



Yellow Dog Enterprise Linux License Agreement - Fixstars GigaAccel 180 Edition

In this Agreement, “you” and “your” refer to each customer (“Customer”) and its agents, including each person listed in your account information as being associated with your account, and “we”, “us”, and “our” refer collectively to Fixstars Solutions, Inc., a California corporation with principal offices at 111 N Market Street, 6th Floor, San Jose, 95113 (“Fixstars”). This Agreement explains our obligations to you, and your obligations to us in relation to your purchase of Fixstars' Yellow Dog Enterprise Linux (YDEL) Fixstars GigaAccel 180 Edition.

1 Services

In consideration for your purchase of YDEL, Fixstars agrees to provide you with a then-current version of Fixstars' Yellow Dog Linux (YDL), special drivers and other software necessary to enable YDL to operate on a Fixstars GigaAccel 180, a support portal dedicated to the Fixstars GigaAccel 180 that enables you to access product errata and obtain support for the Fixstars GigaAccel 180 Edition of YDEL, and a Fixstars YDL.net account that provides you with download access to software updates for the Fixstars GigaAccel 180 Edition of YDEL (collectively, “the Services”).

Through our support portal, we agree to assist you, on an “as requested” basis, with system installation, configuration, usage clarification, basic trouble shooting, unique hardware and software configurations, and solutions or work-arounds for software defects. If we determine that your support request derives from a hardware problem and not a problem with our software, we also agree to assist you in reporting your problem to the original equipment manufacturer. We agree to respond to a support request within 24 hours of its initial posting on our servers. All requests for our services and the performance of our

services are deemed to occur at our offices in Loveland, Colorado, the location of our principal place of business.

2 Fees and Payment

As consideration for the Services, you agree to pay Fixstars the applicable fees set forth on our Web site at the time of your purchase of YDEL, or, if applicable, upon receipt of your invoice from Fixstars. All fees are due immediately and are non-refundable. You also agree to pay all value added, sales, and other taxes related to YDEL or payments made by you hereunder. All payments of fees for YDEL shall be made in U.S. dollars. Through your purchase of YDEL, you agree to establish an account with us for the delivery of YDEL services. You agree that each person listed in your account information as being associated with your account for any services provided to you is your agent with full authority to act on your behalf with respect to such services in accordance with the permissions granted.

3 Term of Service

Unless otherwise specified herein, this Agreement has a one-year initial term and is renewable thereafter for successive one-year terms, as set forth during the renewal process. Any renewal of this Agreement is subject to our then current terms and conditions, including, but not limited to, the payment of all applicable fees at the time of renewal. You are solely responsible for ensuring that this Agreement is renewed. Fixstars shall have no liability to you or any third party in connection with the renewal as described herein, including, but not limited to, any failure or errors in renewing the Agreement.

4 Privacy

The Fixstars Solutions privacy policy is posted

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at:

<http://www.ydl.net/legal/>

We will not process the personal data that we collect from you in a way that is incompatible with the purposes and other limitations described in our privacy statement. You represent and warrant that you have provided notice to, and obtained consent from, any third party individuals whose personal data you supply to us as part of our services with regard to: (i) the purposes for which such third party's personal data have been collected, (ii) the intended recipients or categories of recipients of the third party's personal data, (iii) which parts of the third party's data are obligatory and which parts, if any, are voluntary; and (iv) how the third party can access and, if necessary, rectify the data held about them. You further agree to provide such notice and obtain such consent with regard to any third party personal data you supply to us in the future. We are not responsible for any consequences resulting from your failure to provide notice or receive consent from such individuals nor for your providing outdated, incomplete, or inaccurate information.

