

GigaIO™ FabreX™ Switch
SOFTWARE LICENSE AGREEMENT

GigaIO Networks, Inc.
6108 Avenida Encinas #B
Carlsbad, California 92011

BY PROCEEDING TO USE THE SOFTWARE IN WHICH THIS AGREEMENT IS ELECTRONICALLY EMBEDDED OR BY OBTAINING A LICENSE KEY FOR THIS SOFTWARE, YOU HEREBY ACKNOWLEDGE AND AGREE TO BE BOUND BY THE FOLLOWING TERMS AND CONDITIONS. IF YOU DO NOT AGREE WITH THESE TERMS AND CONDITIONS, THEN CLICK “DO NOT ACCEPT” AND DO NOT USE THE SOFTWARE. BY USING THE SOFTWARE OR BY CLICKING ON “ACCEPT” YOU ACKNOWLEDGE AND AGREE THAT ON BEHALF OF YOURSELF AND YOUR EMPLOYER YOU HAVE READ THIS SOFTWARE LICENSE AGREEMENT CAREFULLY, THAT YOU AND YOUR EMPLOYER AGREE TO BE BOUND BY THIS AGREEMENT AND THAT IF APPLICABLE YOUR EMPLOYER HAS INFORMED YOU OF THE RELEVANT PROVISIONS OF THIS AGREEMENT WHICH MAY BE APPLICABLE TO YOU. THIS AGREEMENT SHALL GOVERN YOUR USE OF THE SOFTWARE IN WHICH THIS AGREEMENT IS ELECTRONICALLY EMBEDDED. GIGAIO URGES YOU TO CAREFULLY READ THIS AGREEMENT AND ASSESS YOUR USE OF THE SOFTWARE PRIOR TO USING THE SOFTWARE.

THIS SOFTWARE LICENSE AGREEMENT, is dated as of the date of, in the case of any Evaluation Software (as defined in Section 16 below), the date of Customer’s acquisition of a License Key, or in the case of any purchase of a license for use of the Licensed Software (as defined below), the date of the Invoice (as defined below) pursuant to which such license is purchased, is between GigaIO, Inc., a Delaware corporation (“GigaIO”), and, in the case of any Evaluation Software, the customer to whom temporary Licenses Keys are delivered or, in the case of any purchase of a license for use of the Licensed Software, the customer set forth on the Invoice (as defined below) pursuant to which such license is purchased (in each case, herein “Customer”), and sets forth the terms and conditions whereby GigaIO agrees to provide to Customer and Customer agrees to acquire from GigaIO, one or more Resellers to use certain software and documentation and maintenance services related thereto, owned or licensed by GigaIO or a subsidiary of GigaIO, as set forth on the Purchase Order delivered in connection with this Agreement.

To the extent any terms or conditions contained in any Purchase Order conflict with the terms or conditions contained in this Agreement, the terms and conditions of this Agreement and the applicable Invoice(s) shall supersede the terms in such Purchase Order. This Agreement specifically supersedes and replaces the terms and conditions of all prior agreements between GigaIO and Customer relating to the software licensed hereunder, and supersedes any agreements between Customer and any Reseller, including, but not limited to, any shrink-wrap agreements, click-wrap agreements or any demo or trial agreements which may accompany or are embedded in GigaIO’s products or which have been previously in force between the parties. If Customer is evaluating Evaluation Software, then only the terms and conditions of Section 16 below (including those Sections of this Agreement incorporated therein by reference) will govern Customer’s temporary use of such Evaluation Software (and no other terms of this Agreement shall apply to Customer or govern Customer’s use of Evaluation Software) and upon purchase of a commercial license for such Evaluation Software, this entire Agreement, exclusive of Section 16, shall apply to Customer and govern all use of the Licensed Material (as defined below). In consideration of the mutual promises and agreements contained herein, the parties hereto also agree as follows:

GENERAL TERMS AND CONDITIONS

1. Definitions –

(a) “Agreement” means this software license agreement, together with all exhibits, schedules, annexes and Purchase Orders and Invoices made a part hereof in accordance with the terms of this Agreement and all amendments, modifications, supplements and alterations thereto effected in accordance with the terms of this Agreement.

