

# The Importance of Legal Review of Software License Agreements

## Why Should a Business Care About Its Software Licenses?

As with any type of business transaction, there are many considerations that must be taken into account when approaching the negotiation of a software license agreement. Before a company enters into an agreement as a licensee of a software product, the company must be made aware of the potential risks involved and remedies available and how those items may be addressed as part of a negotiation. While it's true that some license agreements, such as a license for commercial, off-the-shelf software like Adobe Acrobat or Microsoft Office, are essentially non-negotiable and present little risk to the organization, many software licenses, such as those for customized software or software tailored for a specific business, are frequently negotiable. In those cases, the potential licensee should consider whether negotiation of the vendor's standard agreement is appropriate and could result in both a suitable agreement for the licensee and an improved working relationship between the parties.

By negotiating the license and addressing the items that are regularly excluded from the vendor's standard agreement, the licensee can obtain a better agreement that helps to achieve some or all of the following goals:

- **Reduce Liability.** With appropriate indemnification provisions, the licensee can reduce its potential exposure to significant damages if the licensee's authorized and proper use of the software infringes on a third party's patent, copyright or other intellectual property rights.
- **Get What's Paid For.** Typically, the licensee will want to have the right to perform reasonable testing of all software prior to being obligated to pay for it. There are a few cases where limited acceptance testing or the "deemed acceptance" of software upon delivery is appropriate, but additional acceptance testing rights should be carefully considered, especially if the licensee hasn't used the software before or if there is custom development involved.
- **Address Ongoing Software Performance.** The licensee should consider

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requiring the vendor to warrant that the software will perform as described in the vendor's documentation as well as in any other specifications agreed to by the parties (such as the vendor's proposal response). That warranty should not necessarily expire after 90 days, but the licensee may request that it continue through any term of support.

- **Expand the Scope of the License.** The license granted must be broad enough to allow the licensee to use the software as necessary to meet its needs. That may include extending the license to subcontractors or licensee affiliate entities.
- **Address Data Security.** If the software will be hosted by the vendor in the "cloud," the vendor's policies relating to physical and electronic security, system availability, data backups and disaster recovery may need to be carefully reviewed and the licensee should consider including corresponding obligations and remedies in the agreement. The licensee must also consider the risks if there is a data breach involving licensee data and how that is to be addressed.
- **Negotiate Availability and Performance Service Levels.** Furthermore, if the software is hosted by the software vendor, it may be appropriate to hold the software vendor to measurable targets for uptime availability and other performance levels, and that the licensee be provided with specific remedies if the vendor fails to meet those service levels.
- **Provide Appropriate Termination Rights.** Upon termination, the licensee may wish to have the right to a copy of all licensee data housed in the vendor's systems in a form usable to the licensee, and it may be appropriate that the vendor thereafter is required to destroy its copies of all licensee data.
- **Ongoing Use of the Software.** The licensee will often have significant expense related to acquisition of the software, as well as rollout and training of its personnel, which may make it difficult for the licensee to move to a competing platform. Therefore, it may be appropriate that the vendor is required to warrant that the software will be supported for a minimum number of years following implementation, and that any fee increases for renewal terms are limited.
- **Force Majeure Provisions.** Standard vendor agreements often provide that the vendor is "off the hook" for a failure to meet contractual obligations if the failure is the result of a force majeure event. The licensee should review those exceptions closely since they may not be appropriate in all cases. For example,

if the failure to comply could have been prevented through the proper use of the vendor's disaster recovery and security obligations.

- **Dispute Resolution.** In some cases, the licensee may wish to consider the options available for internal dispute resolution, mediation and arbitration and ensure the agreement provides appropriate dispute resolution provisions based on a conscious evaluation by both parties.

## What Agreements Should Be Reviewed?

There are many factors the licensee may consider when deciding whether a particular software license agreement requires legal review. Some of the most important factors are as follows:

- **Cost.** How much is the licensee spending on the software license and the related implementation and support services?
- **Impact.** Will the software be critical to the performance of the business (e.g., affect on core operations, servicing of licensee customers, or financial reporting)?
- **Sensitivity.** Will sensitive licensee information be provided to the software vendor or hosted at the vendor's site?

## Reinhart's Software, Technology and Licensing Team

Reinhart's Software, Technology and Licensing Practice provides many services to our clients, including the following:

1. Drafting, review and negotiation of software license agreements;
2. Drafting, review and negotiation of cloud computing (SaaS and hosted software) agreements;
3. Representing software vendors in drafting of form software license agreements, reseller agreements, and end user license agreements (aka, "click-wrap" agreements);
4. Open source software compliance audits;



5. Drafting website terms and conditions and privacy policies;
6. Drafting, review and negotiation of software development and consulting services agreements;
7. Dispute resolution, such as responding to alleged excess use of licensed software or other use by a licensee inconsistent with the license grant;
8. Source code and other intellectual property protection;
9. Software and technology export rules and tax issues; and
10. Providing training to in-house counsel. If you would like help with the review of software license agreements, or any of the services noted above, please contact your Reinhart attorney or a member of Reinhart's Software, Technology and Licensing Team.

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