

## **Contents / Inhalt**

This document contains all license agreements for the FlexXCon midget Toolset. /  
Dieses Dokument beinhaltet alle Lizenzvereinbarungen für das FlexXCon midget Toolset.

- 1.** Terms and Conditions for Software Use in English (11. April 2011)
- 2.** Softwarenutzungsbedingungen in Deutsch (11. April 2011)
- 3.** Third Party Licenses / Lizenzvereinbarungen von Dritten

The license agreements **(I)** to **(VI)** are part of components which can be optionally installed. /  
Die Lizenzvereinbarungen **(I)** bis **(VI)** sind Teil von Komponenten, welche optional installiert werden können.

The uIP TCP/IP Stack is included in the Examples and the Library:

**(I)** License for uIP TCP/IP Stack

Eclipse:

**(II)** Eclipse Foundation Software User Agreement

**(III)** Eclipse Public License – v 1.0

GNU GCC:

**(IV)** GPL 2.0

P&E Microcomputer Systems, Inc.:

**(V)** P&E pkgppc Nexus Starter License

**(VI)** P&E Device Driver License

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## **Terms and Conditions for Software Use (11. April 2011)**

### **§ 1 Scope**

1. These Terms and Conditions for Software Use shall govern Eberspächer's provision of Software to the Customer.
2. If the Customer acquires Hardware from Eberspächer in which the Software has been preinstalled, these Terms and Conditions for Software Use shall apply to the pre-installed copy of the Software by way of analogy.
3. These Terms and Conditions for Software Use govern the provision of software against payment and the provision of Demo Software. However, the provision of Demo Software is only governed to the extent explicitly provided in § 20 of these Terms and Conditions for Software Use. Provisions of these Terms and Conditions for Software Use that § 20 does not explicitly declare to be applicable to the provision of Demo Software apply exclusively to software that is provided against payment.

### **§ 2 Definitions**

Unless otherwise explicitly stipulated, the following terms used in these Terms and Conditions for Software Use (including the definitions themselves) have the following meaning:

#### **Customer**

The party to the respective agreement with Eberspächer as licensee.

#### **Demo Software**

Software that Eberspächer provides to the Customer free of charge which has a limited functional scope compared to the corresponding Software provided against payment.

#### **Device Driver**

Software that is designed to control a specific piece of Hardware and is acquired by the Customer from Eberspächer together with this Hardware. Whether or not a piece of Software is a Device Driver is set forth in the respective User Documentation.

#### **Download**

The possibility of transferring data in the Internet from one computer to the Customer's computer.

#### **Eberspächer**

Eberspächer Electronics GmbH & Co. KG.

#### **Firmware/Embedded Software**

Software that is embedded in Hardware and is acquired by the Customer from Eberspächer

together with this Hardware. Whether such Software is Firmware or Embedded Software is set forth in the respective User Documentation.

**Hardware**

Electromechanical devices that are generally not functional without Software.

**License Materials**

The Software together with the User Documentation.

**License Models**

The License Models described in § 6 of these Terms and Conditions for Software Use for the licensing of the Software.

**Normal Working Hours**

Monday through Thursday 9:00 a.m. – 12:00 noon and 1:00 p.m. – 3:30 p.m. plus Friday 09:00 a.m. – 12:00 noon Central European Time (daylight-saving time), excepting legal holidays in the Federal States of Baden-Württemberg or Bavaria and Eberspächer's general closing times (in particular 24 December through 6 January).

**Object Code**

The Software in a form that is only machine readable which is suitable for generating an executable machine code.

**Parties**

Eberspächer and the Customer together.

**Software**

The software that is listed and described in the order confirmation.

**Source Code**

The source code of the Software that is readable by humans and written in a programming language.

**Terms and Conditions for Use of Software**

These general terms and conditions for the provision of Software for use.

**Update**

The bundling of several defect corrections and/or repairs of faults in the Software, as well as minor functional improvements or adjustments of the Software in a single batch.

**User Documentation**

The textual and technical description of the Software that is in effect prior to the conclusion of this agreement and is provided to the Customer prior to the conclusion of this agreement (e.g. Instructions for Use, User Manual, Documentation).

### **§ 3 Order of priority**

1. The agreements entered into by the Customer and Eberspächer have the following order of priority:
  - order confirmation
  - User Documentation of the respective Software
  - these Terms and Conditions for Software Use
  - Eberspächer's general terms and conditions of sale

In the event of any conflicts, the provisions listed first will always take priority over those listed last. Any gaps shall be filled by the respective subordinate provisions.

2. Any contrary or differing terms and conditions of the Customer shall only apply with Eberspächer's explicit written consent.

### **§ 4 Contract formation**

All offers by Eberspächer are non-binding. A contract between the Customer and Eberspächer will only be concluded by the written confirmation of an order or the delivery of Software by Eberspächer.

### **§ 5 General Terms and Conditions of use rights**

1. Eberspächer grants the Customer the right to use the Software under these Terms and Conditions for Software Use. For the use of the Software, Eberspächer offers the License Models designated in § 6 of these Terms and Conditions for Software Use. The following provisions of this § 5 of the Terms and Conditions for Software Use shall apply to all License Models. Any use or exploitation of the Software that goes beyond these Terms and Conditions for Software Use is prohibited.
2. For the duration of the existence of any intellectual property rights, the Customer is granted a non-exclusive right to use the Software for internal use for the purposes set forth in the User Documentation. Use of Software means any permanent or temporary full or partial reproduction of the Software by means of saving, loading, running or displaying the Software for the purpose of executing the Software; any other reproduction of the Software is prohibited, with the exception of the making of a backup copy (§ 7 of these Terms and Conditions for Software Use). Prohibited is in particular, but without limitation, the reproduction of the Software for the purpose of passing it on to third parties with or without remuneration.

3. The Customer may only modify or edit the Software to the extent necessary for the use described in the User Documentation, to connect the Software with another computer program, or to correct errors. Other than that, the Customer may only modify the Software if and to the extent Eberspächer has explicitly permitted the Customer to do so in writing.
4. With regard to the rights to the Software granted to the Customer, the Customer shall not grant rights to third parties. Nor may the Customer grant third parties a sublicense in the rights to the Software granted to the Customer. § 18 of these Terms and Conditions for Software Use remains unaffected.

## **§ 6 License Models**

1. Eberspächer offers the Customer the following License Models for the licensing of the Software:

- a. “Single User License”

Only one employee of the Customer may use the Software on one computer at a time. The Customer is free to choose which computer and which employee will be involved in the use. The Customer is not allowed to keep the Software on the server of a network if this would enable multiple uses of the Software at the same time. If the Customer wishes to have the Software used by multiple employees or on multiple computers at the same time, the Customer must notify this in writing in advance and purchase additional licenses for the Software from Eberspächer.

- b. “Floating License”

The Customer may have the Software used by two or more employees on various computers at the same time. The number of employees entitled to use it at the same time can be derived from the order confirmation. The Customer is free to choose which employees and which computers will be involved in the use. If the Customer wishes to increase the number of employees entitled to use the Software at the same time, it must notify this in writing in advance and purchase additional licenses for the Software from Eberspächer.

- c. “Integrated Software License”

The Integrated Software License applies to device drivers, Firmware and Embedded Software. The Customer may use the licensed Software under the Integrated Software License only for the designated operation of the Hardware acquired from Eberspächer together with this Software. The designated operation The designated operation is set forth in the respective User Documentation.