(b) “Confidential Information” means all technical and non-technical information in both tangible and intangible form, including, but not limited to, product design information, software code, technical information, customer information, discounting, cost and pricing information, financial information and the results derived from or methodology employed by Customer in conducting any benchmark testing of the Licensed Software; provided that the term “Confidential Information” shall not include information which the recipient can show by reasonable proof (i) to have been known by the recipient prior to the time of disclosure by the disclosing party, (ii) to have become part of the public domain through no fault or breach of this Agreement by the recipient, (iii) to have been disclosed to the recipient in good faith by a third party who is not under any obligation of confidence or secrecy to the disclosing party at the time such third party discloses the information to the recipient or (iv) to have been compelled to be produced by a court of competent jurisdiction, provided that the recipient shall first give notice to the disclosing party of any such request or order of the court to give the disclosing party an opportunity to contest or limit said request or order of the court.

(c) “Error” means any error, defect or omission that (i) is discovered in the Licensed Software, (ii) is reproducible and (iii) prevents its operation substantially in accordance with the Licensed Documentation.

(d) “Invoice” or “Invoices” means the invoice or invoices delivered by GigaIO or Reseller to Customer which describes the Licensed Material, Maintenance Services, license term, pricing and payment terms, and other terms related to this Agreement.

(e) “Licensed Documentation” means the published user manuals that GigaIO makes generally available for the Licensed Software.

(f) “Licensed Material” means the Licensed Software and the Licensed Documentation.

(g) “Licensed Software” means the machine-readable object code version of (i) the software specified on each Invoice and which is pre-installed in the Monitored Device and (ii) all Updates for the Licensed Software that Customer is entitled to receive in connection with its receipt of Maintenance Services pursuant to Section 4 of this Agreement.

(h) “Maintenance Services” means the technical support services provided by GigaIO pursuant to Section 4 hereof.

(i) “Maintenance Term” means the period of time for which Customer has purchased Maintenance Services, as evidenced by the Invoice delivered by GigaIO or Reseller in connection therewith, together with all renewals effected in accordance with Section 4 of this Agreement.

(j) “Monitored Device” means the network device or switch with an IP address which was purchased by Customer from GigaIO or Reseller and in which the Licensed Software is pre-installed.

(k) “Purchase Order” means Customer’s purchase order, order form or purchase confirmation, as such document may be amended, supplemented or modified from time to time in accordance with this Agreement.

(l) “Reseller” means a third party licensee authorized by GigaIO to resell the Licensed Material, including any systems integrator or value added reseller.

(m) “Update” means any revision, enhancement, improvement or modification to or programming fix for the Licensed Software or Licensed Documentation which GigaIO makes generally available, incorporates into and makes a part of the Licensed Software or Licensed Documentation and does not separately price or market.

2. LICENSE –

(a) Use – Subject to the terms and conditions of this Agreement, including, but not limited to the applicable licensing restrictions set forth in Section 2(b) below, and subject further to Customer’s full compliance herewith and according to the scope, time period and other terms indicated on the applicable Invoice delivered in connection with this Agreement, GigaIO hereby grants Customer and Customer hereby accepts from GigaIO, a perpetual, non-exclusive and non-transferable right and license to use the Licensed Software on the Monitored Device, to access and use the Licensed Material in accordance with the applicable restrictions and conditions contained in this Agreement. Customer’s right to use the Licensed Material shall extend to use by third parties under a written agreement with Customer to provide outsourcing services for Customer's own internal business operations; provided, that (i) such third parties have agreed to abide by the terms of this Agreement and (ii) Customer shall remain primarily liable for all acts and omissions by such third parties. The Licensed Material may not be copied or used on any device other than the Monitored Device.

(b) License Usage and Restrictions – Customer acknowledges and agrees that, as between Customer and GigaIO, GigaIO or its subsidiaries owns and shall continue to own all right, title, and interest in and to the License Material, including associated intellectual property rights under copyright, trade secret, patent, or trademark laws. This Agreement does not grant Customer any ownership interest in or to the Licensed Material, but only a limited right and license to use the Licensed Materials in accordance with the terms of this Agreement and each applicable Invoice. Customer further acknowledges and agrees that the licenses granted hereunder and the restrictions applicable to Customer’s use of the License Software will vary according to the type of Licensed Software purchased by Customer and the type of license purchased by Customer. One or more of the restrictions set forth in this Section 2 may apply to the Licensed Software depending upon the type of licensed purchased and the terms contained in the applicable Invoice relating to the Licensed Software. Customer is encouraged to carefully review all terms and restrictions contained in this Section 2 and each Invoice. Customer hereby agrees to the following license restrictions and conditions applicable to the Licensed Software as set forth in the Invoice delivered by GigaIO or Reseller under this Agreement:

For all Licensed Software made generally available by GigaIO on a “per-Monitored Device” basis and licensed hereunder by Customer on a “per-Monitored Device” basis, Customer may operate and use such Licensed Software to monitor one (1) Monitored Device per license purchased by Customer.

