

Software Audits: Surviving Settlement

By Keli Johnson Swan

Software auditing entities, such as the Business Software Alliance (“BSA”) and Software & Information Industry Association (“SIIA”), initiate software audits of businesses that more often than not result in a settlement agreed to and negotiated by both parties. It is infrequent that a software publisher or auditor initiates against a company copyright infringement damages arising out of software compliance issues.

There are three key areas of concern regarding settlements. First, the most time-consuming negotiations relate to the total settlement payment, and what, if any, payment terms are available. Unless a company can demonstrate financial distress, the BSA and SIIA do not typically grant payment terms of more than 6 months. It is important to request payment terms before an agreement is reached on the total payment, because this request sometimes changes the total settlement amount, or may require a personal guaranty provision to ensure the company is able to complete the payment schedule.

Once the parties agree on the payment terms, the second most important negotiation relates to the release. A company should ensure that the release of liability covers all software and software publishers at issue, and is not contingent on a perpetual obligation on the part of the company. The release section often requires a certification that the audit results submitted were true and complete, and also requires several post-settlement obligations. In addition to the release of liability provision, most companies prefer to request a confidentiality clause to prevent the auditors from disclosing the existence or terms of settlement. This is particularly important for companies that are conscious of the impact of negative press on business.

Finally, the settlement agreement includes post-settlement obligations that may extend for up to two years past the settlement date. The first post-settlement materials are typically due within 30-60 days following the date the settlement is signed. The auditors require a company to uninstall or replace any unlicensed software discovered during the audit, to provide receipts for replacement products, and sign a certification that the company’s network is in compliance. In addition to this obligation, we typically negotiate annual officer’s certificates for up to two years in lieu of allowing the auditor to conduct inspections or audits at the client’s office during the same period. Our clients are then required to review its network annually for two years and sign a certification confirming its compliance at that time. It is important to complete the post-settlement obligations in order to secure and maintain the release of liability.

Businesses should consider consulting an attorney experienced in software audits to navigate the challenges of reaching a settlement and managing future obligations and software compliance.



About the author Keli Johnson Swan:

As an associate attorney at Scott & Scott, LLP, Keli is primarily focused on software licensing and copyright infringement matters. She advises clients in a variety of industries to ensure compliance with software licenses and develop strategies for maximizing the value of software licenses.

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