Any other use of the Software, in particular but not limited to, the use of the Software for Hardware that the Customer did not acquire from Eberspächer together with the Software is prohibited.

2. Device drivers, Firmware and Embedded Software shall always be licensed under the Integrated Software License. Otherwise, the rule shall apply that unless otherwise explicitly regulated in the confirmation of order, the Customer will merely be acquiring a “Single User License”.

#### **§ 7 Backup copy**

The use of the Software and the data contained therein in accordance with these Terms and Conditions for Software Use includes the creation of a backup copy. The backup copy may only be used for backup purposes. The Customer shall keep the backup copy at a secure location that is not accessible to third parties.

#### **§ 8 Source Code/Object Code**

1. The Software will be provided to the Customer in the Object Code as a Download or on machine readable data carriers.
2. Unless otherwise explicitly provided in the order confirmation, the Customer is not entitled to the provision of the Source Code or parts thereof.
3. A decompilation of the Object Code is permissible only in compliance with the statutory limitations set forth in sec. 69e of the German Copyright Act (UrhG). Any decompilations in excess thereof are prohibited.

#### **§ 9 User Documentation**

1. The Customer will receive one User Documentation in typewritten form and/or in electronic form on machine readable data carriers or as a Download.
2. The Customer may reproduce the User Documentation in typewritten form only with Eberspächer’s prior written consent. If the Customer receives the User Documentation only in electronic form, then notwithstanding sentence 1 the Customer may make one copy of the User Documentation in typewritten form for its own internal use.
3. In all other respects, § 5 through § 7 of these Terms and Conditions for Software Use shall apply by analogy to the use of the User Documentation in electronic form.

## **§ 10 Protection of the License Materials**

1. The Customer undertakes to retain in unmodified form the protection notices contained in the License Materials, such as copyright notices and other reservations of rights, as well as to incorporate them into the backup copy in unmodified form.
2. Notwithstanding the use rights granted on the basis of these Terms and Conditions for Software Use, Eberspächer retains all rights to the License Materials, including all rights in all copies or partial copies created thereof by the Customer. This does not affect the Customer's ownership of machine readable data carriers and Hardware.

## **§ 11 Maintenance of Software**

1. A prerequisite for the provision of Software maintenance is the conclusion of a maintenance agreement for a consideration. Without a maintenance agreement, the Customer shall have no claim to Software maintenance.
2. Software maintenance comprises the delivery of Updates to the Software once Eberspächer also provides it to other customers in the normal course of business.
3. Maintenance agreements shall have a basic term of one calendar year commencing with the day on which the respective Software is provided. If the maintenance agreement is not terminated by one of the Parties in writing at least two calendar months prior to the expiration of the basic term, the maintenance agreement shall extend by another calendar year. Sentence 2 applies for every subsequent extension *mutatis mutandis*.
4. For the use of Updates of the Software, these Terms and Conditions for Software Use, in the version current at the time of the delivery of the respective Updates shall apply.

## **§ 12 Warranty of title (*Rechtsmängelgewährleistung*)**

1. The Customer shall notify Eberspächer in writing without delay of any claims asserted against the Customer arising from an infringement of intellectual property rights by the License Materials.
2. If the Customer's designated use of the License Materials is impaired by the intellectual property rights of third parties, Eberspächer shall to an extent reasonable for the Customer, have the right at Eberspächer's option to acquire corresponding licenses from third parties at Eberspächer's expense or to modify or replace the License Materials such that they no longer impair the intellectual property rights of third parties.
3. Eberspächer shall not be liable under a warranty of title where the infringement of intellectual property rights of third parties is due to the fact that the Customer has modified or edited the License Materials or is using the Software together with Hardware or computer programs that were not supplied by Eberspächer. This also applies where the

third party's claims arise from a use of the License Materials by the Customer after it had been informed by Eberspächer that as a result of a third party claim the use should be stopped.

### **§ 13 Warranty of merchantability (*Sachmängelgewährleistung*)**

1. The Parties to the contract agree that it is not possible to develop software that is free of defects for all operating conditions. The designated use and the conditions for operation of the Software are set forth in the User Documentation. The Customer bears sole responsibility for the selection and usage of the Software, including the performance results to be achieved by the usage of the Software.
2. Eberspächer warrants that the Software in the version provided to the Customer is suitable for the designated use in accordance with the User Documentation. In the event of significant deviations from the User Documentation, Eberspächer shall have the right and, unless unreasonable expense would be involved, the obligation to perform remediation. If the Customer cannot reasonably be expected to await the next Update of the Software and Eberspächer fails to remediate such significant deviations of the Software from the User Documentation or to work around them such that the Customer is able to use the Software in the designated manner within a reasonable period of time,, the Customer may, at its option, withdraw or instead claim a reduction of the license fee pursuant to sec. 441 of the German Civil Code (BGB).
3. Eberspächer will fulfill its warranty obligations during the Normal Working Hours ; no costs will be incurred by the Customer in this respect. If Eberspächer is to fulfill warranty obligations outside of normal working hours, the Parties shall enter into a written supplementary agreement to compensate for the additional costs.
4. The Customer is obligated to provide Eberspächer with verifiable documentation of the nature and occurrence of deviations of the Software from the User Documentation and shall cooperate in isolating any defects.
5. Obvious defects must be notified to Eberspächer within a period of 2 (two) weeks of receipt of the Software; otherwise, Eberspächer shall not be liable for a warranty violation. The timely dispatch of the notification of defect will be sufficient for compliance with the deadline; the burden of proof is on the Customer. If the Customer is a merchant (*Kaufmann*), the provisions of sec. 377 of the German Commercial Code (HGB) shall apply.
6. Eberspächer shall have no warranty obligations if the Customer has modified or edited the Software.



7. Eberspächer will likewise have no warranty obligations for defects in quality if the defect in the Software is due to the fact that the Customer is using the Software together with hardware or computer programs that were not supplied by Eberspächer.
8. Should Eberspächer nonetheless perform work to remediate defects in the cases set forth in § 13 paras. 6 and 7 of these Terms and Conditions for Software Use, the Customer shall pay for such work at Eberspächer's normal rates in effect at the time such work is carried out.
9. The above limitations of the warranty obligation shall not apply in cases in which Eberspächer has assumed a guarantee for a condition of the License Material or if Eberspächer fraudulently concealed any defects.

#### **§ 14 Statute of limitations of warranty claims**

Subject to the provisions in the following sentence and in § 13 para. 9 of these Terms and Conditions for Software Use, warranty claims will become time-barred one year after delivery of the Software. However, the Customer's claims for damages or reimbursement of expenditures shall not be affected by the above provision and shall become time-barred according to the statutory time periods; for claims for damages and reimbursement of expenditures, the provisions in § 15 of these Terms and Conditions for Software Use shall apply.

