



SOFTWARE LICENSE AGREEMENTS

A PRACTICAL GUIDE

By Bradley J. Freedman

SOFTWARE LICENSE AGREEMENTS

A PRACTICAL GUIDE

By Bradley J. Freedman

Table of Contents

Introduction	1
The Software License	2
Software Quality Promises – Warranties, Remedies and Disclaimers	4
Acceptance Testing	5
Maintenance and Support	6
Fees and Related Matters	7
Source Code Escrow Arrangements	9
General Indemnities	11
IP Infringement Indemnity and Remedies	12
Confidentiality Obligations	13
Remedy Restrictions /Liability Limitations and Exclusions	15
Term and Termination	16
Consequences of Expiration /Termination and Surviving Rights and Obligations	17
Governing Law and Dispute Resolution	18
Boilerplate Provisions	20
Contract Interpretation Principles	22
Some Key Questions	23
Glossary	26

This publication provides general information only, and does not constitute legal or other professional advice, a complete statement of the law, or an opinion on any subject. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. Readers of this publication should not act, or refrain from acting, on this publication without a thorough examination of the law after the facts of a particular situation are considered, and are encouraged to obtain advice from their legal counsel regarding their particular circumstances and in cases of specific questions or concerns.

Copyright © 2014 Bradley J. Freedman. All rights reserved. No part of this publication may be reproduced without the express prior written permission of Bradley J. Freedman.

Introduction

Computer software is an essential tool for almost every business. Businesses use computer software to design and create products, perform services, manage business relationships, communicate with suppliers and customers and control internal operations. Almost every business procures various kinds of computer software from numerous software vendors.

Computer software is usually distributed by the software vendor pursuant to a contract – commonly known as a “software license agreement” – that specifies the rights and obligations of the software vendor and the customer. A software license agreement usually gives the customer limited permission to use the licensed software, confirms the software vendor’s limited promises regarding the quality of the software and the availability of related services, imposes obligations on the customer (including an obligation to pay applicable fees for the licensed software and related services) and allocates risk between the software vendor and the customer.

Software license agreements can take various forms and be implemented in various ways. Inexpensive, commercial off-the-shelf software is usually governed by a non-negotiable, standard form agreement, which the customer must accept before or during the software installation process. Expensive software that is costly and complicated to implement is often governed by an agreement that is subject to negotiation by the software vendor and the customer.

An inadequate or unreasonable software license agreement can present the customer with significant business risks and legal liabilities. Accordingly, regardless of the nature or form of a software license agreement, a prudent customer, with the benefit of legal advice, will carefully review the agreement and attempt to negotiate required revisions so that the agreement is appropriate and reasonable in the circumstances.

This handbook provides a simple explanation of some of the important provisions commonly included in software license agreements and some practical guidance for businesses considering the procurement of software. This handbook provides general information only, and does not constitute legal or other professional advice. Businesses procuring software are encouraged to obtain legal advice from a competent professional regarding their particular circumstances.

Bradley J. Freedman

October 1, 2014

The Software License

In most software transactions, the customer does not acquire ownership of the software. Instead, the customer acquires a limited permission – commonly called a “license” – to use the software in accordance with specified usage rights and other restrictions and requirements. The license is of primary importance to the customer, because without the license the customer’s use of the software would be an infringement of the software vendor’s legal rights (e.g. copyright and patent) in the software.

The software license agreement usually specifies the manner in which the customer may use the software, the limited purposes for which the customer may use the software and other restrictions and requirements. Use of licensed software beyond the scope of the license is a breach of the software license agreement and might constitute infringement of the software vendor’s rights in the software. If the customer violates the limits and restrictions specified in a software license agreement, then the customer risks serious adverse consequences, including financial liability to the software vendor and early termination of the software license.

Kinds of Licenses

There are various kinds of software licenses. Most licenses are “non-exclusive” (the software vendor and other licensees can also use the licensed software), but licenses can be “sole” (the customer is the only licensee, but the software vendor can use the licensed software as well) or “exclusive” (the customer can use the licensed software to the exclusion of all other persons, including the software vendor).

Scope of License

A software license defines the scope of the customer’s permissible use of the licensed software. The software vendor can adjust the scope of the license to reflect the customer’s intended use of the software. This can be beneficial for the customer because the customer is required to pay a license fee that reflects the customer’s intended use of the software.

The scope of a software license can be adjusted by limiting or restricting the following variables:

- **Software:** The particular software that may be used under the license. For example, a software license might be limited to a specific version of the software or to specific modules of a software suite.
- **Users:** The individuals who may use the software. For example, a software license might limit the total number of individual users of the software, limit use of the software to specific named individuals, limit the maximum number of simultaneous users or impose other requirements (e.g. a user must be employed by the customer).
- **Purposes:** The purposes for which the software may be used. For example, software licenses commonly provide that the software may be used for the customer’s “internal business purposes only” and prohibit use of the software for the benefit of other persons (e.g. the customer’s corporate affiliates) or to provide services to other persons.
- **Manner of Use:** The manner in which the software may be used. For example, a software license might limit the number of software installations or restrict the kinds of computers on which the software may be installed (e.g. maximum number of processor cores).
- **Location of Use:** The locations where the software may be used. For example, a software license might limit software use to specific locations or geographic territories.
- **Duration of Use:** The duration of the license. For example, licenses are either time-limited or perpetual, and are usually subject to termination in specified situations.

Software vendors often use license management technologies (e.g. time-limited or user-specific license keys) to prevent use of licensed software beyond the scope of the license. However, some kinds of license restrictions and requirements cannot be controlled through technological means, and in those circumstances the software vendor must rely on the customer's honesty and vigilance, and the software vendor's contractual enforcement rights (e.g. periodic reports and audits), to prevent unauthorized use of the licensed software.

Reports /Audits /Enforcement

Software license agreements often require the customer to provide the software vendor with periodic reports regarding the customer's use of the licensed software (e.g. the number of installations and users) so the software vendor can verify that the customer's use of the licensed software has not exceeded the scope of the license. Some licensed software automatically generates and sends periodic usage reports to the software vendor.

Software license agreements usually give the software vendor the right to conduct audits of the customer's facilities and records to verify the customer's compliance with the software license agreement. The customer is usually required to pay the cost of the audit if the audit discloses unauthorized use of the licensed software.

Some licensed software contains license management technologies that require the software to be periodically reactivated using vendor-provided license keys or codes, which the software vendor is usually entitled to withhold if the customer fails to pay applicable fees, deliver required reports or permit the software vendor to conduct an audit.

Recommendations

When negotiating a software license agreement, the customer should ensure that the software license allows the customer to use the software as required for the customer's current and reasonably anticipated future needs. The customer should also take reasonable precautions (including educating the customer's employees and conducting internal audits) to minimize the risk of inadvertent software misuse. ■

Software Quality Promises – Warranties, Remedies and Disclaimers

Software license agreements often contain limited promises by the software vendor regarding the quality of the licensed software, and provide restricted remedies for the customer if the software is defective. The customer should understand those provisions and consider managing risk through other contractual rights and prudent business practices.

