

IT Procurement Summit

Key Strategies for Resolving Software Disputes

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Agenda

- **Contractual Audit Provisions**
- **Legal Issues Related to Software Disputes**
- **Software Dispute Pitfalls**
- **Litigation Considerations**
- **Proactive License Compliance Reviews**
- **Audit Framework and Pre-Audit Agreements**
- **Investigating License Compliance**
- **Determining the Amount in Controversy**
- **Settlement Agreements**
- **Overcoming Obstacles/Focusing on Business Resolution**
- **Reduce Costs and Mitigating Risks**

Contractual Audit Provisions

- **Publisher's rights under the license agreement are usually onerous**
- **Typically provisions contain:**
 - **Right to enter and inspect business to confirm compliance**
 - **Use of a third-party auditor**
 - **Penalties, including back maintenance and interest for 2 or 3 years**
- **Publishers will occasionally negotiate audit provisions**
- **Easier to negotiate before license purchase completed rather than after dispute arises**

Legal Issues Related Software Disputes

- **Bases for liability**
 - **Breach of contract liability**
 - **Copyright infringement liability**
 - **Successor liability resulting from mergers or acquisitions**
 - **Individual liability for officers and directors**
 - **Circumvention of access control technology**
- **Escalation of audit to publisher's legal department**
- **Decision to conduct audit or initiate litigation**

Software Dispute Pitfalls

- Failure to negotiate audit procedures
- Reliance on IT staff to deploy discovery tools
- Failure to understand and gather proper proof of purchase documentation
- Failure to produce audit results as of the effective date
- Scrambling to buy software products after being notified of the dispute

Litigation Considerations

- **Costs associated with the dispute**
 - Software acquisition costs
 - Switching costs
- **Does publisher have the right to terminate license?**
- **Is there a future business relationship?**
- **What is the likelihood of success on the merits**
- **Parole evidence**
- **Construction against drafter**

Proactive License Compliance Reviews

- Conducted before an audit initiated
- Includes thorough review of all deployments and entitlements across the environment
- Review and understand license agreements
- Opportunity to remediate compliance gaps without penalty
- Can be difficult to prioritize products in environments with hundreds of software publishers

Audit Framework and Pre-Audit Agreements

- Establish framework for audit
 - Scope
 - Auditors
 - Whether on-site meeting will be allowed
- Confidentiality and 408 agreements
- Timeframe
- Consequences of non-compliance – buy or uninstall

Investigating License Compliance - Deployments

- Automated process designed to identify all software products installed on corporate computers
- Discovery tool selection is critical to success
- Discovery of all assets is challenging
- Reporting is unreliable
- Validation is difficult
- Make sure all data is protected by attorney work-product privilege
- Attorneys experienced with software licensing should analyze the data

Investigating License Compliance - Entitlements

- **Process of gathering and documenting proof of ownership of software licenses**
- **License agreements, manuals, media, purchase orders, and checks are not sufficient proof**
- **Dated proofs of purchase are required**
- **Valid proof must show product name and version**
- **The entity listed in the invoice or other proof of purchase must match the entity being audited**
- **Clients should leverage vendors to help compile entitlement data**

Determining Amount in Controversy

- **Process of analyzing gross installation information against gross invoices for each specific product**
- **License types, use characterizations, and downgrade rights must be considered**
- **Must include products not included in software discovery reports such as client access licenses, and remote user licenses including terminal server, VPN and Citrix users**
- **Calculate the potential fine exposure for the client prior to producing the audit results**

Settlement Agreements

- **Determine whether signer is required to certify accuracy of audit materials**
- **Understand that the release is predicated on the accuracy of certifications and in many instances future performance**
- **Never allow an agency to conduct future inspections**
- **Non-monetary provisions have “costs” as well**
- **Confidentiality is sometimes negotiable**

Overcoming Obstacles/Focus on Business Resolution

- Get the right parties to the discussion
- Address misunderstandings and frustrations but realize that the resolution must focus on business, not emotional responses
- Identify opportunities to clarify future relationship and ambiguities in contracts
- Determine how software will be used in the future

Reducing Costs and Minimizing Risks

- **Defending software audits can cost hundreds of thousands of dollars**
- **Companies that proactively monitor license compliance spend less**
- **Appoint dedicated resources to conduct periodic license compliance reviews**
- **Establish an audit response protocol**



Questions