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# Navigating Termination Provisions in Software Agreements

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There are many obvious problematic provisions in a software license agreement. These provisions discuss audit rights, scope of the licensae grant, potential third-party use, limitations of liability, indemnity, and limitations on the transfer of licenses. When negotiating a licensing transaction, licensees frequently negotiate these provisions.

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One of the provisions in the license agreement that is often overlooked during the negotiations but that frequently plays a significant role in license disputes is the termination provision. The termination provision can appear in many different places in a license agreement. Sometimes, there are multiple termination provisions in the agreement. Consider these five questions for successfully navigating potential pitfalls:

1. *Where should counsel look for termination provisions?* Publishers often include a separate provision for termination of the licenses, however, that is not the only place licensees should look to identify troubling language. Even if there is a separate termination provision, publishers also include termination provisions inside the audit provision to give it additional leverage during audit negotiations.

Licensees are typically shocked to learn that the licenses for which they have paid millions of dollars in the past are subject to termination if there is a good-faith dispute about the parties' respective rights. For example, if a publisher requests a contractually authorized audit, and the licensee refuses to participate in the audit, the licensor can purport to terminate the license agreement.

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2. *Why are termination provisions so dangerous during an audit?* Licensees have disputes about conducting audits for many different reasons. In some cases, the publisher is asking the licensee to install third-party software to conduct an inventory of the software installed on the network or wants to visit the facility to conduct an in-person review of the license position. If these activities are not expressly required by the license agreement, and if the licensee objects, the publisher often purports to terminate the license agreement for failure to cooperate with an audit.

Even if the licensee agrees to allow the audit to proceed, the auditors usually conclude the audit with objectionable findings. Many license agreements include provisions requiring the licensee to pay an audit demand within 30 days or the license is subject to termination. This may not seem like a problem when the licensee is acquiring the software, but when the licensee has been disputing the audit findings for two months, and then loses its leverage because the licensor purports to terminate the licenses, it becomes a serious problem.

3. *How do the parties determine the scope of the termination provisions?* This problem is amplified by the

fact that the parties have differing interpretations of the scope of the termination and until litigation is commenced, there is no neutral party who can make a decision regarding the parties' rights.

Licensees often have multiple open license and services or support agreements with the same publisher at any given time. When a publisher purports to terminate a licensee's right to use any licenses, updates, or support, the licensee loses any leverage that it may have had.

Licensees typically believe that if the publisher is trying to terminate licenses because of an audit or other dispute, the termination should only apply to that particular license agreement. Publishers argue that provisions that allow them to terminate "technical support, licenses, and/or this agreement" would extend to any licenses the publisher granted to the licensee.

It is not unusual for the termination provision or provisions in a license agreement to be ambiguous. It is also not unusual for a license agreement to contain a provision that any ambiguities in the agreement will not be construed against the drafter. The publishers claim that if they have the right to terminate the licenses under one license agreement, they can terminate all of the licenses they have ever granted to the licensee.

4. *What happens when publishers purport to terminate the licenses?* Unfortunately, when the publisher purports to terminate the license, the licensee typically has limited options: 1) obey the termination and cease all use or distribution of the products in question; 2) try to resolve the matter quickly, which often requires payment of the demanded fee from the publisher; 3) ignore the termination and risk incurring liability for copyright infringement; or 4) request injunctive relief until the matter can be resolved by the parties or a court.

With many enterprise software packages or products that the licensee is reselling, it is not possible to discontinue using the product in less than 18 months. If the parties are at an impasse, it may not be practical to try to resolve the matter. It is generally not advisable to ignore a purported termination, which leaves litigation as the most likely outcome. Companies that do not want to proceed with litigation after receiving a termination notice usually pay the publisher's most recent demand, which the licensee often perceives as unfair.

5. *How does a licensee mitigate risks associated with termination provisions?* To avoid giving the publisher leverage in potential future disputes, it is critical for counsel to revise the proposed termination provisions in software license agreements during the software license transaction. If there are multiple effective license agreements involving the publisher and the licensee, consider a master agreement that governs the entire relationship between the parties.

Additionally, counsel should carefully review the audit and termination provisions and clarify the parties' rights during an audit, the scope of the termination that can result during an audit dispute, and outline a better dispute procedure to protect the licensee in the event that the licensee receives unfavorable audit findings. TNL

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