Software Quality Warranties

Software license agreements often contain limited promises (known as “warranties”) by the software vendor regarding the quality of the licensed software. For example, software vendors typically promise that for a specified period (known as a “warranty period”) the licensed software will conform to the description in the applicable software documentation. Software quality warranties are usually subject to various exceptions for problems that are not caused by software defects (e.g. problems caused by the customer’s improper installation or use of the software) or are otherwise beyond the software vendor’s control.

Limited Remedies

Software license agreements usually provide the customer with limited, exclusive remedies if the software fails to comply with the warranty during the warranty period. For example, the software vendor might be obligated to either remedy or replace the defective software (so that the software conforms to the applicable documentation) or terminate the customer’s license to use the defective software and refund the license fee paid by the customer for the terminated license. The limited remedies for breach of warranty are usually exhaustive and expressly exclude all other remedies, including financial compensation for loss and damage suffered by the customer as a result of the defective software.

Disclaimers

Software license agreements usually contain detailed provisions (known as “disclaimers”) that exclude all other promises regarding the quality of the software. For example, disclaimers usually provide that the express software quality warranties are in lieu of all other express or implied promises regarding the software, including certain promises (e.g. merchantability, durability and fitness for a particular purpose) that might otherwise be implied by law. In addition, disclaimers often specify that the customer is solely responsible for selecting the software and determining the software’s suitability for the customer’s particular purpose, and warn that the software is provided “as is” and “with all faults” and that the customer uses the software at the customer’s own risk.

Entire Agreement Clause

Software license agreements often supplement disclaimers with a provision (known as an “entire agreement” clause) that confirms that the written software license agreement supersedes and replaces all prior discussions, promises, understandings and agreements between the software vendor and the customer regarding the software. An entire agreement clause is intended to prevent either party from relying on pre-contractual discussions or assurances (including statements in the software vendor’s advertising and marketing materials and commitments made by the software vendor’s sales representatives during sales presentations and negotiations) that are not expressly confirmed in the software license agreement.

Recommendations

Limited warranties and disclaimers limit the customer’s rights and remedies if licensed software is defective or otherwise fails to meet the customer’s specific requirements. When negotiating a software license agreement, the customer should ensure that the software license agreement accurately confirms all of the commitments made by the software vendor’s sales representatives during sales presentations and negotiations, and that the customer’s corresponding rights and remedies are reasonable and appropriate. The customer should also manage and mitigate risk through prudent business practices (e.g. pre-contractual software testing and due diligence) and contractual rights (e.g. acceptance testing). ■

Acceptance Testing

Software license agreements often specify a procedure known as “acceptance testing”, which allows the customer to test the licensed software in order to verify that the software meets specified requirements. Acceptance testing can be an important risk management tool for the customer.

The importance of acceptance testing will depend on the circumstances, including the nature and cost of the licensed software, the customer’s ability to test the software before irrevocably purchasing the software license, and the extent to which the software must be implemented (configured or customized) by the software vendor or a service provider for use by the customer.

Testing Procedure

Software license agreements usually specify one or more limited periods during which the customer may test the licensed software to determine whether the software meets specified requirements. Depending on the circumstances, acceptance testing might occur not only when licensed software is initially delivered to the customer but also later during the implementation of the software.

Acceptance testing is often a collaborative process in which the software vendor assists the customer to conduct the testing. The customer is usually required to give the software vendor detailed written notice of all deficiencies in the software identified by the customer during testing, and to allow the software vendor a reasonable opportunity to correct the deficiencies and resubmit the software for further testing. The customer is also usually required to give the software vendor prompt written notice if the software passes or fails acceptance testing. Standard form software license agreements often provide that licensed software is deemed to pass acceptance testing if the customer does not give timely notice that the software has failed acceptance testing.

Acceptance Criteria

Software license agreements usually specify objectively measurable requirements – known as “acceptance criteria” – for the customer’s acceptance or rejection of the licensed software. Acceptance criteria usually include the basic attributes of the licensed software described in the standard software documentation. In appropriate circumstances, the customer might also require that the acceptance criteria include detailed specifications (e.g. required functionality, operation, performance and results) that reflect the customer’s particular business requirements.

Standard form software license agreements often provide that licensed software will pass acceptance testing if the software “substantially conforms” to the acceptance criteria. That approach might not be appropriate in all circumstances, particularly if the customer expects and requires the software comply strictly with all acceptance criteria.

Consequences / Remedies

Software license agreements usually specify the consequences or remedies for successful acceptance testing and acceptance testing failure. Successful acceptance testing might constitute a payment milestone or have other consequences, including commencement of a limited warranty period. The consequences of acceptance testing failure often include an option for the customer to either cancel the software license purchase and receive a refund of pre-paid fees, negotiate revisions to the acceptance criteria and a corresponding license fee adjustment, or agree to give the software vendor more time to correct identified deficiencies so that the software passes acceptance testing.

Recommendations

Acceptance testing can be an important risk management tool. If licensed software is to be subject to acceptance testing, then the software license agreement should specify the acceptance testing procedure, the acceptance criteria and the consequences of successful acceptance testing and acceptance testing failure. ■

Maintenance and Support

Software license agreements usually include offerings of important services regarding the licensed software, known as “software maintenance” and “technical support”, that are essential for the customer’s effective use of the licensed software. The customer should understand the nature and extent of the software vendor’s service offerings, and consider whether those services, together with other risk management practices, will reasonably satisfy the customer’s requirements.

Service Offerings

Software maintenance is usually comprised of software patches and fixes (to correct latent defects in licensed software) and software updates or incremental software releases (to provide minor improvements to licensed software). In some instances, software maintenance may also include major upgrades or new versions of licensed software.

Technical support is usually comprised of remote (telephone or online) technical advice regarding the customer’s use of licensed software and assistance to resolve certain kinds of problems with licensed software, including the provision of temporary work-arounds and permanent solutions (e.g. patches and fixes) for software defects. Technical support might include a helpdesk service for the customer’s end users of licensed software (known as “first level” support) or might be limited to assistance to the customer’s own internal helpdesk personnel (known as “second level” support).

Service Levels and Remedies

In some circumstances, a software license agreement might include promises by the software vendor about the level of service the software vendor will provide to the customer if there are problems with the licensed software (e.g. how quickly the software vendor will respond to a reported problem or provide a temporary work-around for the problem) and might offer limited remedies (e.g. credits against future fees payable by the customer) if the software vendor fails to provide the promised level of service. Software license agreements often provide that the specified limited remedies are the customer’s only remedies if the software vendor fails to provide promised levels of service.