#### **§ 15 Disclaimer of Liability**

1. In the event of a breach of material contractual duties (so-called "Cardinal Obligations"), Eberspächer shall be liable toward the Customer for reimbursement of expenditures and damages (hereinafter in this § 15 of the Terms and Conditions for Software Use collectively referred to as "**Damages**"). Cardinal Obligations are all obligations whose breach would jeopardize the achievement of the contractual purpose, as well as all obligations whose fulfillment enables the proper performance of the contract in the first place and on compliance with which the Customer can generally rely. However, where a breach of a Cardinal Obligation is due only to slight negligence and does not result in injury to life, limb or health, the Customer's claims will be limited to Damages in the amount of the typically foreseeable damage.
2. Eberspächer shall also be liable to the Customer pursuant to the provisions of the German Product Liability Act (*Produkthaftungsgesetz*), in cases of intent and gross negligence, for injury to life, limb or health, if it assumes a guarantee, as well as in all other cases of mandatory statutory liability, in each case in accordance with the statutory provisions.
3. In all other cases, claims for damages against Eberspächer – regardless of their legal basis, in particular due to a breach of obligations under the contractual relationship between the Parties by Eberspächer, its legal representatives, employees or vicarious

agents (*Erfüllungsgehilfen*), pursuant to sec. 311a German Civil Code or based on tort – are disclaimed.

4. To the extent Eberspächer's liability is limited or disclaimed under the above provisions, this shall also apply to the personal liability of Eberspächer's legal representatives, employees and vicarious agents.

## **§ 16 Operating conditions for the Software**

1. The Software provided to the Customer was developed for use on certain hardware and for purposes of interoperability with certain other computer programs. These operating conditions are set forth in detail in the respective User Documentation, compliance with which is mandatory for the Customer. The Customer shall also inspect the Software carefully before putting it into productive operation. This applies especially, but not only, if the Software is to be put to use in a safety-critical area.
2. If the Software is not used in compliance with the operating conditions as set forth in § 16 para. 1 of these Terms and Conditions for Software Use, the warranty obligation pursuant to § 12 and § 13 of these Terms and Conditions for Software Use shall not apply. Should Eberspächer nonetheless perform work to remediate the defects, the Customer shall pay for such work at Eberspächer's normal rates in effect at the time such work is carried out.
3. In the event that third parties assert claims against Eberspächer arising from the fact that the Customer, its legal representatives, employees or vicarious agents culpably used the Software without complying with the operating conditions pursuant to § 16 para. 1 of these Terms and Conditions for Software Use, the Customer shall indemnify Eberspächer against such claims of the third party and reimburse Eberspächer for all damage incurred in this connection. Eberspächer shall notify the Customer in writing without delay in case any claims within the meaning of sentence 1 are asserted against it.

## **§ 17 Test phase**

1. The Customer has the right to test the Software free of charge before putting it into productive operation if this is explicitly provided for in the order confirmation. In that case, the individual modalities of the test phase (duration, etc.) will be those stated in the order confirmation.
2. In any case, the test phase shall end once the Customer begins to put the Software into productive operation. The Customer shall notify Eberspächer in writing of the commencement of the productive operation.

## **§ 18 Transfer of the License Materials**

1. The Customer has the right to transfer the License Materials in their original condition to a third party, together with a copy of these Terms and Conditions for Software Use and the order confirmation as long as the Customer provides Eberspächer with the name and complete address of such third party and the third party undertakes to Eberspächer to comply with the restrictions set forth in the order confirmation, the User Documentation and these Terms and Conditions for Software Use when using the Software. This right to transfer the License Materials does not extend to modified or edited versions of the License Materials.
2. Upon the transfer of the License Materials in compliance with the prerequisites set forth in paragraph 1, the right to use the License Materials will pass to the third party, who thereby replaces the Customer within the meaning of these Terms and Conditions for Software Use. At the same time, the Customer's right to use the Software will end.
3. Upon the transfer of the License Materials, the Customer shall immediately and completely delete or otherwise destroy all copies and partial copies of the License Materials as well as modified or edited versions of the License Materials. This also applies to the backup copy pursuant to § 7 of these Terms and Conditions for Software Use.
4. § 18 paras. 1 to 3 of these Terms and Conditions for Software Use also apply if the transfer consists of a temporary provision for use. However, it is prohibited to rent out the License Materials or parts thereof.
5. For cases in which the License Materials are subsequently transferred to other third parties, § 18 paras. 1 to 4 of these Terms and Conditions for Software Use shall apply accordingly.

## **§ 19 License fee / maintenance fees**

1. The Customer shall pay the license and maintenance fees set forth in the order confirmation. The amounts listed in the order confirmation do not include VAT, which will be invoiced separately at the rate in effect at the time.
2. In all other respects, the payment of the license and maintenance fees will be governed by Eberspächer's general terms and conditions of sale, which shall be provided to the Customer prior to the conclusion of the contract.

## **§ 20 Demo Software**

1. Besides the Software Eberspächer offers against payment, Eberspächer also offers Demo Software in Object Code on machine readable data carriers or as a Download. The Customer is not entitled to a provision of Demo Software for use, nor to a provision

of the Source Code of the Demo Software or parts thereof for use, nor to a provision of Updates of Demo Software for use.

2. The contract between the Customer and Eberspächer on the provision of Demo Software for use shall be concluded by the utilization of the Demo Software by the Customer.
3. For the duration of the existence of any intellectual property rights, the Customer is granted a non-exclusive right to use the Demo Software internally for the purposes set forth in the User Documentation. Use of the Demo Software means any permanent or temporary full or partial reproduction of the Demo Software by means of saving, loading, running or displaying it for the purpose of executing the Demo Software; any other reproduction of the Demo Software is prohibited, with the exception of the making of a backup copy (§ 7 of these Terms and Conditions for Software Use). Prohibited is in particular, but without limitation, the reproduction of the Demo Software for the purpose of passing it on to third parties with or without remuneration.
4. The Customer shall have no right to modify or edit the Demo Software. A decompilation of the Object Code is permissible only subject to the statutory restrictions set forth in sec. 69e Copyright Act. Any decompilations in excess thereof are prohibited.
5. With regard to the rights to the Demo Software granted to the Customer, the Customer shall not grant any rights to third parties. Nor may the Customer grant third parties a sub-license in the rights to the Demo Software granted to the Customer.
6. Eberspächer shall only be liable for defects of title or quality of the Demo Software and the respective User Documentation if Eberspächer has fraudulently concealed such defect. Apart from warranty obligations, Eberspächer shall only be liable for intent and gross negligence. Any other liability of Eberspächer is disclaimed. To the extent Eberspächer's liability is limited or disclaimed pursuant to the above provisions, this shall also apply to Eberspächer's legal representatives, employees and vicarious agents.
7. The Demo Software provided to the Customer was developed for use on certain hardware and for purposes of interoperability with certain other computer programs. These operating conditions are set forth in detail in the respective User Documentation. In the event that third parties assert claims against Eberspächer arising from the fact that the Customer, its legal representatives, employees or vicarious agents culpably used the Demo Software without complying with the operating conditions pursuant to § 20 para. 7 sentence 2 of these Terms and Conditions for Software Use, the Customer shall indemnify Eberspächer against such claims of the third party and reimburse Eberspächer for all damage incurred in this connection. Eberspächer shall notify the Customer in writing without delay in case any such claims are asserted against it.

8. In all other respects, the following provisions of these Terms and Conditions for Software Use shall apply by analogy to the provision of the Demo Software: § 7, § 9 (with the modification that § 9 para. 3 shall refer to this § 20), § 10 and § 22.

