

**42media services GmbH**

General Terms and  
Conditions

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# General Terms and Conditions of 42media services GmbH

## § 1 - Scope of Application

1. All supplies and services of 42media services GmbH are solely based on these general terms and conditions.
2. We will not accept customer's terms and conditions varying from these terms and conditions in whole or in part unless explicit written consent is given. These terms and conditions will also be solely effective when providing our supplies and services without reservation and aware of the customer's contradictory terms and conditions.
3. These terms and conditions also apply for transactions with companies for future business between the parties.
4. With appropriate prior notice 42media services GmbH is entitled to modify or to amend these terms and conditions at any time. If the customer does not contradict the modified terms within two weeks after receipt of the modification notice and not later than by the time the modifications shall become effective they will take effect according to the notice. 42media services GmbH will advise the customer of this circumstance in the modification notice.

## § 2 - Conclusion, Subject Terms and Termination of Contract

1. All offers and prices are subject to change.
2. The contract with the customer will come into effect with written order confirmation by 42media services GmbH or with the first fulfillment activity of 42media services GmbH only.
3. If the customer is an enterprise basically only the product specification of 42media services GmbH will be considered as the properties and condition of the product and will be understood as agreed. Public statements, promoting or advertisement do not represent a product condition description.
4. If 42media services GmbH makes specific service offerings these are exclusively prepared for a computing system specified by the customer. That is why the customer has to bear the risk that products offered on this basis comply with his wishes and requirements. Differing binding specifications by the

customer have to be made in writing and must be countersigned by 42media services GmbH.

5. Any legally allowed or contractually agreed withdrawal must be made in writing.

### **§ 3 - Delivery Obligations and Liabilities**

1. 42media services GmbH will provide the contractually agreed product delivery within the period of delivery stated in the contract. All periods of delivery are approx. periods unless otherwise agreed. They are subject to correct and punctual supply to ourselves and may be extended by a period in which 42media services GmbH is prevented from delivering the goods within the agreed time by circumstances 42media services GmbH is not liable for (e.g. industrial conflicts, force majeure or the like). Same applies for the period in which 42media services GmbH is waiting for the fulfillment of the customer's obligation to co-operate which is required for the product delivery. 42media services GmbH will always inform the customer of foreseeable delays and will aim to deliver its products in due time. In case of wrong or partial delivery 42media services GmbH is obliged to a correct delivery of the agreed goods.

2. 42media services GmbH is not liable for a total or partial failure in the performance of its products (malfunctions) caused by the customer or third persons acting on behalf of the customer by using or handling the products other than stated in the user manual. Same applies if the malfunction is caused by the customer utilizing his own hard- or software or other material not explicitly stated as suitable by 42media services GmbH together with 42media services GmbH products. The same applies if the customer does not co-operate with 42media service GmbH to an appropriate extent in analyzing and/or remedying the malfunction.

3. When supplying products that, according to the agreement, require the customer to use the internet 42media services GmbH is responsible for a working data communication within the 42media services GmbH network and such connected networks it has explicitly taken on responsibility for. The customer agrees that 42media services GmbH is not liable for troubles in delivery caused by disturbances in the data traffic on the internet beyond the sphere of influence of 42media services GmbH defined above.

4. The service of 42media services GmbH does not comprise installation unless otherwise explicitly agreed between the parties in written form. If an installation has been agreed on the

basis of an explicit written agreement it will comprise the deployment of the object of services on the customer's predefined environment. It does not comprise further services, in particular the adjustment of the supplied software to the customer's existing programs or a user training. This also applies if the customer's existing programs have been purchased from 42media services GmbH.

5. If the customer is an enterprise and the dispatch of 42media services GmbH products has been agreed the risk of accidental loss or accidental deterioration shall pass over to the customer when the products are handed over to a carrier. In case of dispatch by 42media service GmbH itself the risk will pass over to the customer upon delivery. This also applies to partial deliveries and in case a carriage free delivery has been agreed.

6. If the products, especially 42media services GmbH software, have been agreed to be retrieved via internet 42media services GmbH guarantees an average annual internet web server availability of 98%. Additionally, times in which the web server is not available via internet due to problems beyond 42media services GmbH's control (force majeure, faults of third persons or similar circumstances) are excluded.