Exclusions/Qualifications

The software vendor’s obligations to provide software maintenance and technical support are usually limited by various exclusions and qualifications. For example, the software license agreement might limit software maintenance and technical support to relatively current versions of licensed software (e.g. the most current version and the previous version) and exclude problems caused by use of the software in breach of the software license agreement or contrary to applicable documentation. The software license agreement might also limit technical support to problems that can be replicated by the software vendor in the software vendor’s technical support environment.

Duration of Service

Software maintenance and technical support might be optional at the customer’s election, or mandatory throughout the entire duration of the software license. Software vendors usually commit to offering software maintenance and technical support for a limited time only. That kind of limitation can be problematic if customer intends to use licensed software for a lengthy period and will require software maintenance and technical support throughout the entire period.

Recommendations

Software maintenance and technical support are particularly important for software that is costly, difficult to replace promptly or essential to the customer’s daily business operations. In those circumstances, the customer should carefully assess whether the software vendor’s service offerings, together with other risk management practices, will reasonably satisfy the customer’s requirements throughout the entire time that the customer expects to use the licensed software. ■

Fees and Related Matters

Software license agreements usually require the customer to pay fees for the software license and related services. The fees are usually based on the duration and scope of the software usage rights granted by the software license agreement, and should reflect the value the customer will derive from using the licensed software.

Kinds of Fees

A software license agreement may require the customer to pay various kinds of fees, including software license fees, fees for software maintenance and technical support and fees for additional services.

The software license fee usually reflects the value the customer will derive from using the licensed software, based on the duration of the software license (e.g. perpetual or fixed term) and the scope of the software usage rights (e.g. the purposes for which the licensed software may be used and the number of permissible software installations and end users). Software license fees are usually payable in advance, on either a one-time basis (for a perpetual license) or a periodic basis (for a fix-term license). The customer might have the option to increase the scope of the license (e.g. adding additional software installations or end users) by paying additional license fees on a periodic basis, either in advance or in arrears following a prescribe true-up procedure.

The fee for software maintenance and technical support usually reflects the nature and scope of those services and their perceived value to the customer. Software maintenance and technical support fees are often calculated using a formula (e.g. a specified percentage of the corresponding software license fee), and are usually payable in advance on a periodic basis. In some circumstances, fees for technical support permit the customer to make a limited number of requests for technical support (e.g. ten support requests each year), and an additional fee is payable for each additional support request.

Software vendors usually charge fees for additional services, such as software implementation and training. Those fees are often based on a fee schedule or calculated on a time and materials basis using the software vendor's applicable rates.

Fee Increases/Price Protection

Most software vendors change their fees periodically to adjust for inflation and changes in market conditions. Software license agreements often impose time-limited restrictions on the software vendor's ability to increase fees, which can be particularly important to the customer if the customer expects to use the licensed software and related services for a lengthy period.

Taxes and Withholdings

Software license agreements usually provide that specified fees do not include applicable taxes, and require the customer to pay all applicable taxes on all amounts paid under the agreement. Software license agreements usually require the customer to pay fees in full without any withholding or deduction, and often include a provision (known as a "gross up" clause) that provides that if the customer is required by law to make a withholding or deduction from a fee payment then the customer will "gross up" the payment to the software vendor so that the amount actually received by the software vendor (net of withholdings and deductions) is the full amount of the specified fee.

Enforcement

Some licensed software contains license management technologies that require the software to be periodically reactivated using vendor-provided license keys or codes, which the software vendor is usually entitled to withhold if the customer fails to pay applicable fees, deliver required reports regarding the customer's use of the licensed software or permit the software vendor to conduct an audit. Software license agreements usually allow the software vendor to terminate the license, sometimes without any prior notice, if the customer fails to make required fee payments.

Recommendations

The customer should ensure that the software license agreement provides reasonable certainty regarding the customer's total cost of use of the software – all software license fees (including fees for additional licenses or usage rights purchased by the customer from time to time) and fees for related services – throughout the entire time that the customer expects to use the licensed software. ■

Source Code Escrow Arrangements

Software license agreements often include a source code escrow arrangement that allows the customer to access and use source code for the licensed software if one or more specified events occur. If the customer requires the right to access and use source code to maintain the licensed software if the software vendor is unwilling or unable to do so, then the customer should request and properly administer an appropriate source code escrow arrangement.

Object Code and Source Code

Computer software is usually written in a programming language that can be read, understood and modified by knowledgeable programmers. The resulting version of the computer software is known as “source code”, and is compiled into machine language format, known as “object code” or “machine code”, which can be installed and run on a computer. Object code is not easily read or understood by programmers and is difficult to modify. Consequently, in most circumstances programmers must have access to the source code and related materials (e.g. explanatory notes and instructions) for computer software in order to modify (e.g. to fix a bug or error) or enhance (e.g. to add new functionality) the software.

Object Code Distribution

Software vendors usually provide customers with copies of licensed software in object code version only. There are numerous reasons for this approach, including: (1) source code is the software vendor’s valuable intellectual property, and unauthorized use or disclosure of source code can cause significant loss or irreparable harm to the software vendor; and (2) customers that do not have access to source code are more likely to purchase software maintenance and other services from the software vendor. This arrangement can be beneficial for customers that use commercial off-the-shelf software because the software vendor is usually able to cost-effectively maintain the software for the benefit of all customers.

Nevertheless, in some situations (e.g. if licensed software is expensive to acquire and implement, custom developed for the customer, not easily or quickly replaced or essential for the customer’s daily business operations), the customer might not want to rely entirely on the software vendor to provide required software maintenance services. Instead, the customer might require a supplemental, self-help remedy – a right to access and use source code to maintain the licensed software if the software vendor is unwilling or unable to do so – provided through a source code escrow arrangement.

Source Code Escrow

Source code escrow refers to a three-way arrangement – between a software vendor, one or more customers and a trusted third party (known as an “escrow agent”) – that provides the customer with access to the source code and related materials for licensed software if one or more specified events (each known as a “release event”) occurs. The most common release events are the software vendor’s bankruptcy and the software vendor’s breach of its contractual obligation to provide software maintenance services. If a release event occurs, the customer is entitled to access and use the source code and related materials to maintain the licensed software for use by the customer, but not for any other purpose.

The fundamental elements of a source code escrow arrangement include: (1) an obligation on the software vendor to periodically deposit with the escrow agent up-to-date versions of the source code and related materials; (2) a procedure for the customer to periodically verify the software vendor’s compliance with the deposit obligations and the quality of the deposited source code and related materials; (3) appropriate, clearly defined and verifiable release events; (4) a license for the customer to use the source code and related materials if they are released from escrow; and (5) a procedure for the prompt resolution of disputes (e.g. a dispute over whether a release event has occurred).