## **§ 21 Confidentiality**

1. The confidentiality obligations of both Parties follow from a separate confidentiality agreement. If the Parties have not entered into such a separate confidentiality agreement, the following paras. 2 to 4 shall apply.
2. The Parties undertake to maintain secrecy for an unlimited period of time with regard to all confidential information that becomes accessible to them in connection with this agreement. Confidential information is information that a Party has either marked or in any other way designated in writing as protected or confidential, or information that, in light of the circumstances of its disclosure, the recipient Party must reasonably identify as confidential. Confidential information includes in particular, but without limitation, the License Materials.
3. The above confidentiality obligations will not apply if and to the extent the respective item of information demonstrably (i) is generally known or has become generally known without a party's fault and without violation of these obligations of confidentiality, (ii) is or becomes state of the art, (iii) was already known to the recipient Party at the time of its disclosure, which must be proved by documents evidencing such knowledge, (iv) was or is lawfully made known or accessible to the recipient Party by a third party, (v) has to be disclosed due to statutory provisions or enforceable official orders or court decisions. The burden of proving the existence of such an exception is borne by the respective recipient of the information. In any case, the respective affected Party must, to the extent possible, be informed in a timely manner prior to the disclosure of the information to third parties.
4. Both Parties will take suitable precautions to protect the confidential information of the respective other Party. Both Parties will disclose confidential information of the respective other Party to governing bodies, employees, consultants or sub-contractors only subject to this confidentiality obligation, which must likewise be imposed on the recipient.

## **§ 22 Miscellaneous**

1. Should any individual provisions of these Terms and Conditions for Software Use be or become invalid, this shall not affect the validity of the other provisions.
2. For the purpose of handling the provision of the Software, Eberspächer will store personal data of the Customer in an IT system and automatically process it. The data will not be used for any purposes in excess thereof. It will not be passed on to third parties.

3. The governing laws are the laws of the Federal Republic of Germany. The UN Convention on Contracts for the International Sale of Goods does not apply.

If the Customer is a merchant (*Kaufmann*), a legal entity under public law (*juristische Person des öffentlichen Rechts*) or a special fund under public law (*öffentlich-rechtliches Sondervermögen*), the exclusive legal venue for all disputes shall be Stuttgart. Eberspächer is entitled, at its option, to file suit against the Customer at the latter's general legal venue.

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## **Softwarenutzungsbedingungen (11. April 2011)**

### **§ 1 Geltungsbereich**

1. Die Softwarenutzungsbedingungen gelten für die Überlassung von Software durch Eberspächer an den Kunden.
2. Erwirbt der Kunde von Eberspächer Hardware, in der die Software vorinstalliert ist, gelten die Softwarenutzungsbedingungen auch für die vorinstallierte Kopie der Software.
3. Die Softwarenutzungsbedingungen regeln die entgeltliche Softwareüberlassung und die Überlassung von Demo Software, die Überlassung von Demo Software jedoch nur, soweit dies ausdrücklich in § 20 der Softwarenutzungsbedingungen vorgesehen ist. Bestimmungen der Softwarenutzungsbedingungen, die § 20 der Softwarenutzungsbedingungen nicht ausdrücklich auf die Überlassung von Demo Software für anwendbar erklärt, gelten ausschließlich für die entgeltliche Softwareüberlassung.

### **§ 2 Definitionen**

Soweit nicht ausdrücklich anders geregelt, haben in den Softwarenutzungsbedingungen (einschließlich der Definitionen selbst) die nachfolgenden Begriffe jeweils die folgenden Bedeutungen:

#### **Anwenderdokumentation**

Die vor Vertragsschluss gültige und dem Kunden vor Vertragsschluss zur Verfügung stehende inhaltliche und technische Beschreibung der Software (z.B. Instruction for Use, User Manual, Documentation).

#### **Demosoftware**

Eine Software mit im Verhältnis zur entsprechenden entgeltlichen Software eingeschränktem Funktionsumfang, die Eberspächer den Kunden unentgeltlich zur Verfügung stellt.

#### **Download**

Die Möglichkeit zur Übertragung von Daten im Internet von einem Computer zum Computer des Kunden.

#### **Eberspächer**

Eberspächer Electronics GmbH & Co. KG.

#### **Firmware/ Embedded Software**

Eine Software, die in Hardware eingebettet ist und vom Kunden gemeinsam mit dieser Hardware von Eberspächer erworben wird. Ob es sich bei einer Software um eine Firmware oder Embedded Software handelt, ergibt sich aus der jeweiligen Anwenderdokumentation.

**Gerätetreiber**

Eine Software, die zur Steuerung einer Hardware bestimmt ist und vom Kunden gemeinsam mit dieser Hardware von Eberspächer erworben wird. Ob es sich bei einer Software um einen Gerätetreiber handelt, ergibt sich aus der jeweiligen Anwenderdokumentation.

**Hardware**

Elektromechanische Geräte, die in der Regel ohne Software nicht funktionstüchtig sind.

**Kunde**

Der jeweilige Vertragspartner von Eberspächer als Lizenznehmer.

**Lizenzmaterial**

Die Software nebst Anwenderdokumentation.

**Lizenzmodelle**

Die in § 6 dieser Softwarenutzungsbedingungen für die Lizenzierung der Software genannten Lizenzmodelle.

**Softwarenutzungsbedingungen**

Diese allgemeinen Bedingungen für die Überlassung von Software.

**Objektcode**

Die Software in einer ausschließlich für Maschinen lesbaren Form, die für die Erzeugung eines ausführbaren Maschinencodes geeignet ist.

**Quellcode**

Der für Menschen lesbare, in einer Programmiersprache geschriebene Quell-Text der Software.

**Software**

Die in der Auftragsbestätigung einzeln aufgeführte und beschriebene Software.

**Übliche Arbeitszeiten**

Montags bis Donnerstags 09.00 – 12.00 Uhr und 13.00 – 15.30 Uhr sowie Freitags 09.00 – 12.00 Uhr Mitteleuropäischer (Sommer-)Zeit, ausgenommen gesetzliche Feiertage in den Bundesländern Baden-Württemberg oder Bayern und allgemeine Schließzeiten von Eberspächer (insbesondere vom 24. Dezember bis zum 6. Januar jeweils einschließlich).

**Update**

Die Bündelung mehrerer Mängelbehebungen und/oder Störungsbeseitigungen der Software sowie geringfügige funktionale Verbesserungen oder Anpassungen der Software in einer einzigen Lieferung.

**Vertragsparteien**

Eberspächer und der Kunde gemeinsam.



### **§ 3 Rangfolge**

1. Die zwischen dem Kunden und Eberspächer geschlossenen Vereinbarungen stehen in der folgenden Rangfolge:
  - Auftragsbestätigung
  - Anwenderdokumentation der jeweiligen Software
  - Softwarenutzungsbedingungen
  - Allgemeine Verkaufsbedingungen von Eberspächer

Die zuerst genannten Bestimmungen haben bei Widersprüchen stets Vorrang vor den zuletzt genannten Bestimmungen. Lücken werden durch die jeweils nachrangigen Bestimmungen ausgefüllt.

2. Entgegenstehende oder abweichende Geschäftsbedingungen des Kunden gelten nur, wenn Eberspächer diesen ausdrücklich schriftlich zugestimmt hat.