(c) Maintenance Optional – Customer’s right to use the Licensed Software shall survive any election by Customer to terminate or not renew Maintenance Services from GigaIO; provided, however, Customer shall not be provided any upgrades to the Licensed Software after termination or expiration of the Maintenance Services.

(d) Other Services – All licenses and Maintenance Services purchased by Customer in respect of the Licensed Material shall be governed by this Agreement, together with the applicable Invoice(s) delivered hereunder. Unless otherwise agreed by the parties in writing, all other services purchased by Customer in respect of the Licensed Software, if any, including implementation services, training services and professional services (collectively, “Ancillary Services”), shall be governed solely by a separate written mutually acceptable services agreement entered into by the parties or, in the absence of such agreement, GigaIO’s standard professional services agreement, and acceptance of the Licensed Material shall not be contingent upon Customer’s acceptance of any such Ancillary Services.

(e) Updates—Customer shall provide continued electronic access to GigaIO or the third party from which Customer purchased the Licensed Material access to the Monitored Device for purposes of providing Updates to the Licensed Material.

(f) Upgrades—The License Key provided to Customer shall enable Customer to use the version of the Licensed Material described in the applicable Invoice on the Monitored Device described in the Invoice. Upon written request by Customer to GigaIO or Reseller, Customer may upgrade to a different version of the Licensed Material, in which event a new Invoice shall be issued to Customer. Upon payment of the new Invoice by Customer, Customer shall receive a new License Key and the previous License Key shall be cancelled.

(g) Transfers— Upon written request by Customer to GigaIO or Reseller, Customer may transfer the Licensed Material to a different Monitored Device (the “Transfer Device”) from the initial Monitored Device (the “Initial Device”) described in the Invoice. In the event of a transfer, the License Key for the Initial Device shall be cancelled, and upon verification by GigaIO or Reseller that the License Key for the Initial Device has been cancelled, GigaIO shall issue a new License Key for the Transfer Device.

3. DELIVERY AND PAYMENT TERMS –

(a) Delivery – All Licensed Material shall be pre-installed on the Monitored Device purchased by Customer from GigaIO or Reseller. Ownership of the all licenses purchased hereunder and risk of loss for the related Licensed Materials shall be deemed to have passed to Customer once Customer has received the Monitored Device and GigaIO or Reseller has provided Customer with License Keys necessary for the operation of the Licensed Software.

(b) Payment – Upon delivery of an Invoice to Customer by GigaIO or Reseller, Customer shall pay all license fees and Maintenance Services fees specified in the Invoice within thirty (30) days of Customer's receipt of such invoice. All fees payable by Customer in respect of such Ancillary Services may be separately invoiced. Customer's payment obligation with respect to all license fees and Maintenance Services fees owing hereunder shall be independent of the provision of Ancillary Services, whether or not such Ancillary Services are separately invoiced. Any late payment of any amount owing hereunder shall accrue interest at a rate equal to the lesser of (i) 15% per annum and (ii) the maximum rate permitted by law.

(c) Taxes – All payments referred to in this Agreement are exclusive of value added tax, sales tax and any other applicable taxes, duties or imposts which (with the exception only of those based on GigaIO's or Reseller's income) shall also be payable by Customer in accordance with applicable law.

4. MAINTENANCE –

GigaIO does not warrant that the Licensed Software will operate error-free or may be used error-free. Upon Customer's payment of the Maintenance Services fees associated with the Maintenance Term purchased by Customer for the Licensed Software specified in an Invoice, GigaIO shall provide Maintenance Services in accordance with this Section 4 and in accordance with any additional Maintenance Services terms specified in such Invoice.

(a) Maintenance Agreement – GigaIO, Reseller or their authorized representatives will provide Maintenance Services for the Licensed Software during each Maintenance Term. Maintenance Services includes problem determinations, reasonable problem resolutions, provisioning of software program temporary fixes and new releases. Maintenance Services shall also include the additional Maintenance Service terms expressly set forth in writing in the Invoice delivered to Customer, which are hereby incorporated herein by reference. Maintenance Services shall entitle Customer to receive, at no additional cost, all Updates.

(b) Additional Maintenance Term – Upon expiration of each Maintenance Term, Maintenance Services shall automatically renew for an additional 12-month Maintenance Term and GigaIO will invoice Customer unless GigaIO or its authorized representative is notified by Customer in writing at least sixty (60) days prior to the expiration of the current Maintenance Term that Customer will not purchase Maintenance Services for another Maintenance Term.

