

Negotiating Software License Agreements – A Checklist for Software Users

By: Candace M. Jones, Esq.

If your company is acquiring software that is significant – either in price or because it will serve a mission critical function – users should review license terms carefully before accepting the software. To facilitate this evaluation, a checklist of basic license terms is discussed.

- Who purchases software for your company?
- Does your I/T manager select or approve all software used in your organization?
- Who reviews the license terms – your I/T or purchasing manager?
- Is it possible for employees download software directly with no review or approval of license terms by a manager?

Because software is readily available and often inexpensive (even “free” in some cases), software purchases often do not get the attention they should.

License restrictions and limitations are agreed to without review, even for some applications that are critical to business operations.

- What issues should be considered when a company is licensing software?
- Do the license terms match your expectations?
- What remedies do you have for software defects?

Even when it is not cost-effective to negotiate changes to the software vendor’s form agreement, software users should review license terms carefully before accepting the software.

To facilitate that initial evaluation, a checklist of basic terms follows.

Software

- Does the license agreement correctly describe the software proposed or marketed?
- Are the components to be licensed complete and correct in the software description?
- Who may use the software?
- Is the license a “seat license” limited to individual users, a site license for everyone at a particular physical location, or an enterprise license for use throughout an organization regardless of physical locations?
- May the software be installed on a network?
- How long does the license continue? Is the term a number of years? Perpetual?
- Are license fees as quoted or advertised (with any discounts applied)?

Minimum System Requirements

- Does the license agreement list (in an attachment or by reference to other material that has been provided in advance for review) the minimum requirements for hardware, operating systems, and other third-party software needed to operate the licensed software?

Use with Other Systems

- How do you expect the software to interact (if at all) with other systems you are using?
- Has the software vendor made any representations in its proposal about how to achieve that result?
- If so, is the ability to interface with other systems promised in writing in the license agreement?

Archival Copy

- Will you be archiving records created with the software for a period longer than the term of the license?
- If so, does the license allow you to maintain a copy of the software to use for reading archived files?
- Alternatively (or in addition), does the license include an undertaking by the licensor to assist you to extract your information or convert files to another system at the end of the license term? (Most standard licenses require software to be uninstalled and prohibit use after the term expires.)

Rights Management/Remote Access

- Does the software contain any security or rights management devices that could affect the continued operation of the software if activated? For example, does the software include code that would cause it to “time-out” after a specific period of time or volume of use?
- If the software is going to be installed on a computer connected to the Internet, is it configured to facilitate remote access by the vendor to your I/T systems?

The license agreement should either represent that the software includes no such devices or state affirmatively that such technology exists in the software and state explicitly the legitimate purpose for which it may be used.

Warranty of Performance and Against Infringement

- Has the software vendor warranted performance for some reasonable period?

Typical software warranties say that the software will perform the functions described in applicable user documentation. Users should review the documentation *before* accepting the software to confirm the description matches the functionality promised in the vendor’s proposal.

The reasonable duration for a software warranty varies depending on the nature of the software. For example, the warranty for an accounting package should probably be long enough that the user can get through quarter-end or year-end when the software includes features likely to be used only at quarter-end and year-end.

- Has the vendor warranted that it owns or has the right to license the software and that no third party rights are violated by the software license?

Upgrades and Enhancements

- What future releases does the license cover for no additional fee?

It is typical that users get enhancements or “updates” as part of routine maintenance, but upgrades (to new versions or substantially new functionality) are provided only for a separate fee. Users may need to license upgrades as they are released in order to continue support, e.g., only the most recent version with all updates and bug fixes installed will be eligible for support. If the license includes such limitations, find out when the next upgrade is scheduled to be released and consider whether such release can be negotiated into the license for no additional charge.

Maintenance

Usually, maintenance is provided subject to a separate on-going fee. (Some vendors include the first year’s maintenance in the license fee.)

- When can maintenance fees be adjusted?
- After an initial term or only at the anniversary date?
- Is there a cap on the adjustment amount?
- If the user cancels maintenance, can maintenance service later be reinstated?
- Will “reinstatement” fees be charged?

Support

- Does the description of support services match the proposal made?
- Are there service level commitments that are reasonable in light of the purpose for which the software is to be used? For example, one-day turnaround may be adequate in some cases, but unacceptable if the software is mission critical.

Training

- How much training is included with the software?
- Who needs to be trained in your organization?
- What training programs work best for your organization?
- What is the cost?
- Is it possible for training to be scheduled at a time and place convenient for you and your staff?

Consulting Services

- Is the software vendor providing related services?
- Have the services been described in enough detail that there is an objective measure for whether services rendered are as promised?
- Is there a timeline and specific list of deliverables?
- Will services be billed on a time and materials basis or fixed fee?
- If the former, has the vendor provided an estimate with milestones identified?
- Are payments due only upon the completion of milestones or after testing and acceptance?

Free Software

Note that “free” software is offered without obligation to pay a license fee, but “free” software is not free of license restrictions and limitations on use. In fact, some license terms for “free” or “open source” software can be onerous. Companies that use free software should institute procedures to review the terms of applicable licenses before that software is installed and used.

If your company is acquiring software that is significant – either in price or because it will serve a mission critical function – consider consulting in advance with counsel who can help you evaluate the license and related agreements.

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