### **§ 4 Vertragsschluss**

Alle Angebote von Eberspächer sind freibleibend. Ein Vertrag kommt zwischen dem Kunden und Eberspächer erst durch die schriftliche Auftragsbestätigung oder durch die Lieferung der Software durch Eberspächer zustande.

### **§ 5 Allgemeine Bedingungen zum Nutzungsrecht**

1. Eberspächer räumt dem Kunden das Recht ein, die Software unter diesen Softwarenutzungsbedingungen zu nutzen. Für die Softwarenutzung bietet Eberspächer die in § 6 dieser Softwarenutzungsbedingungen genannten Lizenzmodelle an. Die nachfolgenden Regelungen dieses § 5 der Softwarenutzungsbedingungen gelten für alle Lizenzmodelle. Jede über diese Softwarenutzungsbedingungen hinausgehende Nutzung oder Verwertung der Software ist ausgeschlossen.
2. Der Kunde erhält für die Dauer des Bestehens etwaiger Schutzrechte ein nicht ausschließliches Recht, die Software für die in der Anwenderdokumentation vorgesehenen Zwecke für den intern Gebrauch zu nutzen. Nutzung der Software ist dabei jede dauerhafte oder vorübergehende ganze oder teilweise Vervielfältigung der Software durch Speichern, Laden, Ablaufen oder Anzeigen zum Zweck der Ausführung der Software; jede anderweitige Vervielfältigung der Software ist mit Ausnahme der Anfertigung einer Sicherungskopie (§ 7 der Softwarenutzungsbedingungen) ausgeschlossen. Ausgeschlossen ist insbesondere, aber nicht nur, die Vervielfältigung der Software zum Zweck der unentgeltlichen oder entgeltlichen Weitergabe an Dritte.

3. Der Kunde darf die Software nur ändern oder bearbeiten, soweit dies zu der in der Anwenderdokumentation vorgesehenen Nutzung, zur Verbindung der Software mit einem anderen Computerprogramm oder zur Fehlerkorrektur erforderlich ist. Darüber hinaus darf der Kunde die Software nur ändern, wenn und soweit Eberspächer dies dem Kunden ausdrücklich schriftlich erlaubt hat.
4. Der Kunde darf hinsichtlich der ihm an der Software eingeräumten Rechte Dritten keine Rechte einräumen. Ebenfalls darf der Kunde die ihm an der Software eingeräumten Rechte nicht an Dritte unterlizenzieren. § 18 der Softwarenutzungsbedingungen bleibt hiervon unberührt.

## **§ 6 Lizenzmodelle**

1. Eberspächer bietet dem Kunden für die Lizenzierung der Software die folgenden Lizenzmodelle an:

- a. „Single User License“

Der Kunde darf die Software zur gleichen Zeit nur durch einen Mitarbeiter auf einem Computer nutzen. Auf welchem Computer und durch welchen Mitarbeiter die Nutzung erfolgt, ist dem Kunden freigestellt. Dem Kunden ist es nicht gestattet, die Software auf dem Server eines Netzwerks vorzuhalten, soweit hierdurch eine zeitgleiche Mehrfachnutzung der Software ermöglicht wird. Will der Kunde die Software gleichzeitig durch mehrere Mitarbeiter oder auf mehreren Computern nutzen, muss der Kunde dies vorher schriftlich anzeigen und entgeltlich weitere Lizenzen für die Software bei Eberspächer erwerben.

- b. „Floating License“

Der Kunde darf die Software zur gleichen Zeit durch mehrere Mitarbeiter auf verschiedenen Computern nutzen. Die Anzahl der gleichzeitig zur Nutzung berechtigten Mitarbeiter ergibt sich aus der Auftragsbestätigung. Durch welchen Mitarbeiter und auf welchen Computern die Nutzung erfolgt, ist dem Kunden freigestellt. Will der Kunde die Zahl der gleichzeitig zur Nutzung berechtigten Mitarbeiter erhöhen, muss der Kunde dies Eberspächer vorher schriftlich anzeigen und entgeltlich weitere Lizenzen für die Software bei Eberspächer erwerben.

- c. „Integrated Software License“

Die Integrated Software License gilt für Gerätetreiber, Firmware und Embedded Software. Der Kunde darf unter der Integrated Software License lizenzierte Software ausschließlich für den bestimmungsgemäßen Betrieb der gemeinsam mit dieser Software bei Eberspächer erworbenen Hardware nutzen. Der be-

stimmungsgemäße Betrieb ergibt sich aus der jeweiligen Anwenderdokumentation. Jede anderweitige Nutzung der Software, insbesondere, aber nicht nur, die Nutzung der Software für Hardware, die der Kunde nicht gemeinsam mit der Software bei Eberspächer erworben hat, ist ausgeschlossen.

2. Gerätetreiber, Firmware und Embedded Software werden immer unter der Integrated Software License lizenziert. Im übrigen gilt: Soweit nicht ausdrücklich etwas anderes in der Auftragsbestätigung geregelt ist, erwirbt der Kunde nur eine „Single User License“.

## **§ 7 Sicherungskopie**

Zur vertragsgemäßen Nutzung der Software und den darin enthaltenen Datenbeständen gehört die Herstellung einer Sicherungskopie. Die Sicherungskopie darf ausschließlich zu Sicherungszwecken verwendet werden. Der Kunde wird die Sicherungskopie an einem sicheren, für Dritte nicht zugänglichen Ort aufbewahren.

## **§ 8 Quellcode/Objektcode**

1. Die Software wird dem Kunden im Objektcode als Download oder auf maschinenlesbaren Datenträgern überlassen.
2. Soweit in der Auftragsbestätigung nicht ausdrücklich etwas anderes geregelt ist, hat der Kunde keinen Anspruch auf die Überlassung des Quellcodes oder von Teilen des Quellcodes.
3. Eine Rückübersetzung des Objektcodes ist nur unter Einhaltung der gesetzlichen Beschränkungen gemäß § 69e UrhG zulässig. Weitergehende Rückübersetzungen sind ausgeschlossen.

## **§ 9 Anwenderdokumentation**

1. Der Kunde erhält eine Anwenderdokumentation in druckschriftlicher Form und/oder in elektronischer Form auf maschinenlesbaren Datenträgern oder als Download.
2. Der Kunde darf die Anwenderdokumentation in druckschriftlicher Form nur mit vorheriger schriftlicher Zustimmung von Eberspächer vervielfältigen. Erhält der Kunde die Anwenderdokumentation nur in elektronischer Form, darf der Kunde abweichend von Satz 1 eine Vervielfältigung der Anwenderdokumentation in druckschriftlicher Form für den eigenen internen Gebrauch erstellen.
3. Im Übrigen gelten für die Nutzung der Anwenderdokumentation in elektronischer Form § 5 bis § 7 der Softwarenutzungsbedingungen sinngemäß.

## **§ 10 Schutz des Lizenzmaterials**

1. Der Kunde verpflichtet sich, die im Lizenzmaterial enthaltenen Schutzvermerke wie Copyrightvermerke und andere Rechtsvorbehalte unverändert beizubehalten sowie in der Sicherungskopie in unveränderter Form zu übernehmen.
2. Unbeschadet der auf Grund dieser Softwarenutzungsbedingungen eingeräumten Nutzungsrechte behält Eberspächer alle Rechte am Lizenzmaterial einschließlich aller vom Kunden hergestellten Kopien oder Teilkopien desselben. Das Eigentum des Kunden an maschinenlesbaren Datenträgern und Hardware wird hiervon nicht berührt.