(c) Reinstatement – If Customer terminates Maintenance Services or elects not to renew Maintenance Services, Customer may, at its option, purchase Maintenance Services within one year of such termination or non-renewal by providing notice to GigaIO and making payment of GigaIO's then-current list maintenance fees for the upcoming 365-day period plus an amount equal to 1.5 times the Maintenance

Services fees that would have accrued during the period subsequent to such termination or non-renewal, had Customer not terminated or elected not to renew Maintenance Services.

5. PROPRIETARY RIGHTS –

Customer shall not acquire any right or license other than as expressly provided herein. Customer shall not reproduce the Licensed Material or other confidential or proprietary information of GigaIO. All proprietary rights in and to the Licensed Material and all Evaluation Software (as defined in Section 16 below), all derivatives, translations, modifications, adaptations, improvements, enhancements or developments thereof and all confidential or proprietary information of GigaIO, including without limitation, all rights under and with respect to patents, copyrights, trademarks and rights under the trade secret laws of any jurisdiction shall remain the sole property of GigaIO or its applicable licensor, whether recognized by or perfected under applicable local law. Customer shall promptly notify GigaIO of any infringement of GigaIO's proprietary rights of which it becomes aware.

6. LIMITED WARRANTIES –

(a) Warranty – GigaIO warrants to Customer that during the first twelve (12) months after the date of the Invoice for the Licensed Software (the “Warranty Period”) such Licensed Software will perform substantially as described in the accompanying Licensed Documentation. GigaIO does not warrant that (i) the Licensed Software will satisfy or may be customized to satisfy any of Customer's requirements or any other particular use or (ii) the use of the Licensed Software will be uninterrupted or error-free. Laws from time to time in force may imply warranties that cannot be excluded or can only be excluded to a limited extent. This Agreement shall be read and construed subject to any such statutory provisions.

(b) Remedies – If (i) at any time during a Maintenance Term, the Licensed Software contains Errors which make the Licensed Software unable to perform substantially as described in the accompanying Licensed Documentation or (ii) during the Warranty Period, GigaIO breaches the warranty set forth in clause (a) above, then Customer shall promptly notify GigaIO of such Error or breach and GigaIO shall (A) use all commercially reasonable efforts to correct such Error or breach within thirty (30) days of notification or (B) provide Customer within thirty (30) days of notification with a plan acceptable to Customer for correcting such Error or breach. If such Error or breach is not corrected or if an acceptable plan for correcting such Error or breach is not established within such thirty (30) day period, GigaIO shall replace the defective Licensed Software or, if not practicable, accept the return of the defective Licensed Software and refund to Customer the amount paid for the defective Licensed Software, less depreciation based on a 3-year straight line schedule. GigaIO's obligations under this Section 6(b) shall be waived in the event such Error or breach is due to (I) improper handling or use of the software media by Customer, or (II) an unauthorized alteration, revision or configuration of the Licensed Software or to Customer's computer system by Customer or its employees. Customer acknowledges that this Section 6(b) sets forth Customer's sole and exclusive remedy, and GigaIO's and its authorized representatives' sole and exclusive liability, for

any breach of warranty, Error or failure of the Licensed Software to function properly.

(c) Disclaimer – EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, ALL WARRANTIES, REPRESENTATIONS, INDEMNITIES AND GUARANTEES WITH RESPECT TO THE LICENSED MATERIAL, WHETHER EXPRESS OR IMPLIED, ARISING BY LAW, CUSTOM, PRIOR ORAL OR WRITTEN STATEMENTS BY GIGAIO OR ITS AUTHORIZED REPRESENTATIVES OR OTHERWISE (INCLUDING, BUT NOT LIMITED TO ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE) ARE HEREBY OVERRIDDEN AND DISCLAIMED.

7. INDEMNITY –

(a) Indemnity – Subject to this Section 7 and Section 8 below, GigaIO agrees to indemnify, defend and hold harmless Customer from and against all claims, damages, losses, liabilities and expenses (including, but not limited to, reasonable attorneys' fees) arising out of any claim by a third party asserting that the Licensed Material or any of Customer's use thereof, infringes upon any third party's patent, copyright or trademark, provided that (i) Customer promptly notifies GigaIO in writing no later than thirty (30) days after Customer's notice of any potential claim, (ii) Customer permits GigaIO to defend, compromise or settle the claim, and provided further that no settlement intended to bind Customer shall be made without Customer's prior written authorization and (iii) Customer gives GigaIO all available information, reasonable assistance, and authority to enable GigaIO to do so.