7. 42media services GmbH may temporarily block access of third party workstations or services to its infrastructure in order to protect the 42media services GmbH's network or the customers from imminent danger when the 42media services GmbH is not responsible for the respective danger.

#### **§ 4 - Customer's Obligation to Co-Operate**

1. The customer is obliged to comply with the stipulated obligations to co-operate (particularly specifications of the currently used computing system and the concretely intended hardware extensions) within the contractually agreed time limits.

2. If the customer does not comply with the obligations to co-operate after 42media services GmbH has set a new appropriate deadline 42media services GmbH is at its option entitled to temporarily suspend the full or parts of the order execution or to withdraw from the contract and to claim the so far occurred effort plus the lost profit as damages.

## **§ 5 – Prices and Terms of Payment**

1. Amount and maturity of purchase prices are stipulated in the contract with the customer. In relationships with consumers the stated prices are total prices. In relationships with companies the prices do not include VAT and are net prices. The 42media services GmbH prices apply from its business location in Hannover, Germany. They do not include packaging, freight, postage, insurance and other shipping costs if shipment is necessary or agreed.

2. Invoices are always due in full within 10 days after billing date per bank transfer in favor of one of the 42media services GmbH accounts. A discount is only granted upon explicit prior written agreement. If, after signing the agreement, facts emerge that lead to a objectively estimated decreased creditworthiness of the customer all due pending claims shall be due to be paid immediately. In this case 42media services GmbH is entitled to deliver upon prepayment only or may demand appropriate securities.

3. The customer is charged separately for subsequent amendments of the order volume at the customer's instance including the additional expenses thereby incurred. These costs are calculated on the basis of the 42media services GmbH price list.

## **§ 6 – Third Party Rights, Copyrights and Licenses**

1. In relationships with customers who are enterprises the following terms apply to defects of title: If a third party claims an infringement towards customers that would prevent the customer from using the contractually granted usage authorization the customer will immediately inform 42media services GmbH in writing. The customer will turn over the defense against these claims judicially and extrajudicially to 42media services GmbH solely and at its expense and will render every reasonable assistance. This applies in particular for information on how the customer has employed the product. This information should preferably be provided in writing.

As far as third party rights are violated 42media services GmbH is entitled to perform rectification of its own choice. 42media services GmbH may

a) obtain the right of utilization from the body authorized to dispose of that right that allows the customer to comply with the contractual purposes or

b) change the product without or with impacts on the product's functionality acceptable to the customer or

c) exchange the respective product with another product that does not violate third parties' rights when used as contractually defined without or with impacts on the product's functionality acceptable to the customer or

d) deliver a new product status that does not violate third parties' rights when used as contractually defined.

If 42media services GmbH fails to remedy the defect of title with two attempts of rectification the customer is entitled to extend the final deadline for 42media services GmbH and advise 42media services GmbH explicitly in writing that in case of another failure he will appropriately reduce the price or withdraw from the contract. A withdrawal will come into consideration at a considerable defect of title only.

2. The customer shall receive the non-exclusive, perpetual, non-transferable right to use the contractual products in accordance with the contract. The transfer of usage rights shall become effective upon full payment.

The copyright and the source code of all developed programs remain with 42media services GmbH. Without 42media services GmbH's prior consent the customer is strictly not allowed to change, decode, reconvert, decompile, disassemble or develop programs deviated from the software unless otherwise stipulated by law. The customer must not change identification marks, copyright notes or property information on 42media services GmbH products.

3. If the right to use 42media services GmbH products granted to the customer should end due to a legal or contractual right of cancellation of the contract, the customer must return all data carriers with programs, any copies, written documentation and advertising aids to 42media services GmbH. The customer must delete all saved programs from his computer system, unless and as long as he is obligated due to compulsory legal provisions to keep them for a longer period of time. Furthermore the customer must return all other items and documents immediately and not later than two weeks after termination of the contract. If the customer is an enterprise the return to 42media services GmbH is carried out at his risk and expense.

4. The customer undertakes to ensure through suitable precautionary measures (e.g. secrecy of passwords) that the unauthorized third-party use of the products delivered by

42media services GmbH in the meaning mentioned above shall not occur. In the event that the customer violates this obligation, 42media services GmbH shall be entitled to terminate the contract without notice.