## **§ 11 Softwarepflege**

1. Voraussetzung für die Leistung von Softwarepflege ist der Abschluss eines entgeltlichen Pflegevertrags. Ohne Pflegevertrag hat der Kunde keinen Anspruch auf Softwarepflege.
2. Gegenstand der Softwarepflege ist die Lieferung von Updates der Software, sobald Eberspächer diese im normalen Geschäftsverkehr auch anderen Kunden zur Verfügung stellt.
3. Pflegeverträge haben eine Grundlaufzeit von einem Kalenderjahr beginnend mit dem Tag der Überlassung der jeweiligen Software. Wird der Pflegevertrag nicht spätestens zwei Kalendermonate vor Ablauf der Grundlaufzeit von einer der Vertragsparteien schriftlich gekündigt, verlängert sich der Pflegevertrag um ein weiteres Kalenderjahr. Satz 2 gilt für jede nachfolgende Verlängerung entsprechend.
4. Für die Nutzung von Updates der Software gelten diese Softwarenutzungsbedingungen in ihrer bei Lieferung des jeweiligen Updates gültigen Fassung.

## **§ 12 Gewährleistung für Rechtsmängel**

1. Der Kunde wird Eberspächer unverzüglich schriftlich benachrichtigen, falls ihm gegenüber Ansprüche wegen der Verletzung von Schutzrechten durch das Lizenzmaterial geltend gemacht werden.
2. Wird der Kunde an der vertragsgemäßen Nutzung des Lizenzmaterials durch Schutzrechte Dritter beeinträchtigt, so hat Eberspächer in einem für den Kunden zumutbaren Umfang das Recht, nach der Wahl von Eberspächer und auf Kosten von Eberspächer entsprechende Lizenzen vom Dritten zu erwerben oder das Lizenzmaterial so zu ändern oder auszutauschen, dass es die Schutzrechte des Dritten nicht mehr beeinträchtigt.
3. Eberspächer trifft keine Verpflichtung zur Rechtsmängelgewährleistung, soweit die Verletzung von Schutzrechten Dritter darauf beruht, dass der Kunde das Lizenzmaterial geändert oder bearbeitet hat, oder darauf, dass der Kunde die Software zusammen mit

nicht von Eberspächer gelieferter Hardware oder Computerprogrammen nutzt. Dies gilt auch, wenn die Ansprüche des Dritten auf einer Nutzung des Lizenzmaterials durch den Kunden beruhen, nachdem Eberspächer den Kunden darauf hingewiesen hat, dass die Nutzung wegen eines Anspruchs von Dritten einzustellen ist.

### **§ 13 Gewährleistung für Sachmängel**

1. Die Vertragsparteien stimmen darin überein, dass es nicht möglich ist, Software so zu entwickeln, dass sie für alle Anwendungsbedingungen fehlerfrei ist. Die vertragsgemäße Benutzung und die Einsatzbedingungen der Software ergeben sich aus der Anwenderdokumentation. Die Verantwortung für die Auswahl der Software und den Einsatz der Software einschließlich der durch deren Einsatz herbeizuführenden Leistungsergebnisse liegt allein beim Kunden.
2. Für die Software in der dem Kunden überlassenen Fassung gewährleistet Eberspächer die Eignung für den vertragsgemäßen Gebrauch in Übereinstimmung mit der Anwenderdokumentation. Im Fall von erheblichen Abweichungen von der Anwenderdokumentation ist Eberspächer zur Nachbesserung berechtigt und, soweit dies nicht mit unangemessenem Aufwand verbunden ist, auch verpflichtet. Ist dem Kunden das Abwarten auf das nächste Update der Software nicht zumutbar und gelingt es Eberspächer innerhalb einer angemessenen Frist nicht, durch Nachbesserung die erheblichen Abweichungen der Software von der Anwenderdokumentation zu beseitigen oder so zu umgehen, dass dem Kunden der vertragsgemäße Gebrauch der Software ermöglicht wird, kann der Kunde nach seiner Wahl zurücktreten oder stattdessen eine Herabsetzung der Lizenzgebühr gemäß § 441 BGB verlangen.
3. Eberspächer erfüllt die Gewährleistungspflichten während der üblichen Arbeitszeiten; insoweit entstehen für den Kunden keine Kosten. Soll Eberspächer Gewährleistungspflichten außerhalb der üblichen Arbeitszeiten erfüllen, so ist eine schriftliche Zusatzvereinbarung zum Ausgleich der anfallenden Mehrkosten erforderlich.
4. Der Kunde ist verpflichtet, Eberspächer nachprüfbare Unterlagen über Art und Auftreten von Abweichungen der Software von der Anwenderdokumentation zur Verfügung zu stellen und bei der Eingrenzung von Fehlern mitzuwirken.
5. Offensichtliche Mängel sind Eberspächer innerhalb einer Frist von 2 (zwei) Wochen ab Empfang der Software anzuzeigen; anderenfalls ist die Geltendmachung des Gewährleistungsanspruchs ausgeschlossen. Zur Fristwahrung genügt die rechtzeitige Absendung der Mängelanzeige; die Beweislast hierfür trifft den Kunden. Ist der Kunde Kaufmann, gelten die Regelungen des § 377 HGB.
6. Eberspächer trifft keine Verpflichtung zur Sachmängelgewährleistung, wenn der Kunde die Software geändert oder bearbeitet hat.

7. Ebenfalls trifft Eberspächer keine Verpflichtung zur Sachmängelgewährleistung, wenn der Mangel der Software darauf beruht, dass der Kunde die Software zusammen mit nicht von Eberspächer gelieferter Hardware oder Computerprogrammen nutzt.
8. Erbringt Eberspächer in den Fällen des § 13 Abs. 6 und 7 dieser Softwarenutzungsbedingungen dennoch Arbeiten zur Mängelbeseitigung, hat der Kunde diese Arbeiten nach den zum Zeitpunkt der Ausführung dieser Arbeiten üblichen Sätzen von Eberspächer zu vergüten.
9. Die vorstehenden Einschränkungen der Gewährleistungspflicht gelten nicht in Fällen, in denen Eberspächer eine Garantie für die Beschaffenheit des Lizenzmaterials übernommen oder Mängel arglistig verschwiegen hat.

#### **§ 14 Verjährung von Gewährleistungsansprüchen**

Gewährleistungsansprüche verjähren – vorbehaltlich der Regelungen im folgenden Satz und in § 13 Abs. 9 der Softwarenutzungsbedingungen – in einem Jahr ab Ablieferung der Software. Schadensersatz- oder Aufwendungsersatzansprüche des Kunden bleiben hingegen durch die vorstehenden Regelungen unberührt und verjähren innerhalb der gesetzlichen Fristen; für Schadensersatz- und Aufwendungsersatzansprüche gelten die Regelungen in § 15 der Softwarenutzungsbedingungen.