(b) Alternative Remedy – If a claim described in Paragraph 7(a) may or has been asserted, Customer will permit GigaIO, at GigaIO's option and expense, to (i) procure the right to continue using the Licensed Material, (ii) replace or modify the Licensed Material to eliminate the infringement while providing functionally equivalent performance or (iii) accept the return of the Licensed Material and refund to Customer the amount actually paid to GigaIO or its authorized representative for such Licensed Material, less depreciation based on a 3-year straight-line depreciation schedule.

(c) Limitation – GigaIO shall have no indemnity obligation to Customer hereunder if the violation or infringement claim results from (i) a correction or modification of the Licensed Material not provided by GigaIO or its authorized representative, (ii) the failure to allow GigaIO access to the Monitored Device to install an Update, (iii) the combination of the Licensed Software with other non-GigaIO software and (iv) continuing the allegedly infringing activity after receiving written notice of such infringement claim from GigaIO.

8. LIMITATION ON DAMAGES -

UNDER NO CIRCUMSTANCES WILL GIGAIO OR ITS RESELLERS OR OTHER AUTHORIZED REPRESENTATIVES BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, PUNITIVE, EXEMPLARY OR INCIDENTAL DAMAGES, WHETHER FORESEEABLE OR UNFORESEEABLE,

BASED ON CLAIMS BY CUSTOMER OR ANY THIRD PARTY (INCLUDING, BUT NOT LIMITED TO, CLAIMS FOR LOSS OF DATA, GOODWILL, PROFITS, USE OF MONEY OR USE OF THE LICENSED MATERIALS, INTERRUPTION IN USE OR AVAILABILITY OF DATA, STOPPAGE OF OTHER WORK OR IMPAIRMENT OF OTHER ASSETS), ARISING OUT OF BREACH OF EXPRESS OR IMPLIED WARRANTY, BREACH OF CONTRACT, BREACH OF ANY INTELLECTUAL PROPERTY RIGHT, MISREPRESENTATION, NEGLIGENCE, STRICT LIABILITY IN TORT OR OTHERWISE, EXCEPT ONLY IN THE CASE OF PERSONAL INJURY WHERE AND TO THE EXTENT THAT APPLICABLE LAW REQUIRES SUCH LIABILITY. IN NO EVENT WILL THE AGGREGATE LIABILITY INCURRED IN ANY ACTION OR PROCEEDING BY GIGAIO OR ITS AUTHORIZED REPRESENTATIVE EXCEED THE TOTAL AMOUNT ACTUALLY PAID BY CUSTOMER FOR THE SPECIFIC LICENSED SOFTWARE THAT DIRECTLY CAUSED THE DAMAGE.

9. CONFIDENTIALITY -

(a) Confidentiality. – Customer acknowledges that the Licensed Materials incorporate confidential and proprietary information developed or acquired by or licensed to GigaIO and that all results of testing of the Licensed Software, whether performed by Customer or another third party, are confidential. In no event will Customer publish or disclose the results of any testing or performance specifications of the Licensed Software without GigaIO’s express prior written consent. A party that receives Confidential Information (the “Receiving Party”) from the other party (the “Disclosing Party”) shall not: (i) export or re-export (within the meaning of US laws or other export control laws or regulations) any Confidential Information, except in strict compliance with US laws; (ii) reverse engineer any Confidential Information; or (iii) disclose or make available the Disclosing Party’s Confidential Information to any of the Receiving Party’s employees, agents, contractors or consultants or to any third parties, except those that have agreed in writing to be bound by terms and conditions substantially similar to, and no less restrictive with respect to limitations on use and disclosure, than those contained in this Agreement and each of which have a “need to know” in order to carry out the purposes set forth in this Agreement. Each party shall take all reasonable precautions necessary to safeguard the confidentiality of all Confidential Information disclosed by the other party, including those precautions (A) taken by the disclosing party to protect its own Confidential Information and (B) which the disclosing party or its authorized representative may reasonably request from time to time. Neither party shall allow the removal or defacement of any confidentiality or proprietary notice placed on the Confidential Information disclosed by the disclosing party. The placement of copyright notices on Confidential Information shall not constitute publication or otherwise impair their confidential nature of such information.

(b) Disclosure – If an unauthorized use or disclosure of the disclosing party’s Confidential Information occurs within the recipient party’s enterprise, the recipient party will immediately notify the disclosing party or its authorized representative and take, at recipient party’s expense, all steps which may be available to recover such Confidential Information and to prevent its subsequent unauthorized use or dissemination.