## **§ 7 - Retentions of Title**

1. 42media services GmbH shall retain ownership of its products until it has received full payment arising from the concluded contract.

2. As far as the customer is an enterprise the customer is permitted to resell the conditional commodity in the ordinary course of business to third parties (end customer) under reservation of ownership and under consideration of the due diligence of a responsible businessman; the customer, however, shall assign in advance to 42media services GmbH all receivables due to him either now or later from the resale or from any other legal transaction with respect to the conditional commodity when they incur in the amount of the invoice value of the concluded contract between the customers and 42media services GmbH. The customer shall remain entitled to collect these receivables as long as he duly fulfills his obligations towards 42media services GmbH. If the customer comes from this contract behind schedule with duties, 42media services GmbH is entitled to the revocation of the resale authority and collection of the receivables. At the request of 42media services GmbH, the customer then shall be obligated to inform the end customer of its advance assignment and to provide 42media services GmbH with the information necessary for asserting its rights towards the end customer and to surrender documentation. Should the conditional commodity of 42media services GmbH be seized by a third party or affected in any other way, the customer shall be obligated to inform 42media services GmbH immediately of said occurrence and to notify the third party of the security interests of 42media services GmbH.

3. Insofar as the customer alters or processes the delivered conditional commodity for resale on a commercial basis, said alteration or processing shall be carried out for 42media services GmbH, without incurring any obligation on the part of 42media services GmbH. In the event that the conditional commodity is processed, combined or mixed with other commodities not belonging to 42media services GmbH, 42media services GmbH shall be entitled to co-ownership of the new object at a ratio of the invoiced value of the conditional commodity to the value of the processed commodities at the time it was processed, combined or mixed. Insofar as the

customer purchases the sole ownership of the new object, he shall transfer at this point in time the co-ownership of the new object to 42media services GmbH at a ratio of the invoiced value of the conditional commodity to the value of the remaining processed commodity at the time of its processing, combining or mixing, and shall keep the new object in safe custody for 42media services GmbH with the due diligence of a responsible businessman.

4. Insofar as the customer resells the conditional commodity after it has been processed, combined or mixed or sells the new object achieved by processing, combining or mixing, subsection (2) shall apply with the proviso that the customer shall assign to 42media services GmbH the receivables due to him from the resale to the end customer in the amount of the invoiced value of the processed, combined or mixed conditional commodities. This shall also apply if the conditional commodity, by way of processing, combining or mixing with other objects not belonging to 42media services GmbH, has become an essential component of movable property.

## **§ 8 - Warranty Rights**

If the customer is an enterprise the following regulations apply:

1. The customer must verify conformity of the delivered products with the contract immediately upon receipt and must report any detected defects to us without delay. Should he neglect to promptly inspect the products and give notice of defects, the delivered products shall be deemed as accepted, unless the defect was not recognizable upon inspection. Defects detected at a later date should also be reported to 42media services GmbH immediately; otherwise, the goods shall be deemed as accepted with regard to these defects. The notification of defects must be made in writing and the notified defect must be described in detail. Furthermore, Sections 377 et. seq. German Commercial Code (HGB) shall apply accordingly for all business entities.

2. 42media services GmbH warrants defects of the product towards enterprises at its discretion by subsequent improvement or product replacement. Provided that the product has to be given back to 42media services GmbH for the product replacement, the customer shall bear the costs of transportation. Should the subsequent improvement and/or product replacement fail twice, the customer shall have the right to set a reasonable time limit for the removal of defects. Should the subsequent improvement and/or product

replacement even fail within this time limit, the customer shall be entitled to demand a reduction of the remuneration or, at his discretion, a withdrawal from contract. In case of an insignificant defect the withdrawal shall be excluded.

3. The claims regarding a defect are time-barred within one year (statute of limitation), beginning with the delivery of the product.