The need for a source code escrow arrangement, and the value it will provide to the customer, will depend on various circumstances, including: (1) the importance of the licensed software to the customer and the likely cost and time required to replace the software; (2) the probability that the software vendor will fail to provide promised software maintenance services; (3) the quality and completeness of deposited source code and related materials; (4) the probability of a dispute over whether a release event has occurred and the customer's ability to resolve the dispute in a timely manner; and (5) the customer's technical and financial ability to use the source code to maintain the licensed software.

In many situations, the customer might be better off replacing licensed software rather than attempting to use source code to maintain the software if the software vendor fails to do so. Nevertheless, a source code escrow arrangement might benefit the customer by creating an incentive for the software vendor to perform the software vendor's software maintenance obligations.

Recommendations

When negotiating a software license agreement, the customer should carefully consider whether a source code escrow arrangement is necessary and appropriate. If the customer requires the self-help remedy that source code can provide, then the customer should request a comprehensive source code escrow arrangement with proper release conditions, and the customer should properly administer the arrangement by periodically verifying that the software vendor has deposited the source code and related materials for the licensed software. ■

General Indemnities

Software license agreements often include a provision – known as a “general indemnity” – that requires a party (usually the customer, but sometimes also the software vendor) to protect the other party against certain kinds of third party claims and resulting liabilities. The customer should understand the burdens and benefits of general indemnity provisions and consider managing risk through insurance.

Purpose of Indemnity

A general indemnity is a means of contractually allocating the risk of claims by persons who are not parties to the contract (known as “third parties”) against the contracting parties. The risk allocation can be based on fault (e.g. risk is allocated to the contracting party whose acts or omissions caused the third party claim), efficiency (e.g. risk is allocated to the contracting party who is best able to manage or control the risk of the third party claim) or other considerations (e.g. risk is allocated based on the financial benefit of the agreement).

A general indemnity usually imposes two distinct obligations on the indemnifying party for the benefit of the other contracting party and other persons (each a “beneficiary”): (1) an obligation to defend the beneficiary against third party claims, including paying legal costs of defending the claim; and (2) an obligation to indemnify (reimburse) and hold harmless (protect) the beneficiary against obligations and liabilities (including court awards and settlement amounts) resulting from third party claims.

Scope/Application of Indemnity

The scope of a general indemnity can be adjusted in various ways, including the following:

- **Beneficiaries:** The indemnity might be for the benefit of a contracting party only or might also benefit the contracting party’s personnel (e.g. directors, officers and employees) or other related persons (e.g. affiliates, service providers and subcontractors).
- **Covered Claims:** The indemnity might be limited to certain kinds of claims (e.g. claims for bodily injury or damage to tangible personal property), claims resulting from certain events (e.g. the indemnifying party’s breach of contract or willful misconduct) or claims made in certain countries.
- **Time Restriction:** The indemnity might apply only during the term of the agreement or might continue to apply after the agreement ends.
- **Financial Limitation:** The indemnity might be subject to a limit on the amount of the indemnifying party’s financial obligations, including the amount of legal fees paid to defend claims and amounts paid to satisfy resulting liabilities.

A general indemnity is usually subject to exclusions for claims resulting from the beneficiary’s breach of the agreement or other misconduct.

A general indemnity usually requires a beneficiary to comply with certain procedural obligations regarding a third party claim, such as giving prompt notice of the claim to the indemnifying party, allowing the indemnifying party to control the defence and settlement of the claim, and reasonably assisting the indemnifying party to defend and settle the claim.

Recommendations

When negotiating a software license agreement, the customer should understand the burdens and benefits of the general indemnities included in the agreement and should consider how to best manage and mitigate risk through prudent business practices (e.g. administrative practices and procedures to minimize risk, and risk allocation provisions in contracts with potential claimants) and insurance for residual risk. ■

IP Infringement Indemnity and Remedies

Software license agreements often include a provision – known as an “IP infringement indemnity” – that requires the software vendor to provide the customer with limited protection and special remedies if a third party claims that the customer’s use of licensed software infringes third party intellectual property rights. The customer should understand the protections and remedies provided by an IP infringement indemnity and consider whether to procure insurance for residual risk.

IP Infringement Indemnity

An IP infringement indemnity provides the customer with limited protection against claims by persons who are not parties to the contract (known as “third parties”) based on allegations that the customer’s use of the licensed software infringes the third party’s intellectual property rights (e.g. copyright, patents and trade secrets). An IP infringement indemnity usually imposes two distinct obligations on the software vendor: (1) an obligation to defend the customer against intellectual property infringement claims; and (2) an obligation to indemnify (reimburse) and hold harmless (protect) the customer against obligations and liabilities (including court awards and settlement payments) resulting from intellectual property infringement claims.

The scope of an IP infringement indemnity can be adjusted using the same variables – beneficiaries, covered claims, time restriction and financial limitation – as apply to a general indemnity. An IP infringement indemnity usually requires the customer to comply with the same kinds of procedural obligations – prompt notice of a covered claim, conduct and control of defence and settlement of a covered claim and cooperation regarding a covered claim – as apply to a general indemnity.

IP infringement indemnities are often subject to exceptions for certain kinds of infringement claims (e.g. certain patent infringement claims) and exclusions for infringement claims caused by certain circumstances (e.g. the customer’s modification of the licensed software or unauthorized use of the licensed software).

Additional Remedies

Software license agreements usually require the software vendor to provide the customer with additional remedies if an intellectual property infringement claim affects the customer’s continuing use of the licensed software. Those remedies usually include: (1) the software vendor will obtain rights for the customer to continue to use the licensed software without a risk of infringement liability; (2) the software vendor will replace or modify the licensed software so that the software is no longer infringing but provides the same functionality and benefit to the customer (in which case the customer must use the replacement/modified software instead of the infringing software); or (3) the software vendor will terminate the software license (in which case the customer must stop using the licensed software) and provide the customer with a partial refund of previously paid software license fees.

Exclusive Remedies

Software license agreements often provide that an IP infringement indemnity and additional remedies are the customer’s only remedies against the software vendor if there is an intellectual property infringement claim against the customer. This exclusivity means that if an intellectual property infringement claim prevents the customer from using the licensed software or causes the customer to suffer loss, damage and liability that are not covered by the IP infringement indemnity, then the customer may not be entitled to compensation from the software vendor.

Recommendations

When negotiating a software license agreement, the customer should understand the protections provided by the IP infringement indemnity and additional remedies and should consider whether to procure insurance to cover residual risk. ■

Confidentiality Obligations

Software license agreements often contain provisions that impose restrictions and requirements regarding each party's use and disclosure of the other party's confidential information. The customer should consider whether the confidentiality obligations are sufficient, reasonable and practicable for the transaction.