10. TERMINATION –

Upon prior written notice to GigaIO, Customer may terminate this Agreement without any right to refund, except as otherwise expressly set forth in this Agreement. If Customer or any of Customer's employees, consultants, authorized representatives or permitted third parties breach any term or condition of this Agreement, including, without limitation, Customer's failure to pay any amounts under any Invoice, GigaIO or Reseller may terminate this Agreement, without judicial or administrative resolution or obligation to refund. This Agreement will terminate automatically if Customer ceases to do business, becomes insolvent, goes or is put into receivership or liquidation, passes a resolution for its winding up (other than for the purpose of reconstruction or amalgamation) or for any of the foregoing, makes an arrangement for the benefit of its creditors, enters into bankruptcy, suspension of payments, moratorium, reorganization or any other proceeding that relates to insolvency or protection of creditors' rights or takes or suffers any similar action in consequence of debt. Upon the termination of this Agreement for any reason, all rights granted to Customer hereunder will cease, and Customer will promptly (i) cease using the Licensed Software and any related Updates, (ii) delete all Updates of the Licensed Material and all copies thereof and (iii) deliver to GigaIO an affidavit certifying that Customer has complied with these termination obligations. The provision of Sections 1, 3, 5, 6, 8 through 12, 14, 15 and 17 shall survive the termination of this Agreement.

11. U.S. EXPORT RESTRICTIONS -

Customer acknowledges that the Licensed Materials and all related technical information, documents and materials are subject to export controls under the U.S. Export Administration Regulations. Customer covenants and agrees to comply with all import and export control regulations of the United States with respect to the Licensed Material. Customer acknowledges that it may not re-export or divert the Licensed Material or any related technical information, document or material, or direct derivatives thereof, to any country set forth on the U.S. Department of Commerce's list of T-5 countries (currently, Cuba, Iran, North Korea, Sudan and Syria), including any future changes to the government's list of T-5 countries.

12. EQUITABLE RELIEF –

The parties recognize that Sections 5, 9, 11 and 13 are necessary for the protection of the business and goodwill of the parties and are considered by the parties to be reasonable for such purpose. The parties agree that any breach of such Sections would cause the other party substantial and irreparable damage and therefore, in the event of any such breach, in addition to other remedies which may be available, the non-breaching party shall have the right to seek specific performance and other injunctive and equitable relief in a court of law.

13. LICENSE KEY & USE REPORTING -

Customer acknowledges that a security code owned and controlled by GigaIO (the "License Key") is required to render the Licensed Software operational on Customer's computer hardware. Upon use of a permanent License Key to use the Licensed Software on the Monitored Device, no other security code will be required for the Licensed Material to operate on such computer hardware in accordance with the terms and restrictions contained in this Agreement. Customer shall not attempt to crack, alter or otherwise derive the License Key. GigaIO or Reseller shall promptly provide Customer with all necessary License Keys upon purchase of the Licensed Software or upon any authorized transfer of the Licensed Software to any other hardware equipment permitted under Section 2 of this Agreement. GigaIO reserves the right to gather data on license usage by Customer for each item of Licensed Software, including License Key numbers, server IP addresses, email addresses of users, domain counts and other information deemed relevant, to ensure that the Licensed Software is being used in accordance with the terms of this Agreement. GigaIO expressly prohibits domain count overrides without prior written approval. Customer hereby consents to GigaIO gathering and processing such usage information and agrees not to block, electronically or otherwise, the transmission of data required for compliance with this Agreement. Any unauthorized use of the Licensed Software by Customer or other use by Customer in violation of the restrictions contained herein shall be deemed a material breach of this Agreement. The auditing, reporting and certification rights and obligations set forth in this Section 13 shall survive termination of this Agreement for a period of eighteen months.

14. ENFORCEABILITY -

If for any reason a court of competent jurisdiction finds any provision of this Agreement, or portion thereof, to be unenforceable, void, invalid or illegal, that provision shall be enforced to the maximum extent permissible so as to effect the intent of the parties, and the remainder of this Agreement shall continue in full force and effect.

15. ENTIRE AGREEMENT -

(a) Customer acknowledges that it has read this Agreement, understands it and agrees to be bound by its terms. Customer and GigaIO further agree that, subject to clause (b) below, this Agreement, together with all Invoices delivered in connection herewith and all exhibits, schedules and annexes hereto, is the complete and exclusive statement of the agreement between Customer and GigaIO and supersedes all proposals, oral or written, and all other communications between the parties (including any Reseller) relating to the subject matter of this Agreement, including any shrink-wrap agreements, click-wrap agreements or demo or trial agreements which may accompany the Licensed Material or which may have been previously in force between the parties. Subject to clause (b) below, this Agreement may not be amended, modified, supplemented or altered except by a written agreement that is signed by Customer and GigaIO.

