

Software Disputes

Lessons Learned in over 500 Software License Disputes

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Robert Scott is the managing partner of a boutique law firm in Southlake, Texas that has been voted Best Technology Law Firm – USA by *Finance Monthly* for the last three years. The firm has handled over 500 software audit matters in the last 12 years. Robert has identified a number of issues that recur in many of the cases he has handled.

Regardless of whether the publisher is Microsoft, Adobe, Autodesk, Oracle, IBM or any of their trade groups including the BSA | The Software Alliance, Scott & Scott LLP sees common issues - here are the most critical ones:

Audit Effective Date – This is the date on the auditor's initial letter requesting the audit. Many respondents do not understand that most audits only relate to the computer software products installed on the Effective Date and that the invoices for purchases must be dated prior to the Effective Date. Understanding the importance of the audit effective date in a software audit matter is the first step to a successful outcome.

Scope – Narrowing the scope of a requested audit is one of my first priorities in a software audit case. I like to think of scope in a number of different ways all with an eye toward narrowing the number of devices to be investigated as much as possible at the outset of the case. Scope limitations could be to certain business units or affiliates, certain geographic locations, certain products, certain purchasing agreements. Winning the scope battle is an early success factor in an audit case.

Discovering the Installations - Many clients delay taking action in response to an audit letter for various reasons. This delay often makes evidence gathering more difficult. I advise my clients to conduct a network inventory using a quality discovery tool immediately after receiving the initial audit. By doing so, the audit target is preserving evidence and avoiding inaccuracies due to changes over time. The discovery services performed by our IT staff are protected by the attorney-work product and attorney-client privileges.

Identifying Proof of Licenses – Some audit targets are simply not that great at recordkeeping. When it

comes to proving ownership of software installed during an audit, many audit targets struggle. The targets that are most successful are able to leverage vendor records showing historical software purchases. Even though these vendor records are not invoices, they are typically acceptable proof in audit cases. Unfortunately, purchase orders, end-user license agreements, certificates of authenticity and many other undated indicia of ownership are not considered valid proof of a license in a non-litigation audit matter. Manuals, cd's, products keys are all also not considered good proof. The best proof in an audit is a dated document from an authorized reseller or a licensing statement provided directly from the publisher.

Interim Confidentiality / 408 Agreements - Almost 10 years ago, I realized the importance of protecting my clients' audit materials. After a decade of negotiating with opposing counsel, confidentiality and protection agreements are almost commonplace in audit cases now. The reason this practice has become universally accepted is because in litigation, the defendant would not be required to prepare evidence that is not already in existence.

Calculating Financial Exposure – One of the first things I do when I get involved in an audit case is to try to calculate the financial exposure my client is facing. Frequently, a client will come to me after receiving a settlement demand from the auditor, looking to replace their current lawyer. These lawyers regularly get fired because they failed to calculate the exposure for the client and allowed the client to be surprised by the financial demand. Our audit defense process is designed to ensure that our clients are not surprised.

What Constitutes a Good Settlement - Many clients come to me saying that they want to settle their case out of court and get a "good deal." What constitutes a good deal can depend on a number of factors including monetary and non-monetary aspects of settlement. Each publisher has a different method of preparing a settlement demand, and the ultimate settlement amounts vary greatly among the publishers. Most cases settle for less than the original demand, but it is not always easy to predict the outcomes. Some of the factors that influence a final settlement amount are: 1) the amount of time a matter has been pending; 2) the percentage of non-compliance in the organization overall; 3) the willfulness of any violations; and 4) the financial circumstances of the audit target. It is also important to come away from the settlement with a stronger license agreement from the publisher. Many audit cases involve both a settlement and release of liability related to the audit and a new license agreement covering the period following the audit. It is important to make sure that whatever settlement is reached, that the client gets the most value for the money paid in terms of additional software it can put on its balance sheet or services that will reduce operating expenses.

Confidentiality - If the audit target does not want the auditor to issue a press release at the conclusion of the case, we generally negotiate confidentiality provisions that prohibit such disclosures. In many cases, the auditors expect a premium for settling with confidentiality.

