

# SELLWINE ECOMMERCE LICENCE AGREEMENT

Effective June 22 2011

In this document unless the context requires otherwise:

FTW, We Our or Us refers to Free the Wine (ABN 58 475 322 374) care of PO Box 1447, Margaret River WA 6285;

Customer, Client, Your or Your refers to the person or legal entity using the service provided by Free The Wine

## Background

- A. Free the Wine owns the shopping cart software and related documentation known as "SellWine."
- B. Free The Wine has agreed to licence SellWine to the Client on the terms and conditions of this Agreement.

## Agreement

### 1. Definitions

The following definitions apply in this Agreement:

"Client's Website" means the website operated by the client which is directly linked to the SellWine cart as specified in the Schedule.

"Schedule" means the description of the service and list of costs agreed to with Free The Wine by the client for the service.

"Licence" means the licence granted to the Client pursuant to clause 2.1 of this Agreement.

"SellWine" means the shopping cart software owned by Free the Wine and any user documentation, related computer programs and information provided by Free the Wine to the Client as set out in the Schedule and as updated or corrected from time to time by Free the Wine;

"Server" means the ASP.net compatible server operated by the Client through an internet service provider or otherwise as set out in the Schedule and list of costs agreed to with Free The Wine for the service.

### 2. Licence

- 2.1. Subject to the terms of this Agreement Free the Wine grants the Client a non-exclusive, non-transferable Licence to use SellWine in relation to the Client's Website ("the Licence").
- 2.2. The Licence entitles the Client to:
  - 2.2.1. use the version of SellWine software installed on the Server as set out in the Schedule;
  - 2.2.2. access SellWine remotely through a customised web browser interface on the Client's Website that communicates with the Server via a secure internet connection; and
  - 2.2.3. obtain valid access permissions that are recognised by the Server ('Account Details'); and
  - 2.2.4. use any documentation, related computer programs and information provided by Free the Wine to the Client for the purpose for which they were provided;

### 3. Installation

- 3.1. For the avoidance of doubt the Client is not entitled to receive or install, a copy of the SellWine software on any of its computer equipment however it will be installed by Free the Wine on computer equipment operated by the Client's internet service provider.
- 3.2. Installation of Sellwine on computer equipment by the client internet service provider will be dependant on the clients internet service provider meeting the minimum specifications as outlined in schedule 1.
- 3.3. Free The Wine will uninstall or delete user accounts upon termination of this agreement
- 3.4. Access to the software is dependant on the client internets service provider providing continuous access and verified login and password details.

#### **4. Use of SellWine**

##### 4.1. The Client may not:

- 4.1.1. copy, disseminate, reverse engineer, decompile, disassemble, or otherwise derive source code from the SellWine software;
- 4.1.2. subLicence or transfer the Licence or any other rights granted under this Agreement; or
- 4.1.3. do anything calculated to damage or impair the operation or reputation of SellWine.

##### 4.2. The Client must:

- 4.2.1. not attempt to access or control SellWine except through the browser interface on the Client's Website;
- 4.2.2. comply with the current editions of any technical and instructional manuals, documentation, operational guidelines or emergency directions provided by Free the Wine to the Client from time to time; and
- 4.2.3. promptly report to Free the Wine any errors, defects or malfunctions in SellWine that they become aware of.

#### **5. Access & Security**

##### 5.1. The Client must:

- 5.1.1. only access SellWine using account access details supplied and approved by Free the Wine;
- 5.1.2. keep account access details secure and confidential and only disclose such details to employees or consultants on a need-to-know-basis;
- 5.1.3. regularly change passwords and keep records of all passwords used or disclosed, in accordance with good computer security practice;
- 5.1.4. make regular backups of all data which may be used as part of SellWine. This includes database records if no separate agreement has been entered into with Free The Wine to manage this data.

##### 5.2. If the Client becomes aware that account access details may have been disclosed to an unauthorised person then the Client must:

- 5.2.1. change any compromised access password immediately;
- 5.2.2. notify Free the Wine that there may be unauthorised access to SellWine through the Client's account;
- 5.2.3. take all other steps reasonably necessary to protect the integrity of SellWine, the Server and the Client's Website;
- 5.2.4. keep their computer system, network and internet connectivity secure and confidential in accordance with good computer security practice.