Confidentiality Restrictions/Requirements

Confidentiality provisions impose restrictions and requirements on a contracting party (the "Receiving Party") regarding the use and disclosure of the confidential information of the other party (the "Disclosing Party"). Those obligations can be adjusted to reflect the nature of the Disclosing Party's confidential information, the manner in which the Receiving Party is allowed to access and use the information and the potential risks to the Disclosing Party if the information is misused. For example:

- Confidential Information: The information to be treated as confidential might be defined broadly (e.g. all non-public information about the Disclosing Party or its business) or narrowly (e.g. information that is expressly identified in writing as confidential).
- Permitted Use: The purpose for which the Receiving Party may use the information might be specific (e.g. as reasonably required to use the licensed software) or general (as reasonably required to perform obligations and exercise rights under the software license agreement).
- Permitted Users: There might be restrictions on the individuals who may use the information (e.g. only the Receiving Party's employees on a need-to-know basis).
- Permitted Disclosures: There might be restrictions on the Receiving Party's ability to disclose the information to other persons (e.g. no disclosure to contractors or service providers) or requirements for mandatory disclosures required by law (e.g. prior notice to the Disclosing Party of the required disclosure).
- Protection/Standard of Care: The Receiving Party's obligation to protect the information might be absolute or limited to a specific standard of care (e.g. the same measures the Receiving Party uses to protect the Receiving Party's own confidential information, but not less than reasonable care).
- Duration: The confidentiality obligations might last for a specified period only (e.g. five years after the end of the software license agreement) or until an item of information no longer qualifies as confidential.
- Exceptions: The confidentiality obligations might not apply to certain kinds of information (e.g. information that is already known to the Receiving Party or is subsequently obtained by the Receiving Party from another source that is not subject to confidentiality obligations).

Return/Destruction Obligation

Confidentiality provisions usually require the Receiving Party to return or permanently delete and destroy all records of the Disclosing Party's confidential information in the Receiving Party's possession or control when the Receiving Party no longer has a legitimate need to use or retain the records or when requested to do so by the Disclosing Party. There are often exceptions that permit the Receiving Party to retain records for legal compliance purposes.

Liability/Enforcement

Liability for breach of confidentiality obligations is often an exception to contractual liability exclusions and limitations. In those circumstances, the Receiving Party faces a risk of unlimited liability for all damage and loss suffered by the Disclosing Party as a result of the Receiving Party's breach of confidentiality obligations.

Confidentiality provisions often give the Disclosing Party special enforcement remedies, including a right to inspect and verify the Receiving Party's compliance with the confidentiality obligations and a right to judicial remedies (e.g. an injunction) to prevent the Receiving Party from breaching the confidentiality obligations.

Administrative Practices

Confidentiality obligations might require the Receiving Party to implement new administrative practices (e.g. internal policies and procedures) for handling the Disclosing Party's confidential information. In some circumstances, required administrative practices can be a significant burden and impose unanticipated costs on the Receiving Party.

Recommendations

When negotiating a software license agreement, the customer should ensure that the confidentiality obligations in the agreement are sufficient, reasonable and practicable for the intended transaction (including the kinds of sensitive information that each party will disclose to the other party and the manner in which each party will use the other party's information). The customer should also carefully consider the customer's ability to establish and implement the administrative practices required to comply with confidentiality obligations regarding the software vendor's confidential information. ■

Remedy Restrictions /Liability Limitations and Exclusions

Software license agreements often contain provisions that restrict and limit the customer's rights and remedies against the software vendor for damage, loss or liabilities caused by the software vendor's breach of the agreement or other misconduct. The customer should understand the risk allocation resulting from those provisions and consider managing risk through prudent business practices and insurance.

Remedy Restrictions

Software license agreements often restrict the customer's remedies against the software vendor if the licensed software or associated services fail to comply with contractual requirements. For example, the customer's remedies might be limited to repair or replacement of defective software or re-performance of deficient services, or alternatively (at the software vendor's option) to a refund of fees paid for the defective software or deficient services. The customer might also be entitled to limited financial credits against future fees if certain services (e.g. software maintenance and technical support for serious software problems) fail to meet contractual requirements. If the specified remedies are exclusive, then the customer might not be able to sue the software vendor for financial compensation for damage, loss or liabilities caused by defective software or deficient services.

Liability Limitations and Exclusions

Software license agreements also usually contain provisions – known as “liability limitations” – that limit or cap the amount of the software vendor's potential liability to the customer for damage, loss and liability caused by the software vendor's breach of contract or other misconduct. Liability limitations often impose a cap that is a specified amount or is determined by a formula based on the amount of fees paid by the customer.

Software license agreements also usually contain provisions – known as “liability exclusions” – that limit the software vendor's potential liability to “direct damages” only, and exclude liability on the part of the software vendor for all other kinds of damage (e.g. indirect damages, consequential damages, special damages and punitive damages) and specific kinds of losses (loss of business, loss of revenue, loss of profit, loss of data and loss of customer goodwill) suffered by the customer regardless of the cause. Liability exclusions often prevent the customer from recovering from the software vendor financial compensation for the kinds of damage and loss that are most likely to result from defective software, deficient services or other wrongful conduct by the software vendor.

Liability limitations and liability exclusions are often subject to exceptions for specific kinds of damage and loss (e.g. bodily injury or physical damage to tangible property), for damage and loss caused by specific misconduct (e.g. breach of confidentiality obligations, breach of privacy or data protection obligations or infringement of intellectual property rights) or for certain financial obligations (e.g. general indemnity obligations).

Liability limitations and liability exclusions might apply to both the software vendor and the customer, but applicable exceptions often substantially limit the protection that the liability limitations and liability exclusions provide to the customer.

Recommendations

When negotiating a software license agreement, the customer should understand the risk allocation resulting from contractual remedy restrictions and liability limitations and liability exclusions, and should consider how to best manage and mitigate risk through prudent business practices (e.g. effective project management, business continuity plans and data protection procedures) and insurance for residual risk. ■

Term and Termination

Software licenses and associated services are usually time-limited and subject to early termination. The customer should understand the term of each software license and associated services and take reasonable precautions to properly exercise renewal rights and avoid unintended early termination.

Term

A software license agreement usually specifies the “term” or duration of the software license and the software vendor’s associated services (e.g. software maintenance and technical support). A software license can be time-limited or perpetual, and associated services can be available during the entire term of the software license or for a limited period.

A time-limited software license expires when the specified license period ends, but the software license agreement might provide for the renewal or extension of the term. A renewal or extension might be automatic (unless a party opts out), at a party’s sole option, or require the agreement of both parties. Optional renewals and extensions are usually subject to limitations or pre-conditions, such as timely renewal notice and prompt payment of fees. A renewal that requires the agreement of both the software vendor and the customer provides flexibility but no certainty.

A perpetual software license continues unless and until the license is lawfully terminated, but the customer’s right to receive important services necessary for the use of the software (e.g. software maintenance or technical support) is usually limited to a specified period.

Fees payable for a software license and associated services usually reflect the term of the license and associated services and the customer’s ability to renew or extend the term. Fees payable for automatic or optional license term renewals or extensions are usually either pre-determined or based on a formula (e.g. annual cost-of-living increases or a specified discount from the software vendor’s then-current standard fees).