5 Intellectual Property

Except as provided herein, all right, title, and interest in and to all (i) registered and unregistered trademarks, service marks, and logos; (ii) patents, patent applications, and patentable ideas, inventions, and (or) improvements; (iii) trade secrets, proprietary information, and know-how; (iv) registered and unregistered copyrights including, without limitation, any forms, images, audiovisual displays, text, and software; and (vi) all other intellectual property, proprietary rights, or other rights related to intangible property which are used, developed, comprised of, embodied in, or practiced in connection

with any of the Fixstars services identified herein (the "Intellectual Property Rights") are owned by Fixstars or its licensors, and you agree to make no claims of interest in or ownership of any such Intellectual Property Rights. You acknowledge that no title to the Intellectual Property Rights is transferred to you, and that you do not obtain any rights, express or implied, except those rights expressly granted in this Agreement.

6 Limitation of Liability

You agree that our entire liability and your exclusive remedy in law, in equity, or otherwise, with respect to the Services provided under this Agreement and (or) for any breach of this Agreement is solely limited to the amount you paid for such service(s) during the term of this Agreement. In no event shall Fixstars, its Licensors, and its contractors be liable for any indirect, incidental, special, or consequential damages even if Fixstars has been advised of the possibility of such damages. To the extent that a state does not permit the exclusion or limitation of liability as set forth herein, Fixstars' liability is limited to the extent permitted by law in such states.

Fixstars, its licensors, and its contractors disclaim any and all loss or liability resulting from, but not limited to, (i) loss or liability resulting from access delays or access interruptions; (ii) loss or liability resulting from data non-delivery or data mis-delivery; (iii) loss or liability resulting from acts of God; (iv) loss or liability resulting from the unauthorized use or misuse of your account number or password; (v) loss or liability resulting from errors, omissions, or misstatements in any and all information or service(s) provided under this Agreement; (vi) loss or liability relating to the deletion of or failure to store em-mail messages; (vii) loss or



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liability resulting from the development or interruption of a Fixstars web site; (viii) loss or liability from your inability to use any component of the Services; or (ix) loss or liability relating to limitations, incompatibilities, defects, or other problems inherent in XML or any other Internet or other standard not under Fixstars' control. You agree that regardless of any statute or law to the contrary, any claim or cause of action arising out of or related to this Agreement or any of the Services must be filed within one (1) year after such claim or cause of action arose or such claim shall be forever barred.

7 Disclaimer of Warranties

You agree that your use of the Services is solely at your own risk. You agree that all of the Services are provided on an “as is” and “as available” basis, except as otherwise noted in this Agreement. We expressly disclaim all warranties of any kind, whether express or implied, including but not limited to the implied warranties of merchantability, fitness for a particular purposes, and non-infringement. Fixstars makes no warranty that the Services provided hereunder will meet your requirements, or that the Services will be uninterrupted, timely, secure, or error free; nor do we make any warranty as to the results that may be obtained from the use of the Services or as to the accuracy or reliability of any information obtained through the Services.

You understand and agree that any material and (or) data downloaded or otherwise obtained through the any of the Services is done at your own discretion and risk and that you will be solely responsible for any damage to your computer system or loss of data that results from the download of such material and (or) data. No advice or information,

whether oral or written, obtained by you from us or through the Services shall create any warranty not expressly made herein, and you may not rely on any such information or advice. To the extent jurisdictions do not allow the exclusion of certain warranties, some of the above exclusions may not apply to you. We are not responsible for and shall have no liability with respect to any products and (or) services purchased by you from a third party.

8 Indemnity

You agree to release, indemnify, defend, and hold harmless Fixstars and any of our contractors, agents, employees, officers, directors, shareholders, affiliates, and assigns from all liabilities, claims, damages, costs, and expenses, including reasonable attorney's fees and expenses relating to or arising out of (i) this Agreement or the breach of your warranties, representations, and obligations under this Agreement; (ii) the Services or your use of such services including, without limitation, infringement or dilution by you, or someone else using our services from your computer; (iii) any intellectual property or other proprietary right of any person or entity; (iv) a violation of any of our operating rules or policies relating to the Services; or (v) any information or data you supplied to Fixstars. We shall have the right to participate in any defense by you of a third-party claim related to your use of any of the Services, with counsel of our choice at our own expense. We shall reasonably cooperate in the defense at your request and expense. You have sole responsibility to defend us against any claim, but you must receive our prior written consent regarding any related settlement. The terms of this paragraph will survive any termination or cancellation of this Agreement.