#### **6. Term and Payment for Services.**

- 6.1. The term of the Licence is 12 months from the date that the SellWine software is installed by Free the Wine onto the Server as set out in the Schedule.
- 6.2. The Client agrees to pay the fees on the dates and in the manner as set out in the attached Schedule.

#### **7. Training, Email Marketing, Hosting and Additional Services**

- 7.1. Free the Wine agrees to provide the Client with training, email marketing, hosting and additional services as set out in the Schedule.
- 7.2. It is acknowledged by the Client that any additional work, design, construction or implementation that is not included in the Schedule or in the written and signed off specification will incur additional charges. Any additional work or variations shall be charged out on an hourly basis. Variations shall be described as line items on a separate variation sheet and invoiced on a monthly basis.

#### **8. Technical Support**

- 8.1. Free the Wine agrees to provide the Client with technical support as set out in the attached Schedule and subject to the following terms:

- 8.1.1. assistance with installation of SellWine on the Client's Website is limited strictly to providing a default installation of the SellWine software utilising existing, pre-installed prerequisite components. Dependant on the internet service provider there may be additional charges for technical support in configuring or installing prerequisites such as Microsoft SQL Server, IIS, or Microsoft ASP.NET.
- 8.1.2. assistance with general internet related services such as hosting, domain name registration, domain name server (DNS) configuration, or Secure Socket Layer (SSL) certificate installation and maintenance can be provided however this service will be charged for separately; and
- 8.1.3. technical support is limited to questions directly related to the SellWine software, its setup (including interaction with SSL certificates), operation, and product features. Free the Wine does not provide technical support for day to day operational storefront issues directly with, or on behalf of, store owners or developers.

8.2. For the avoidance of doubt Free the Wine does not provide general information technology (IT) services such as server setup and management, database or web server maintenance, virus protection, firewall maintenance, or other related hardware/software operations even if such operation or maintenance is directly related to the installation and use of the SellWine software. SellWine requires the use of certain third party components such as Microsoft Windows, Microsoft SQL Server, and the Microsoft Asp.NET framework however Free the Wine does not provide support or assistance with these components in any manner. Technical support for any such third-party component must be arranged pursuant to a separate Licence agreement directly between the Client and the seller of any such component.

## 9. Termination by Client

- 9.1. The Licence will be automatically renewed for a 12 month period at the end of the term unless the Client sends Free the Wine a written notice of termination via email to [info@freethewine.com](mailto:info@freethewine.com) at least 30 days before the end of the current Licence term. Any such notice of termination must include sufficient customer identification information so that Free the Wine may properly identify the Client. The notice of termination will be effective upon Free the Wine's receipt of the email.
- 9.2. If the Client terminates the Licence before the end of each 12 month term pursuant to clause 9.1 then:
  - 9.2.1. Free the Wine may immediately erase, wipe clean or otherwise destroy any of the Client's details which are contained on the Server; and
  - 9.2.2. Free the Wine does not have the obligation to refund any fees paid in advance of termination nor relieve the Client of any obligations to pay fees and costs accrued before the termination date or any other amounts owed to Free the Wine under this Agreement.

## 10. Termination by Free the Wine

- 10.1. Free the Wine may terminate this Agreement at any time and for any reason by providing the Client 90 days' prior written notice of termination. If Free the Wine terminates this Agreement pursuant to this clause Free the Wine will refund to the Client the pro-rata portion of any fees paid that are attributable to services not yet rendered.

## 11. Termination by Either Party

- 11.1. This Agreement may be terminated by either party immediately by written notice if the other party:
  - 11.1.1. being the Client, breaches any payment obligation of this Agreement and does not remedy the breach within 14 days of written notice to do so;
  - 11.1.2. breaches any material provision of this Agreement and does not remedy the breach within 30 days of written notice to do so;
  - 11.1.3. ceases to have the ability to pay its debts as they fall due; or
  - 11.1.4. has appointed a receiver, manager, trustee, liquidator, administrator or any such like person to all or part of its assets or business.

## 12. Upon Termination

- 12.1. If this Agreement is terminated for any reason then:
  - 12.1.1. Free The Wine will not be liable to the Client for any compensation, reimbursement or damages on for loss of prospective profits, anticipated sales, goodwill or on account of expenditures, investments, leases or

commitments in connection with the Client's business, or for any other reason whatsoever flowing from the termination; and

12.1.2. Free the Wine may immediately erase any of the Client's details which are contained on the Server.

12.2. The Client is responsible for any costs Free the Wine incurs in enforcing collection, including reasonable legal fees, court costs and collection agency fees. If the Client wishes to reinstate the SellWine software the Client will need to pay all fees associated with re-licensing and re-installing the software.