## **§ 9 - Liability**

Irrespective of the legal grounds 42media services GmbH shall only be liable to compensate or replace futile expenses in accordance with the following stipulations:

1. 42media services GmbH shall be liable for damages caused by the intentional or grossly negligent conduct of 42media services GmbH, its legal representatives, managerial employees or any other vicarious agents and damages arising from death, bodily damage and damage to health from the assumption of a guarantee or from a procurement risk as well as 42media services GmbH's liability for damages pursuant to the Product Liability Act (Produkthaftungsgesetz). In the case of damage caused by the grossly negligent conduct of any other vicarious agents, the liability shall be limited to those damages which are typically to be expected within the scope of an agreement such as the present one. Any further liability under this Agreement shall be excluded.

2. In the case of damage caused neither by intentional nor by the grossly negligent conduct of 42media services GmbH, 42media services GmbH shall only be liable where an obligation is violated, the fulfillment of which is of particular significance to the achievement of the contractual purpose (cardinal obligation). In this case, the restrictions of liability pursuant to the foregoing subsection 9.1 sentences 2 and 3 shall apply. In case of Trial Version Software, the liability for damages according to this subsection shall be excluded.

3. This limitation of liability for 42media services GmbH shall also apply for the benefit of 42media services GmbH's employees in the event that any claims are filed directly against them.

## **§ 10 - Resale by the Customer**

1. Insofar as the customer himself resells the products delivered by 42media services GmbH to a third party (end customer), he shall be obligated to refrain from any statements to the end customer at the time of resale with regard to characteristics of

42media services GmbH or its products, which 42media services GmbH has not expressly consented to in writing. The customer must refrain from everything that could adversely affect the good name and reputation of the products of 42media services GmbH.

2. The customer authorized to resell the products shall not have the right to represent 42media services GmbH on a contractual basis. The customer is obligated to avoid any semblance of entitlement to be in the capacity of establishing direct contractual relationships between 42media services GmbH and the end customer, and must conclude contractual relations with the end customer without the inclusion of 42media services GmbH. 42media services GmbH shall be entitled to reject inquiries from the end customer as well as direct contact with the end customer.

3. In the event that the products are resold within the meaning of the previous paragraphs, the customer shall be obligated to oblige his end customer to comply with the General Terms and Conditions in order to protect the rights to which 42media services GmbH is entitled and the integrity of its products as well as the corresponding provisions as set forth in individual contracts. The customer shall release 42media services GmbH from third party claims that result from an infringement by the end customer upon the provisions concerned.

## **§ 11 - Assignment/Setoff/Right of Retention**

1. The customer may assign claims based on this contract directed against 42media services GmbH to third parties only with the written consent of 42media services GmbH.

2. 42media services GmbH has the right to transfer its legal position arising from the contracts concluded with the customers to affiliated companies according to Sections 15 et. seq. German Stock Companies Act (Aktiengesetz - AktG) of 42media services GmbH.

3. The customer may only effect a set-off against claims of 42media services GmbH with undisputed and finally judged debts due and owing. The customer may only assert his right of retention insofar as it is based on the same contractual relationship.

4. Insofar as the customer falls in arrears with payment arising from an individual contract concluded with 42media services GmbH, 42media services GmbH may refuse to ship deliveries due within the framework of other business relationships with

the customer until such time when the customer is no longer in arrears.

## **§ 12 – Final Provisions**

1. Every modification, supplement, side agreement or the partial or entire cancellation of the contract must be made in writing, as must the amendment or cancellation of the written form requirement. The written form requirement pursuant to these General Terms and Conditions shall also be complied with by way of declaration via telefax
2. The laws of the Federal Republic of Germany shall apply exclusively for contracts concluded by 42media services GmbH on the basis of these General Terms and Conditions and for all claims arising therefrom regardless of type excluding the application of the UN Convention on Contracts for the International Sale of Goods (CISG).
3. Exclusive jurisdiction and legal venue for all disputes arising from this contract shall be Hannover, Germany, if the customer is a commercial businessman, legal entity of public law, public special estate or is without jurisdiction domestically.
4. Should provisions of these General Terms and Conditions and/or the contract be or become invalid, the validity of the remaining provisions shall remain unaffected.
5. The invalid provision shall be deemed to be replaced with a valid one that corresponds to the purpose of the agreement or at least comes closest to achieving the same commercial result originally intended by the contractual parties, had they been aware of the invalidity of the provision. The same shall apply for any incompleteness in the contract.

Garbsen, Germany, May 2009