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9 Termination

You may terminate this Agreement for any reason upon thirty (30) days written notice to Fixstars. We may terminate this Agreement or any part of the Services at any time in the event you breach any obligation hereunder or upon thirty (30) days written notice if we terminate or significantly alter any of the Services.

10 Representations and Warranties

You agree and warrant that (i) your use of the Services will not directly or indirectly infringe the legal rights of a third party, (ii) that you are of legal age to enter into this Agreement, and (iii) that you agree to comply with all applicable laws and regulations.

11 Modifications to the Agreement

Except as otherwise provided in this Agreement, you agree during the term of this Agreement that we may (i) revise the terms and conditions of this Agreement and (or) (ii) change part of the services provided under this Agreement at any time. Any such revision or change will be binding and effective 30 days after posting of the revised Agreement or change to the Services on Fixstars' web sites, or upon notification to you by e-mail or United States mail. You agree to periodically review our Web sites, including the current version of this Agreement available on our Web sites, to be aware of any such revisions. If you do not agree with any revision to the Agreement, you may terminate this Agreement at any time by providing us with notice. Notice of your termination will be effective on receipt and processing by us. Any fees paid by you if you terminate your Agreement with us are nonrefundable. By continuing to use the Services after any revision to this Agreement or change in the Services, you agree to abide

by and be bound by any such revisions or changes. No employee, contractor, agent or representative of Fixstars is authorized to alter or amend the terms and conditions of this Agreement.

12 Notices and Announcement

Except as expressly provided otherwise herein, all notices to Fixstars shall be in writing and delivered via overnight courier or certified mail, return receipt requested, to Fixstars at the address first stated above. All notices to you shall be delivered to your mailing address or e-mail address as provided in your account information (as updated by you pursuant to this Agreement).

13 Severability

You agree that the terms of this Agreement are severable. If any term or provision is declared invalid or unenforceable, in whole or in part, then (i) that term or provision will not affect the remainder of this Agreement; (ii) this Agreement will be deemed amended to the extent necessary to make this Agreement enforceable, valid, and to the maximum extent possible, consistent with applicable law in a manner that is consistent with the original intentions of the parties; and (iii) the remaining terms and provisions will remain in full force and effect.

14 Entire Agreement

You agree that this Agreement and all documents incorporated by reference in this Agreement are the entire, complete, and exclusive agreement between you and us regarding the Services and supersede all prior agreements and understandings, whether written or oral, or whether established by custom, practice, policy, or precedent, with respect to the subject matter of this



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Agreement, including, without limitation, any purchase order provided by you for the Services.

15 Assignment

Except as otherwise set forth herein, your rights under this Agreement are not assignable or transferable. Any attempt by your creditors to obtain an interest in your rights under this Agreement, whether by attachment, levy, garnishment, or otherwise, renders this Agreement voidable at our option. You agree not to reproduce, duplicate, copy, sell, resell, or otherwise exploit for any commercial purposes any of the Services (or portion thereof) without Fixstars' prior express written consent.

16 Governing Law, Venue, and Limitations

This Agreement will be governed and interpreted under the laws of the state of Colorado in the United States of America without regard to its conflict of laws provisions. In the event of any dispute or controversy between the parties to this Agreement, the parties shall try to resolve the dispute in a fair and reasonable way. To that end, the parties shall first attempt to resolve such dispute or controversy through one senior management member of each party.

If the parties' senior management members are unable to resolve such dispute or controversy within sixty (60) days after the complaining party's written notice (a "Dispute Notice") to the other party of such dispute or controversy, the parties shall further seek to resolve the dispute or controversy pursuant to non-binding mediation conducted in either Larimer County or Denver, Colorado. Each party shall bear its own expenses in connection with the mediation, except that

Fixstars shall pay the fees and expenses of the mediator.