### **13. Suspension and reactivation**

13.1. Free the Wine may from time to time without notice suspend the Client's Licence in the following circumstances:

13.1.1. During any technical failure, modification or maintenance of SellWine provided that Free the Wine will use reasonable endeavours to procure the resumption of the Licence as soon as practicable; or

13.1.2. If the Client breaches any provision in this Licence, which breach in Free the Wine's reasonable opinion may have the effect of jeopardising the operation of SellWine until the breach (if capable of remedy) is remedied.

13.2. If the Licence is suspended pursuant to clause 13.1 the Client will still remain liable for all fees due throughout the period of suspension.

13.3. If the Licence is suspended pursuant to clause 13.2 reactivation of the Licence will be at Free the Wine's sole discretion and will require payment of all outstanding fees due and any re-activation fees.

### **14. Technical Requirements, Performance & Availability**

14.1. Free the Wine may customise, modify, enhance, adapt, update or replace SellWine in its absolute discretion, and a reference to SellWine includes such customization, modification, enhancement, adaptation, update or replacement.

14.2. Free the Wine may publish minimum technical requirements for the use of Sellwine and may revise them from time to time:

14.2.1. with at least 30 days notice in writing in the case of changes that require new or different hardware, or the purchase of new software; and

14.2.2. with at least 7 days notice in writing in the case of changes that only involve system reconfiguration, or the installation of free software.

14.3. Free the Wine does not warrant that SellWine will operate in environments other than as specified in the minimum technical requirements or that its operation will be uninterrupted or error-free.

14.4. The Client acknowledges that:

14.4.1. SellWine does not come with a payment gateway to process payments and the Client must enter into a separate agreement with a provider of payment gateway services before it can process payments;

14.4.2. minimum technical requirements are designed to deliver only basic system performance, and the Client may require a more powerful computer system or faster internet connectivity to achieve higher level performance;

14.4.3. the Client must ensure, at its own cost, that its computer system and internet connectivity meet the minimum technical requirements at all times;

14.4.4. the Client is responsible for ensuring any changes to or development of the Client Website is compatible with SellWine; and

14.4.5. the Client is responsible for ensuring that adequate disaster recovery plans and back up procedures are in place.

## 15. Copyright

- 15.1. SellWine is Licensed to the Client under this Agreement, not sold. The Client acknowledges that the SellWine software is owned by Free the Wine and is protected by Australian copyright laws and international treaty provisions. Therefore, the Client must treat the software like any other copyrighted material (ie. book or musical recording). The Client may not copy the SellWine software or the written materials accompanying SellWine.
- 15.2. If Free the Wine customises the appearance of the browser interface to include intellectual property owned by the Client it is acknowledged and agreed that the Client will continue to own that intellectual property. If the Client requests that Free the Wine use intellectual property owned by a third party the Client warrants that it has the right to use such material and indemnifies Free the Wine in relation to any damages or loss it may suffer as a result of using any such material.

## 16. Disclaimer

**16.1.** To the extent allowed by Australian law:

- 16.1.1.** the SellWine software is provided to the Client "*as is*" without warranties or conditions of any kind, whether oral or written, express or implied;
- 16.1.2.** Free the Wine specifically disclaims any implied warranties or conditions of merchantability, satisfactory quality, non-infringement, title, accuracy of informational content, and fitness for a particular purpose; and
- 16.1.3.** the entire risk as to the results and performance of SellWine is assumed by the Client and no oral or written information or advice given by Free the Wine shall create a warranty.

## 17. Limitation of Liability

- 17.1. Except to the extent prohibited by Australian law, in no event will Free the Wine or its subsidiaries, directors, officers or employees be liable for direct, indirect, special, incidental or any other damages (including lost profit, lost data, or downtime costs), arising out of the use, inability to use SellWine, whether based in warranty, contract, tort or other legal theory, and whether or not Free the Wine was advised of the possibility of such damages. The Client's use of the software is entirely at the Client's own risk.

## 18. Governing Law

- 18.1. The law of Western Australia governs this Agreement and the parties submit to the non-exclusive jurisdiction of the courts of Western Australia and their appeal courts.

The agreement made between us on these Terms commences on the date FTW accepts Customers first payment (in full or part) for the services.