Termination

The software license and other rights and obligations set forth in a software license agreement might be subject to early termination by the software vendor or customer in accordance with express or implied termination rights. Even software licenses described as “perpetual” can usually be terminated in specified circumstances (e.g. by the software vendor if the customer fails to pay the license fee or misuses the licensed software, or by the customer if the licensed software does not meet certain requirements).

Two kinds of termination rights are commonly found in software license agreements: termination for convenience (which allows a party to terminate for the party’s sole convenience) and termination for cause (which allows a party to terminate only if the other party breaches the agreement). Termination rights can be subject to limitations or pre-conditions, such as a warning to the breaching party and a reasonable opportunity for the breaching party to remedy the breach. Termination rights might apply to the software license agreement as a whole or only to specific rights and obligations (e.g. maintenance and support services might be terminated separately from the software license).

The software vendor and the customer might also have implied termination rights under generally applicable law. The nature and extent of implied termination rights will depend upon the particular circumstances and the express provisions of the software license agreement.

Recommendations

When negotiating a software license agreement, the customer should understand the term of the software license and associated services and the circumstances in which the license and services may be terminated by the software vendor or the customer. The customer should take reasonable precautions to properly exercise renewal or extension rights and avoid circumstances that present a risk of unintended early termination, particularly if the licensed software is essential for the customer’s daily business operations. ■

Consequences of Expiration/Termination and Surviving Rights and Obligations

Software license agreements often specify important rights and obligations that are triggered when the software license ends or that continue to apply after the software license agreement ends. Those rights and obligations often vary depending upon whether the software license agreement expires at the end of its prescribed term or is terminated early. The customer should understand those rights and obligations and be prepared to enforce and comply with them.

Consequences of Expiration/Termination

Software license agreements usually require the customer to stop using the licensed software, and delete or destroy all copies of the software and related documentation, when the software license ends, and often require the customer to certify in writing that the customer has complied with those obligations.

Software license agreements often provide the software vendor with a right to inspect the customer's facilities to verify the customer's compliance with the customer's obligations that arise when the software license agreement expires or is terminated. Some software vendors use license management technologies (e.g. time-limited or user-specific license keys) to prevent the customer from continuing to use licensed software after the customer's software license ends.

If licensed software is essential for the customer's daily business operations, then the software license agreement might provide the customer with an optional post-term transition period during which the customer may continue using the licensed software while the customer transitions to replacement software. The customer's right to invoke an optional transition period might be subject to restrictions and requirements, including timely notice and advance payment of applicable fees.

Software license agreements might also specify other consequences of early termination of a software license, such as a refund of pre-paid fees (if the customer terminates the software license because of the software vendor's breach) or accelerated payment obligations (if the software vendor terminates the software license because of the customer's breach).

Surviving Rights and Obligations

Software license agreements usually specify certain rights and obligations that continue after the agreement ends. Surviving rights and obligations commonly relate to the protection of intellectual property and confidential information, audit and inspection rights, liability limitations and liability exclusions, indemnity obligations and dispute resolution procedures. Surviving rights and obligations can impose substantial burdens on the customer, and the customer's breach of those obligations can result in significant liability.

Recommendations

When negotiating a software license agreement, the customer should ensure that the customer's rights and obligations that are triggered when the software license ends or that continue after the agreement ends are consistent with the customer's business requirements, and the customer should be prepared to enforce and comply with those rights and obligations. ■

Governing Law and Dispute Resolution

Software license agreements usually specify the law that governs the agreement and a procedure for resolving disputes relating to the agreement. The customer should ensure that the governing law is appropriate and the dispute resolution procedure and venue are suitable and fair to both parties.

Governing Law

To properly negotiate a software license agreement, and to perform obligations and exercise rights under the agreement, the customer must know the legal rules that govern the interpretation and enforcement of the agreement. Those legal rules will be determined primarily by the law of a particular jurisdiction (i.e. a country or province/state), which is commonly known as the “governing law”. The governing law is important because different jurisdictions have different legal rules relevant to software license agreements, and even a small difference in legal rules can have a significant effect on the customer’s rights and obligations.

Under Canadian law, a software license agreement is usually governed by the law specified in the agreement or, if the governing law is not specified, the law of the jurisdiction that has the most real and substantial connection to the agreement. If there is a dispute regarding a software license agreement that has connections to multiple jurisdictions (e.g. the software vendor and the customer are in different countries) but does not specify the governing law, then the court or arbitrator will determine the governing law by identifying the jurisdiction that has the most real and substantial connection to the agreement.

It is usually best if a software license agreement specifies the governing law, so that the software vendor and customer know with certainty the law that will govern the interpretation and enforcement of the agreement. Most software vendors and customers prefer their respective local law to be the governing law, but a different law might be better. The software vendor and the customer should select a governing law based on careful consideration of the potential effect of the law on all aspects of the interpretation and enforcement of the agreement.

The selection of a governing law presents considerations of cost and risk. A contracting party that is not familiar with a proposed foreign governing law must either obtain legal advice from a lawyer qualified to provide advice regarding the governing law or accept the risk that the governing law is materially different from the law of the contracting party’s jurisdiction.

Dispute Resolution

Software license agreements often specify a procedure for the resolution of disputes between the software vendor and the customer. Dispute resolution procedures can include some or all of the following:

- **Negotiation:** One or more rounds of direct negotiation by representatives of the software vendor and the customer, with each round of negotiation involving more senior representatives.
- **Mediation:** Negotiation facilitated by an independent and experienced neutral person (known as a “mediator”) who assists the software vendor and the customer to negotiate a settlement of the dispute, but does not have authority to impose a binding decision.
- **Arbitration:** Formal dispute resolution through a private adversarial process in which the software vendor and the customer present evidence and argument to one or more independent decision makers (known as “arbitrators”) who have authority to impose a binding decision that is subject to review by a court in limited circumstances.
- **Litigation:** Formal dispute resolution through a public adversarial process in the applicable court system in which the software vendor and the customer present evidence and argument to a judge who has authority to impose a binding decision that is subject to review by an appellate court.

Each kind of dispute resolution procedure has advantages and disadvantages, including varying degrees of privacy, speed and finality. The optimal dispute resolution procedure will depend on the nature and circumstances of the software licensing transaction and the preferences of the software vendor and the customer.

The location (also known as “venue”) of dispute resolution proceedings does not have to be in the governing law jurisdiction. The dispute resolution venue can impose significant costs and logistical burdens on either or both of the software vendor and the customer. Dispute resolution proceedings in a local venue can be much more convenient than proceedings in a foreign venue. If the software vendor and the customer are located in different jurisdictions, then they might negotiate a compromise on this issue by selecting a neutral dispute resolution venue or agreeing that the party commencing dispute resolution proceedings will do so in the other party’s local venue.