(b) UNDER NO CIRCUMSTANCES MAY THE TERMS OF THIS AGREEMENT OR ANY GIGAIO INVOICE BE AMENDED, MODIFIED, SUPPLEMENTED, ALTERED, SUPERSEDED OR REPLACED BY ANY NON-GIGAIO INVOICE OR NON-GIGAIO INVOICE OR OTHER SIMILAR INSTRUMENT DELIVERED BY CUSTOMER TO GIGAIO. EACH PARTY ACKNOWLEDGES AND AGREES THAT, AS A CONVENIENCE TO CUSTOMER AND ONLY FOR CUSTOMER'S INTERNAL ACCOUNTING PROCEDURES, CUSTOMER MAY DELIVER TO GIGAIO A CUSTOMER PURCHASE ORDER OR OTHER SIMILAR DOCUMENT FOR ANY TRANSACTION CONTEMPLATED HEREUNDER AND THAT NO ACTION BY GIGAIO, INCLUDING GIGAIO'S DELIVERY OF ANY LICENSED MATERIALS OR ACCEPTANCE OF PAYMENT, SHALL BE DEEMED TO BE ACCEPTANCE OF ANY OF THE TERMS OR CONDITIONS CONTAINED IN SUCH CUSTOMER PURCHASE ORDER OR OTHER SIMILAR INSTRUMENT AND SUCH TERMS AND CONDITIONS SHALL BE VOID AND OF NO FORCE OR EFFECT, UNLESS ACCEPTED BY GIGAIO PURSUANT TO A WRITTEN INSTRUMENT SIGNED BY BOTH PARTIES.

16. TRIAL LICENSE -

(a) If Customer is evaluating Evaluation Software (as defined below), then only the terms and conditions of this Section 16 (including those Sections of this Agreement incorporated in this Section 16 by reference) will govern Customer's temporary use of such Evaluation Software (and no other terms of this Agreement shall apply to Customer or govern Customer's use of Evaluation Software) and upon purchase of a commercial license for such Evaluation Software, this entire Agreement, exclusive of this Section 16, shall apply to Customer and govern all use of the Licensed Material.

(b) GigaIO is the owner and provider of certain proprietary software and documentation that Customer may request to use, from time to time, on a temporary basis for the sole purpose of testing and evaluating such software prior to purchasing a commercial license for such software ("Evaluation Software"). All usage of Evaluation Software by Customer requires a temporary License Key or trial License Key to be issued by GigaIO and Customer is only permitted to use Evaluation Software during the term of the temporary License Key or trial License Key issued by GigaIO.

(c) Evaluation Software is provided to Customer solely for evaluation purposes for Customer's own testing and evaluation purposes (an "Evaluation") and upon delivering a temporary License Key or trial License Key to Customer, GigaIO hereby grants Customer a non-transferable, nonexclusive, limited license to operate and use the Evaluation Software for such Evaluation during the period commencing on the date Customer commences use of the the Evaluation Software and ending on the expiration of the temporary License Key or trial License Key (including any extensions thereof authorized by GigaIO, the "Evaluation Period"). Customer agrees not to cause or permit the reverse engineering, disassembly, modification, translation or de-compilation of any Evaluation Software. Customer shall not copy the Evaluation Software, or create or develop any derivative software based upon the Evaluation Software.

(d) Customer acknowledges that all Evaluation Software incorporates confidential and proprietary information developed or acquired by or licensed to GigaIO and that all results of testing of the Evaluation Software, whether performed by Customer or another third party, are confidential. In no event will Customer publish or disclose the results of any testing or performance specifications of the Evaluation Software without GigaIO's express prior written consent. Customer shall not remove or deface of any confidentiality or proprietary notice placed on the Evaluation Software. The placement of copyright notices on Evaluation Software shall not constitute publication or otherwise impair their confidential nature of such information.