#### **§ 15 Haftung**

1. Eberspächer haftet dem Kunden bei der Verletzung wesentlicher Vertragspflichten (sogenannter Kardinalpflichten) auf Aufwendungs- und Schadensersatz (im Folgenden in § 15 der Softwarenutzungsbedingungen gemeinsam „**Schadensersatz**“). Kardinalpflichten sind alle Pflichten, deren Verletzung die Erreichung des Vertragszwecks gefährdet sowie alle Pflichten, deren Erfüllung die ordnungsgemäße Durchführung des Vertrags überhaupt erst ermöglicht und auf deren Einhaltung der Kunde regelmäßig vertrauen darf. Soweit jedoch die Verletzung einer Kardinalpflicht nur leicht fahrlässig geschah und nicht zu einer Verletzung von Leben, Körper oder Gesundheit führte, sind Ansprüche des Kunden auf Schadensersatz der Höhe nach auf den typischen vorhersehbaren Schaden beschränkt.
2. Eberspächer haftet dem Kunde außerdem nach den Vorschriften des Produkthaftungsgesetzes, in Fällen des Vorsatzes und der groben Fahrlässigkeit, für die Verletzung des Lebens, des Körpers oder der Gesundheit, bei Übernahme einer Garantie sowie in allen anderen Fällen gesetzlich zwingender Haftung, jeweils nach Maßgabe der gesetzlichen Vorschriften.
3. Im Übrigen sind Ansprüche auf Schadensersatz gegen Eberspächer – gleich aus welchem Rechtsgrund, insbesondere wegen Verletzung von Pflichten aus diesem Schuld-

verhältnis durch Eberspächer, deren gesetzliche Vertreter, Mitarbeiter oder Erfüllungsgehilfen, aus § 311a BGB oder aus unerlaubter Handlung – ausgeschlossen.

4. Soweit nach den vorstehenden Regelungen die Haftung von Eberspächer eingeschränkt oder ausgeschlossen ist, gilt das auch für die persönliche Haftung der gesetzlichen Vertreter, Mitarbeiter und Erfüllungsgehilfen von Eberspächer.

## **§ 16 Einsatzbedingungen für die Software**

1. Die dem Kunde überlassene Software wurde für den Einsatz auf bestimmter Hardware und für das Zusammenwirken mit bestimmten anderen Computerprogrammen entwickelt. Diese Einsatzbedingungen sind im Einzelnen in der jeweiligen Anwenderdokumentation angegeben, die vom Kunden zwingend zu beachten ist. Der Kunde ist verpflichtet, die Software vor dem produktiven Einsatz sorgfältig zu testen. Dies gilt insbesondere, aber nicht nur, wenn die Software in einem sicherheitskritischen Bereich eingesetzt werden soll.
2. Bei der Benutzung der Software ohne Einhaltung der Einsatzbedingungen gemäß § 16 Abs. 1 dieser Softwarenutzungsbedingungen entfällt die Verpflichtung zur Gewährleistung nach § 12 und § 13 dieser Softwarenutzungsbedingungen. Erbringt Eberspächer dennoch Arbeiten zur Mängelbeseitigung, hat der Kunde diese Arbeiten nach den zum Zeitpunkt der Ausführung dieser Arbeiten üblichen Sätzen von Eberspächer zu vergüten.
3. Machen Dritte gegenüber Eberspächer Ansprüche geltend und beruhen diese Ansprüche darauf, dass der Kunde, dessen gesetzliche Vertreter, Mitarbeiter oder Erfüllungsgehilfen die Software schuldhaft ohne Einhaltung der Einsatzbedingungen gemäß § 16 Abs. 1 dieser Softwarenutzungsbedingungen genutzt haben, wird der Kunde Eberspächer von diesen Ansprüchen des Dritten freistellen und Eberspächer alle in diesem Zusammenhang entstehenden Schäden ersetzen. Eberspächer wird den Kunden unverzüglich schriftlich benachrichtigen, falls Eberspächer gegenüber Ansprüche im Sinne von Satz 1 geltend gemacht werden.

## **§ 17 Testphase**

1. Der Kunde darf die Software vor der produktiven Nutzung kostenlos testen, wenn dies ausdrücklich in der Auftragsbestätigung vorgesehen ist. In diesem Fall ergeben sich auch die einzelnen Modalitäten der Testphase (Dauer, etc.) aus der Auftragsbestätigung.
2. In jedem Fall endet die Testphase, wenn der Kunde mit der produktiven Nutzung der Software beginnt. Der Kunde ist verpflichtet, Eberspächer den Beginn der produktiven Nutzung schriftlich anzuzeigen.

## **§ 18 Weitergabe des Lizenzmaterials**

1. Der Kunde ist berechtigt, das Lizenzmaterial im Originalzustand zusammen mit einer Kopie dieser Softwarenutzungsbedingungen und der Auftragsbestätigung an einen Dritten abzugeben, soweit der Kunde Eberspächer den Namen und die vollständige Adresse des Dritten schriftlich mitteilt und sich der Dritte gegenüber Eberspächer verpflichtet, die Einschränkungen aus der Auftragsbestätigung, der Anwenderdokumentation und diesen Softwarenutzungsbedingungen bei der Nutzung der Software einzuhalten. Diese Berechtigung zur Weitergabe des Lizenzmaterials erstreckt sich nicht auf geänderte oder bearbeitete Fassungen des Lizenzmaterials.
2. Mit der Weitergabe des Lizenzmaterials unter Einhaltung der Voraussetzungen gemäß Abs. 1 geht die Berechtigung zur Nutzung des Lizenzmaterials auf den Dritten über, der damit im Sinne der Softwarenutzungsbedingungen an die Stelle des Kunden tritt. Zugleich erlischt die Berechtigung des Kunden, die Software zu nutzen.
3. Mit der Weitergabe des Lizenzmaterials hat der Kunde alle Kopien und Teilkopien des Lizenzmaterials sowie geänderte oder bearbeitete Fassungen des Lizenzmaterials umgehend und vollständig zu löschen oder auf andere Weise zu vernichten. Dies gilt auch für die Sicherungskopie gemäß § 7 der Softwarenutzungsbedingungen.
4. § 18 Abs. 1 bis 3 der Softwarenutzungsbedingungen gelten auch, wenn die Weitergabe in einer zeitweiser Überlassung besteht. Die Vermietung des Lizenzmaterials oder von Teilen davon ist jedoch ausgeschlossen.
5. Für nachfolgende Weitergaben des Lizenzmaterials gelten § 18 Abs. 1 bis 4 der Softwarenutzungsbedingungen entsprechend.

## **§ 19 Lizenzgebühr/ Pflegegebühren**

1. Der Kunde zahlt die in der Auftragsbestätigung ausgewiesenen Lizenz- und Pflegegebühren. Die in der Auftragsbestätigung aufgeführten Beträge enthalten keine Umsatzsteuer, diese wird gesondert mit dem jeweils gültigen Satz in Rechnung gestellt.
2. Im Übrigen gelten für die Zahlung der Lizenz- und der Pflegegebühren die Allgemeinen Verkaufsbedingungen von Eberspächer, die dem Kunden vor Vertragsschluss zur Verfügung gestellt worden sind.

## **§ 20 Demosoftware**

1. Eberspächer bietet neben der entgeltlichen Software auch Demosoftware im Objektcode auf maschinenlesbaren Datenträgern oder als Download an. Der Kunde hat keinen Anspruch auf die Überlassung von Demosoftware, auf die Überlassung des Quellcodes



oder von Teilen des Quellcodes von Demosoftware oder auf die Überlassung von Updates von Demosoftware.