Recommendations

When negotiating a software license agreement, the customer should: (a) understand the effect of the governing law on the interpretation and enforcement of the agreement; (b) ensure that the dispute resolution procedure is reasonable and appropriate in the circumstances; and (c) ensure that the dispute resolution venue is reasonable and fair based on the relative convenience/inconvenience of the venue to both the software vendor and the customer. ■

Boilerplate Provisions

Software license agreements usually contain numerous provisions – known as “boilerplate” provisions – that deal with various miscellaneous issues, including publicity, notices, waivers/consents, amendments, assignment and interpretation. Boilerplate provisions can have a significant effect on the interpretation of the software license agreement and the customer’s rights and obligations under the agreement.

Publicity

Software license agreements often include a provision that allows the software vendor to publicize the customer’s use of the licensed software and to use the customer’s branding for those purposes. If that kind of publicity is not acceptable to the customer, or if the customer requires control over the use of the customer’s branding, then the customer should negotiate a revision to the publicity provision to require the customer’s prior written approval of the software vendor’s use of the customer’s name and branding.

Notices

Software license agreements usually include a provision that requires all notices under the agreement be given in writing and be delivered by specified methods to designated addresses. The customer should ensure that the specified delivery methods are appropriate for the kinds of important notices (e.g. notices of license renewal and notices of breach or termination of the agreement) that might be given by the customer and the software vendor under the agreement. The customer should strictly comply with the notice requirements when the customer gives a notice to the software vendor.

Waivers/Consents

Software license agreements usually include a provision that purports to render ineffective any consent by the software vendor to the customer’s non-compliance with the agreement, or any waiver by the software vendor of rights under the agreement, unless the consent or waiver is confirmed in writing and signed by the software vendor. That kind of provision might not be effective in all circumstances. Nevertheless, the customer should ensure that all required consents and waivers by the software vendor are confirmed in a written and signed document.

Amendments

Software license agreements usually include a provision that purports to render ineffective any amendment to the agreement unless the amendment is in writing and signed by both the software vendor and the customer. That kind of provision might not be effective in all circumstances. Nevertheless, the customer should ensure that all amendments to the agreement, including important promises by the software vendor made after the agreement is signed, are confirmed in a written and signed document.

Assignment

Software license agreements usually include a provision that prohibits the customer from assigning the agreement (including as a result of a merger or acquisition) without the software vendor’s prior consent. That kind of restriction might present significant difficulties for the customer if the licensed software is costly, difficult to replace promptly or essential to the customer’s daily business operations. In those circumstances, the customer might negotiate a revision to the provision to permit the customer to assign the agreement without the software vendor’s consent in limited circumstances (e.g. in connection with a corporate merger or acquisition or a sale of substantially all of the customer’s business and assets).

Rules of Interpretation

Software license agreements usually include a provision that specifies rules for the interpretation of the agreement. For example, headings are for reference only and do not affect the scope or meaning of the agreement, and “including” means including without limitation. Those rules of interpretation are important, because they can affect the meaning of the software license agreement.

Recommendations

When negotiating a software license agreement, the customer should be mindful of the boilerplate provisions that affect the interpretation of the agreement and the customer's rights and obligations under the agreement. The customer should consider whether the boilerplate provisions require revision to be appropriate in the circumstances. ■

Contract Interpretation Principles

When negotiating a software license agreement, the customer should understand the basic legal principles that will govern the interpretation of the agreement in the event of a dispute. In most circumstances, the customer's rights and obligations will be defined and limited by the express words of the agreement (including external documents incorporated by reference into the agreement), which will be given their ordinary and natural meaning.

Interpretation Rules

A court will interpret a software license agreement by following generally applicable contract interpretation rules. The fundamental rule is that a written contract will be interpreted to ascertain, objectively, the contracting parties' intention at the time the contract was made, based on the words used in the contract construed in light of the surrounding circumstances at the time of contracting. In most cases, the words in a written contract will be given their ordinary and natural meaning, and the court will not consider other evidence (e.g. the parties' post-contracting conduct) to interpret the contract. In particular, a court will not consider evidence of the parties' subjective intention or understanding regarding the meaning or effect of the contract.

Disclaimers / Entire Agreement Clauses

Software license agreements usually contain provisions, known as "disclaimers" and "entire agreement" clauses, that limit the customer's rights and obligations to those expressly set forth in the written agreement. A disclaimer prevents the customer from relying on rights (e.g. minimum standards of suitability or quality of the licensed software) that might otherwise be implied by law. An entire agreement clause prevents the customer from relying on promises by the software vendor (e.g. statements in the software vendor's advertising and marketing materials and assurances by the software vendor's sales representatives) that are not expressly confirmed in the written agreement.

External Contract Documents

A software license agreement is often presented as a relatively short and simple agreement that incorporates by reference other documents (e.g. standard form terms and conditions) that are available to the customer (e.g. on the software vendor's website) when the agreement is signed by the customer but are not physically attached to the agreement. In most cases, those external contract documents, which often deal with important business, technical and legal issues, will be part of the software license agreement even if the customer does not access or read the documents.

Signatures

In most circumstances, a signature on a contract document is a binding confirmation that the signer accepts and agrees to the contract. A person who signs a contract (including by using an electronic signature or clicking on an "I Accept" button on a computer screen) will usually not be permitted to later reject the contract on the basis that the person did not read or understand the contract (including external documents incorporated by reference into the contract) or intend to be bound by the contract. Accordingly, in most cases the customer will be bound by a software license agreement signed or otherwise accepted by the customer regardless of the customer's actual, subjective understanding or intention.

Recommendations

When negotiating a software license agreement, the customer should carefully review the entire software license agreement (including external documents incorporated by reference) to ensure that the agreement as a whole, when given its ordinary and natural meaning, accurately and completely describes the intended agreement regarding the licensed software and all related matters. ■

Some Key Questions

Following are some key questions that a customer should consider when negotiating a software license agreement.

Software License and Restrictions:

- Does the software license properly identify the licensed software?
- Does the software license allow the customer to use the licensed software as required for the customer's current and reasonably anticipated future needs?
- Does the software license apply to all relevant versions of the licensed software?
- Does the software license agreement specify the persons who may use or benefit from the licensed software, the purposes for which the software may be used, the manner in which the software may be used, and the locations where the software may be installed or used?
- If the software license agreement requires the customer to periodically report the customer's use of the licensed software, then are those reporting obligations reasonable and practicable?
- If the software license agreement gives the software vendor audit rights, then are those audit rights reasonable and practicable?

Software Warranty and Remedies:

- Does the software license agreement contain appropriate promises by the software vendor regarding the quality of the licensed software, and specify sufficient and reasonable remedies if the licensed software is deficient?
- Does the software license agreement contain all of the commitments made by the software vendor during sales presentations and negotiations?