If the parties are unable to resolve the dispute or controversy within sixty (60) days after commencing mediation, either party may commence litigation in the state or federal courts in Larimer County, Colorado (but only in such courts). Notwithstanding the foregoing, each party shall have the right to seek equitable relief in order to protect any rights to confidentiality or intellectual property. The parties hereby waive any bond requirements for obtaining equitable relief.

To the extent permitted by law, EACH PARTY HERETO HEREBY IRREVOCABLY WAIVES ALL RIGHT OF TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTER-CLAIM (WHETHER OR NOT RELATING TO OR ARISING OUT OF THIS AGREEMENT). ANY LITIGATION ARISING OUT OF ANY DISPUTE OR CONTROVERSY BETWEEN THE PARTIES TO THIS AGREEMENT MUST BE BROUGHT WITHIN ONE (1) YEAR FROM THE FIRST DATE SUCH ACTION COULD HAVE BEEN BROUGHT. IF A LONGER PERIOD IS PROVIDED BY STATUTE, THE PARTIES HEREBY EXPRESSLY WAIVE IT.

17 Agreement to be Bound

By purchasing one or more copies of YDEL Fixstars GigaAccel 180 Edition through our online store or otherwise, or by using the Services provided by Fixstars under this Agreement, you acknowledge that you have read and agree to be bound by all terms and conditions of this Agreement and documents incorporated by reference.

18 Independent Parties

Neither party nor their employees, consultants, contractors, or agents are agents,



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employees, or joint ventures of the other party, and they do not have authority to bind the other party by contract or otherwise to any obligation. Each party shall ensure that the foregoing persons shall not represent to the contrary, either expressly, implicitly, by appearance, or otherwise.

19 Waiver

No waiver of any provision of this Agreement shall be effective unless it is in writing and signed by an authorized representative of Fixstars. The remedies of Fixstars under this Agreement shall be cumulative and not alternative, and the election of one remedy for a breach shall not preclude pursuit of other remedies. The failure of a party, at any time or from time to time, to require performance of any obligations of the other party hereunder shall not affect its right to enforce any provision of this Agreement at a subsequent time, and the waiver of any rights arising out of any breach shall not be construed as a waiver of any rights arising out of any prior or subsequent breach.

20 Export Restrictions

You acknowledge and agree that you shall not import, export, or re-export directly or indirectly, any commodity, incorporating or using any of the Services in violation of the laws and regulations of any applicable jurisdiction.

21 U.S. Government Users

In the event that any software is provided by Fixstars to a U.S. Government User, the software and accompanying documentation, which are used as part of the Services are “commercial items”, as such terms are defined at 48 C.F.R. 2.101 (October 1995), consisting of “commercial computer software” and

“commercial computer software documentation”, as such terms are used in 48 C.F.R. 12.212 (September 1995) and is provided to the U.S. Government only as a commercial end item. Consistent with 48 C.F.R. 12.212 and 48 C.F.R. 227.7202-1 through 227.7202-4 (June 1995), all U.S. Government entities acquiring the use of the Services and accompanying documentation shall have only those rights set forth herein.

22 Force Majeure

Neither party shall be deemed in default hereunder, nor shall it hold the other party responsible for, any cessation interruption or delay in the performance of its obligations hereunder due to earthquake, flood, fire, storm, natural disaster, act of God, war terrorism, armed conflict, labor strike, lockout, or boycott, provided that the party relying upon this section (i) shall have given the other party written notice thereof promptly and, in any event, within five (5) days of discovery thereof; and (ii) shall take all steps reasonably necessary under the circumstances to mitigate the effects of the force majeure event upon which such notice is based; provided further, that in the event a force majeure event described in this Section extends for more than thirty (30) days in the aggregate, Fixstars may immediately terminate this Agreement.

23 Headings

The section heading appearing in this Agreement are inserted only as a matter of convenience and in no way define, limit, construe, or describe the scope or extent of such section or in any way affect such section.

24 Survival

Those sections of this Agreement that by their



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nature survive expiration or termination will
survive expiration or termination.