(e) ALL EVALUATION SOFTWARE PROVIDED BY GIGAIO IS DELIVERED "AS IS, WHERE IS" AND GIGAIO SPECIFICALLY DISCLAIMS ANY AND ALL WARRANTIES OF ANY KIND INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. GIGAIO DOES NOT WARRANT THAT THE EVALUATION SOFTWARE WILL OPERATE WITHOUT INTERRUPTION OR BE ERROR FREE. UNDER NO CIRCUMSTANCES WILL GIGAIO OR ITS AUTHORIZED REPRESENTATIVES BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, PUNITIVE, EXEMPLARY OR INCIDENTAL DAMAGES, WHETHER FORESEEABLE OR UNFORESEEABLE OR WHETHER BASED ON CLAIMS BY CUSTOMER OR ANY THIRD PARTY, ARISING OUT OF OR RELATED TO CUSTOMER'S USE OF EVALUATION SOFTWARE. IN NO EVENT WILL THE AGGREGATE LIABILITY OF GIGAIO OR ITS AUTHORIZED REPRESENTATIVES INCURRED IN ANY ACTION OR PROCEEDING RELATING TO CUSTOMER'S USE OF EVALUATION SOFTWARE EXCEED ONE HUNDRED DOLLARS.

(f) The Evaluation and the evaluation license granted under this Section 16 shall automatically terminate immediately upon the earliest of (i) the expiration of the Evaluation Period, (ii) the date upon which Customer purchases a commercial license for such Evaluation Software and (iii) the date upon which either party notifies the other party of its termination of the Evaluation. Upon expiration of the Evaluation Period or the Evaluation, Customer shall cease using the Evaluation Software unless Customer has purchased a commercial license for such Evaluation Software on or prior to such expiration.

(g) Sections 1, 5, 8, 9, 11, 14, 15 and 17 of this Agreement shall be deemed incorporated by this reference in this Section 16 and the Evaluation license granted under this Section 16.

17. MISCELLANEOUS -

(a) Customer shall not assign, delegate or otherwise transfer this Agreement or any of its rights or obligations hereunder to any other person or entity, whether by contract, merger or operation of the law, without GigaIO's prior written consent. In the event of any merger of Customer or a sale of substantially all of the assets of Customer in which Customer is not the surviving entity, Customer may assign or transfer any licenses granted under this Agreement; provided, that Customer provides GigaIO with written notice

of such transfer within thirty days of such merger or sale. Any assignment or delegation in breach of this Section 17(a) shall be void. This Agreement shall be binding upon the parties hereto and shall inure to the benefit of the parties hereto and their respective permitted successors and assigns.

(b) All notices or approvals required or permitted under this Agreement must be given in writing and delivered to the appropriate party at the address set forth in this Agreement or in any Invoice delivered in connection with this Agreement.

(c) The waiver of compliance with or breach of any term or condition of this Agreement or the failure of a party to exercise any right under this Agreement shall in no event constitute a waiver as to any other failure to comply or breach, whether similar or dissimilar in nature, or prevent the exercise of any right under this Agreement. Unless otherwise specified herein, the rights and remedies of GigaIO set forth in this Agreement are not exclusive and are in addition to any other rights and remedies available to it at law or in equity.

(d) THIS AGREEMENT WILL BE GOVERNED BY AND INTERPRETED IN ACCORDANCE WITH THE LAWS OF THE STATE OF CALIFORNIA WITHOUT GIVING EFFECT TO ANY CHOICE OF LAW RULES. GIGAIO AND CUSTOMER HEREBY IRREVOCABLY AGREE ON BEHALF OF THEMSELVES THAT THE SOLE AND EXCLUSIVE JURISDICTION AND VENUE FOR ANY LITIGATION ARISING FROM OR RELATING TO THIS AGREEMENT OR THE SUBJECT MATTER HEREOF SHALL BE IN AN APPROPRIATE FEDERAL OR STATE COURT IN THE STATE OF CALIFORNIA LOCATED IN SAN DIEGO COUNTY.

(e) Unless otherwise specified herein, the rights and remedies of GigaIO set forth in this Agreement are not exclusive and are in addition to any other rights and remedies available to it at law or in equity.

(f) This Agreement is not intended to be nor shall it be construed as a joint venture, association, partnership or other form of business organization or agency relationship.

(g) Headings used in this Agreement are for reference purposes only and shall not be used to modify the meaning of the terms and conditions of this Agreement. This Agreement may be executed in counterparts, all of which shall constitute one single agreement between the parties hereto.

(h) In consideration of the mutual covenants contained herein, including the rights and licenses granted to Customer herein, the parties hereto do hereby agree that for a period of two years following Customer's most recent purchase of any licenses or services, including Maintenance Service, from GigaIO or its authorized representative, Customer shall not solicit, induce, hire, engage, or attempt to hire or engage any employee of GigaIO, or in any other way interfere with GigaIO's contractual or employment relations with any of its employees, nor will Customer hire or engage or attempt to hire or engage any individual who was an employee of GigaIO at any time during such two-year period.