosed to the Customer by a third party, provided such third party or any other party from whom such third party receives such information is not in breach of any confidentiality obligation in respect of such information; (iv) is independently developed by the Customer, as evidenced by its business records; or (v) is disclosed when such disclosure is compelled pursuant to legal, judicial, or administrative proceeding, or otherwise required by law, provided that the Customer shall give all reasonable prior notice to Xandros to allow it to seek protective or other court orders.

(b) The Customer shall not: (i) Use the Software and Documentation for any purpose other than Customer’s own internal business purposes and other than as authorized by this agreement; (ii) except as expressly authorized herein, make any copies of the Software except as may be necessary for archival purposes only; (iii) reverse engineer, disassemble, reverse translate, decompile, or in any other manner decode the object code for the Software in order to derive the source code form, or decode any passwords or encrypted license or installation keys that have been provided to the Customer by Xandros in order to enable the execution of the Software on unauthorized equipment, or for any other reason do or attempt to do any of the foregoing; (iv) assign (by operation of law or otherwise) or transfer this agreement or the Customer’s interest in or rights under this agreement, or attempt to do so or enter into any agreement to do so with any other party, without the prior written agreement of Xandros, and any such assignment or attempted assignment shall be null and void and shall result in the automatic termination of this agreement; (v) except as expressly provided herein, or unless expressly authorized by Xandros in writing, sublicense, distribute, transfer, loan, use, lease or otherwise make available the Software and Documentation or any part thereof to any third party; or (vi) remove any copyright notices, trade-marks, or any other proprietary legends and/or logos of Xandros or its licensors appearing on the Software or the Documentation.

#### 4. **Proprietary Rights**

(a) The Software Product is confidential and copyrighted. Title to the Software and all intellectual property rights therein and relating thereto is retained by Xandros and/or its licensors. The Customer may not make copies of the Software. No right, title or interest in or to any trade-mark, service mark, logo or trade name of Xandros or its licensors is granted under this Agreement.

(b) All title and intellectual property rights in and to the content which may be accessed through use of the Software is the property of the respective content owner and may be protected

by applicable copyright or other intellectual property laws and treaties. This agreement grants the user no rights to use such content.

5. **Fees**

(a) Customer shall pay Xandros the fees ("Fees") set out in its then current price list. Past due amounts shall be subject to a monthly service charge of one and one-half percent (1 1/2%) per month of the unpaid balance or the maximum rate allowable by law. In addition to all other sums payable hereunder, Customer shall pay all reasonable out-of-pocket expenses incurred by Xandros, including fees and disbursements of counsel, in connection with collection and other enforcement proceedings resulting therefrom or in connection therewith.

(b) All Fees are net of applicable taxes. Customer will pay or reimburse all taxes, duties and assessments, if any due, based on or measured by amounts payable to Xandros in any transaction between Customer and Xandros under this Agreement (excluding taxes based on Xandros' net income) together with any interest or penalties assessed thereon, or furnish Xandros with evidence acceptable to the taxing authority to sustain an exemption therefrom (collectively, "Taxes").

6. **Limited Warranty**

EXCEPT WHERE SPECIFICALLY STATED OTHERWISE IN THIS AGREEMENT, THE SOFTWARE, INCLUDING WITHOUT LIMITATION THE THIRD PARTY SOFTWARE, IS PROVIDED TO THE USER ON AN "AS IS" BASIS, WITHOUT ANY OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR THOSE ARISING BY LAW, STATUTE, USAGE OF TRADE, COURSE OF DEALING OR OTHERWISE. THE ENTIRE RISK AS TO THE RESULTS AND PERFORMANCE OF XANDROS PRESTO IS ASSUMED BY THE USER.