2. Der Vertrag zwischen dem Kunden und Eberspächer über die Überlassung von Demosoftware kommt durch die Ingebrauchnahme der Demosoftware durch den Kunden zustande.
3. Der Kunde erhält für die Dauer des Bestehens etwaiger Schutzrechte ein nicht ausschließliches Recht, die Demosoftware für die in der Anwenderdokumentation vorgesehenen Zwecke intern zu nutzen. Nutzung der Demosoftware ist dabei jede dauerhafte oder vorübergehende ganze oder teilweise Vervielfältigung der Demosoftware durch Speichern, Laden, Ablaufen oder Anzeigen zum Zweck der Ausführung der Demosoftware; jede anderweitige Vervielfältigung der Demosoftware ist mit Ausnahme der Anfertigung einer Sicherungskopie (§ 7 der Softwarenutzungsbedingungen) ausgeschlossen. Ausgeschlossen ist insbesondere, aber nicht nur, die Vervielfältigung der Demosoftware zum Zweck der entgeltlichen oder unentgeltlichen Weitergabe an Dritte.
4. Der Kunde hat kein Recht, die Demosoftware zu ändern oder zu bearbeiten. Eine Rückübersetzung des Objektcodes ist ausschließlich unter den gesetzlichen Beschränkungen gemäß § 69e UrhG zulässig. Weitergehende Rückübersetzungen sind ausgeschlossen.
5. Der Kunde darf hinsichtlich der ihm an der Demosoftware eingeräumten Rechte Dritten keine Rechte einräumen. Ebenfalls darf der Kunde die ihm an der Demosoftware eingeräumten Rechte nicht an Dritte unterlizenzieren.
6. Für Rechts- und Sachmängel der Demosoftware und der jeweiligen Anwenderdokumentation haftet Eberspächer nur, wenn Eberspächer einen Mangel arglistig verschweigt. Außerhalb der Mängelgewährleistung haftet Eberspächer nur für Vorsatz und grobe Fahrlässigkeit. Im Übrigen ist die Haftung von Eberspächer ausgeschlossen. Soweit nach den vorstehenden Regelungen die Haftung von Eberspächer eingeschränkt oder ausgeschlossen ist, gilt das auch für die persönliche Haftung der gesetzlichen Vertreter, Mitarbeiter und Erfüllungsgehilfen von Eberspächer.
7. Die dem Kunde überlassene Demosoftware wurde für den Einsatz auf bestimmter Hardware und für das Zusammenwirken mit bestimmten anderen Computerprogrammen entwickelt. Diese Einsatzbedingungen sind im Einzelnen in der jeweiligen Anwenderdokumentation angegeben. Machen Dritte gegenüber Eberspächer Ansprüche geltend und beruhen diese Ansprüche darauf, dass der Kunde, dessen gesetzliche Vertreter, Mitarbeiter oder Erfüllungsgehilfen die Demosoftware schuldhaft ohne Einhaltung der Einsatzbedingungen gemäß § 20 Abs. 7 Satz 2 der Softwarenutzungsbedingungen genutzt haben, wird der Kunde Eberspächer von diesen Ansprüchen des Dritten freistellen und Eberspächer alle in diesem Zusammenhang entstehenden Schäden ersetzen. Ebers-

pächer wird den Kunden unverzüglich schriftlich benachrichtigen, falls Eberspächer gegenüber derartige Ansprüche geltend gemacht werden.

8. Auf die Überlassung der Demosoftware sind im Übrigen sinngemäß folgende Bestimmungen der Softwarenutzungsbedingungen anwendbar: § 7, § 9 (mit der Änderung, dass § 9 Abs. 3 auf diesen § 20 verweist), § 10, § 22.

## **§ 21 Geheimhaltung**

1. Die Geheimhaltungspflichten beider Vertragsparteien ergeben sich aus einer gesonderten Geheimhaltungsvereinbarung. Haben die Vertragsparteien keine gesonderte Geheimhaltungsvereinbarung abgeschlossen, gelten die nachfolgenden Abs. 2 bis 4.
2. Die Vertragsparteien verpflichten sich, sämtliche ihnen im Zusammenhang mit diesem Vertrag zugänglich werdenden vertraulichen Informationen unbefristet geheim zu halten. Vertrauliche Informationen sind Informationen, die entweder durch eine Vertragspartei als geschützt oder vertraulich markiert oder in anderer Weise schriftlich gekennzeichnet sind, oder Informationen, die gemäß den Umständen ihrer Offenlegung von der empfangenden Vertragspartei vernünftigerweise als vertraulich erkennbar sind. Zu den vertraulichen Informationen gehört insbesondere, aber nicht nur, das Lizenzmaterial.
3. Die vorstehende Geheimhaltungsverpflichtung gilt nicht, wenn und soweit die jeweiligen Informationen nachweislich (i) allgemein bekannt sind oder ohne Verschulden einer Vertragspartei und ohne Verstoß gegen diese Geheimhaltungsverpflichtung allgemein bekannt werden, (ii) Stand der Technik sind oder werden, (iii) der empfangenden Vertragspartei zum Zeitpunkt der Übermittlung bereits bekannt sind, was durch Unterlagen bewiesen werden muss, die eine solche Kenntnis belegen, (iv) der empfangenden Vertragspartei von einem Dritten rechtmäßig bekannt oder zugänglich gemacht wurden oder werden, (iv) aufgrund gesetzlicher Vorschriften oder vollstreckbarer behördlicher Verfügungen oder gerichtlicher Entscheidungen offengelegt werden müssen. Die Beweislast für das Vorliegen eines Ausnahmetatbestandes trägt der jeweilige Informationsempfänger. In jedem Fall ist die jeweils betroffene Vertragspartei rechtzeitig vor der Weitergabe der Informationen an Dritte zu informieren, soweit dies möglich ist.
4. Beide Parteien werden angemessene Vorkehrungen zur Sicherung der vertraulichen Informationen der jeweils anderen Partei treffen. Beide Parteien werden vertrauliche Informationen der jeweils anderen Partei Organen, Mitarbeitern, Beratern oder Subunternehmern nur offen legen vorbehaltlich dieser Vertraulichkeitsverpflichtung, der die Empfänger dann entsprechend zu unterwerfen sind.

## § 22 Sonstiges

1. Sollten einzelne Bestimmungen der Softwarenutzungsbedingungen unwirksam sein oder werden, so wird die Wirksamkeit der übrigen Bestimmungen hierdurch nicht berührt.
2. Eberspächer wird personenbezogene Daten des Kunden zum Zweck der Abwicklung der Softwareüberlassung in einer EDV-Anlage speichern und automatisch verarbeiten. Zu darüber hinausgehenden Zwecken werden die Daten nicht verwendet. Eine Weitergabe der Daten an Dritte erfolgt nicht.
3. Es gilt das Recht der Bundesrepublik Deutschland. Das UN-Übereinkommen über Verträge über den internationalen Warenkauf findet keine Anwendung.

Ist der Kunde Kaufmann, juristische Person des öffentlichen Rechts oder öffentlich-rechtliches Sondervermögen, ist ausschließlicher Gerichtsstand für alle Streitigkeiten aus oder im Zusammenhang mit diesem Vertrag Stuttgart. Eberspächer ist berechtigt, den Kunden wahlweise an dessen allgemeinem Gerichtsstand zu verklagen.

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**(I) License for uIP TCP/IP Stack:**

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