Acceptance Testing:

- If the customer requires an opportunity to conduct acceptance testing of the licensed software, then: (a) does the software license agreement permit the customer to conduct reasonable acceptance testing of the software; (b) does the software license agreement specify appropriate acceptance criteria; and (c) does the software license agreement provide the customer with reasonable remedies if the software fails acceptance testing?

Software Maintenance and Technical Support Services:

- Does the software license agreement contain appropriate commitments by the software vendor regarding software maintenance and technical support services?
- Does the software license agreement contain reasonable assurances regarding the quality of the software maintenance and technical support services?
- Does the software license agreement confirm the availability of software maintenance and technical support services throughout the entire time that the customer expects to use the licensed software?

Fees:

- Does the software license agreement specify the fees payable for the software license and related services?
- Does the software license agreement provide reasonable protection against future fee increases for additional usage rights and related services?
- Does the software license agreement specify the taxes payable by the customer?

Source Code Escrow:

- If the customer requires a source code escrow arrangement, then does the software license agreement establish an appropriate source code escrow arrangement with proper release conditions?

Indemnities:

- Does the software license agreement contain reasonable and appropriate general indemnities against relevant third party claims?
- Does the software license agreement contain a reasonable and appropriate IP infringement indemnity and sufficient additional remedies for IP infringement claims?
- Has the customer considered appropriate and practicable ways to manage and mitigate the risks inherent in the software licensing transaction?

Confidentiality:

- Does the software license agreement contain confidentiality provisions that are sufficient, reasonable and practicable for the particular circumstances of the transaction?

Restricted Remedies:

- If the software license agreement imposes restrictions on the customer's remedies for deficient software or services, then are those restrictions reasonable in the circumstances?

Liability Limitations/Exclusions:

- If the software license agreement imposes limits on the liability of the software vendor or the customer, then are the limits reasonable in the circumstances and are the limits subject to appropriate exceptions?
- If the software license agreement excludes liability on the part of the software vendor or the customer for certain kinds of damage and loss, then are the exclusions reasonable in the circumstances and are the exclusions subject to appropriate exceptions?

Term and Termination:

- What is the duration (term) of the software license?
- If the software license is fixed-term, in what circumstances can the license be extended or renewed?
- In what circumstances can the software license or the entire software license agreement be terminated by each of the software vendor and the customer?

Consequences of Expiration / Termination:

- What are the consequences of the expiration or termination of the software license or the entire software license agreement?
- What rights and obligations survive the expiration or termination of the software license agreement?

Governing Law and Disputes:

- What is the governing law of the software license agreement, and how does the governing law affect the interpretation and enforcement of the agreement and the rights and obligations of each of the software vendor and the customer?
- Does the software license agreement specify the procedure for the resolution of disputes relating to the software license agreement, and is the procedure appropriate?
- Does the software license agreement specify the venue for the resolution of disputes relating to the software license agreement, and is the venue reasonable and fair to both the customer and the software vendor?

Miscellaneous:

- Are the software vendor's publicity rights acceptable?
- Is the notices procedure appropriate?
- Can the customer assign the software license agreement without the software vendor's consent in appropriate circumstances? ■

Glossary

Acceptance criteria: The requirements for the functionality, performance, operation and results of computer software.

Acceptance testing: A procedure for the customer to review and test computer software to determine whether the software conforms to the applicable acceptance criteria.

Disclaimer: A contract provision that excludes certain promises or obligations, including promises or obligations that might otherwise be implied by law.

Entire agreement clause: A contract provision that confirms that the written contract supersedes and replaces all prior discussions, promises, understandings and agreements regarding the subject matter of the contract.

Exclusive license: A license that implicitly prohibits the licensor from exercising the licensed rights or permitting any other person (except the licensee) to exercise the licensed rights.

Fixed-term license: A license that has a limited, specific duration, unless the license is terminated earlier in accordance with the license agreement.

Indemnity: A contractual obligation that requires a person (known as the “indemnitor”) to protect another person (known as the “indemnitee”) against certain damages and losses suffered by the indemnitee or certain liabilities incurred by the indemnitee.

IP Infringement Indemnity: An indemnity that protects the indemnitee against claims that the indemnitee has infringed third party intellectual property rights.

Liability exclusion: A qualitative restriction on the kinds of damages for which a person is liable.

Liability limitation: A quantitative limit or cap on the amount of a person’s liability.

License: A legal permission given by a person (known as the “licensor”) to another person (known as the “licensee”) to do something that would otherwise be an infringement of the licensor’s legal rights.

License key: A code required to install or activate computer software, which is used by the software vendor to prevent unauthorized installation or use of the software.

Non-exclusive license: A license that permits other persons (e.g. the licensor and other licensees) to exercise the same rights as the licensee.

Object code: A version of computer software that is in machine code that can be installed and run on a computer but cannot be easily read or modified by a knowledgeable computer programmer.

Perpetual license: A license that has a perpetual duration, unless the license is terminated in accordance with the license agreement.

Representation: A promise as to a present fact.

Software maintenance: A service that provides updates (e.g. patches, bug fixes and minor improvements) and upgrades (e.g. significant improvements or new versions) to computer software.

Sole license: A license that implicitly permits the licensor to exercise the licensed rights but implicitly prohibits the licensor from permitting any other person (except the licensee) to exercise the licensed rights.

Source code: A version of computer software that is in a programming language that can be read and modified by a knowledgeable computer programmer.

Source code escrow: An arrangement that involves the deposit of source code for licensed software with a trusted third party (known as an “escrow agent”) and provides a person (known as a “beneficiary”) with access to the source code for a software program if one or more specified events (each known as a “release event”) occurs.

Technical support: A service that provides technical advice regarding the use of computer software and technical assistance to resolve problems with computer software.

Warranty: A promise as to a future fact.

Calgary

Centennial Place, East Tower
1900, 520 – 3rd Ave S W, Calgary, AB, Canada T2P 0R3
T 403.232.9500 | F 403.266.1395

Montréal

1000 De La Gauchetière St W, Suite 900, Montréal, QC H3B 5H4
T 514.879.1212 | F 514.954.1905

Ottawa

World Exchange Plaza, 100 Queen St, Suite 1300
Ottawa, ON, Canada K1P 1J9
T 613.237.5160 | F 613.230.8842 (Legal)
F 613.787.3558 (IP) | ipinfo@blg.com (IP)

Toronto

Scotia Plaza, 40 King St W, Toronto, ON, Canada M5H 3Y4
T 416.367.6000 | F 416.367.6749

Vancouver

1200 Waterfront Centre, 200 Burrard St, P.O. Box 48600
Vancouver, BC, Canada V7X 1T2
T 604.687.5744 | F 604.687.1415

blg.com

Calgary | Montréal | Ottawa | Toronto | Vancouver

Lawyers | Patent & Trade-mark Agents | Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.

blg.com

B05344-11-14

BLG
Borden Ladner Gervais