7. **Limitation of Liability**

NEITHER XANDROS NOR ITS DEALERS, SUPPLIERS OR LICENSORS SHALL HAVE ANY LIABILITY TO THE CUSTOMER OR ANY OTHER PERSON OR ENTITY FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, LOSS OF REVENUE OR PROFIT, LOST OR DAMAGED DATA OR OTHER COMMERCIAL OR ECONOMIC LOSS, EVEN IF XANDROS HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, OR THEY ARE FORESEEABLE. XANDROS IS ALSO NOT RESPONSIBLE FOR CLAIMS BY A THIRD PARTY. THE MAXIMUM AGGREGATE LIABILITY OF XANDROS (INCLUDING ITS LICENSORS, DEALERS AND SUPPLIERS) TO THE CUSTOMER SHALL NOT EXCEED THE AMOUNT PAID BY THE CUSTOMER FOR THE SOFTWARE. THE LIMITATIONS IN THIS SECTION SHALL APPLY WHETHER OR NOT THE ALLEGED BREACH OR DEFAULT IS A BREACH OF A FUNDAMENTAL CONDITION OR TERM OR A FUNDAMENTAL BREACH. SOME STATES/COUNTRIES DO NOT

ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, SO THE ABOVE LIMITATION MAY NOT APPLY TO YOU.

8. **Term and Termination**

(a) **Term.** This Agreement is entered into as of the Effective Date and shall continue until terminated in accordance with the terms hereof.

(b) **Termination.**

(i) This Agreement may be terminated by Xandros: (i) if Customer fails to pay when due all or any portion of any amounts payable hereunder, and such failure is not cured within ten (10) days after written notice; or (ii) immediately if Customer breaches any provisions of Section 3 hereof; or (iii) in the event of a material breach by Customer of any other provision of this Agreement where Customer fails to correct such breach within thirty (30) days of its receipt of written notice thereof; or (iv) immediately upon the occurrence of a Bankruptcy Event in respect of the Customer.

(ii) This Agreement may be terminated by the Customer upon sixty (60) days prior written notice to the other.

(c) **Effect of Termination.** Termination of this Agreement shall simultaneously terminate the licenses granted in Section 2 hereof. Within thirty (30) days after the termination of this Agreement, Customer shall: (i) furnish Xandros written notice certifying that the original and all copies, including partial copies, of the Software furnished by Xandros under this Agreement or made by Customer as permitted by this Agreement, have either been returned to Xandros or destroyed and no copies or portions thereof remain in the possession of Customer, its employees, contractors or agents; and (ii) make prompt payment in full to Xandros for all amounts then due, together with any applicable Taxes.

(d) **Survival.** Sections 3, 4, 6, and 9 shall survive expiration or termination of this Agreement.

9. **General**

(a) No waiver by either of the parties hereto of any breach of any condition, covenant or term hereof shall be effective unless it is in writing and it shall not constitute a waiver of such condition, covenant or term except in respect of the particular breach giving rise to such waiver.

(b) This agreement contains the whole of the agreement between the parties hereto concerning the matters provided for herein and there are no collateral or precedent representations, warranties, agreements or conditions not specifically set forth in this agreement and none have been relied on by either party as an inducement to enter into this agreement. This agreement supersedes any prior proposal, representation or understanding between the parties hereto.

(c) This agreement shall be governed by the laws of the state of New York. The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this agreement or the transactions contemplated hereunder.

(d) This agreement has been prepared and drawn up in the English language. In the event that this agreement is translated into any other language and in the event of a discrepancy in the interpretation between the English text and the text of the other language, the English text shall govern.

(e) If any provision of this agreement is declared by a court of competent jurisdiction to be invalid, illegal or unenforceable, such provision shall be severed from this agreement and the remaining provisions shall continue in full force and effect.

(f) This agreement shall enure to the benefit of and be binding upon You and Xandros and your respective heir, executors, successors and permitted assigns.

Should there be any questions concerning this agreement, or desire to contact Xandros for any reason, please see our contact information at <http://www.xandros.com/about/contact.html>.

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