

Risk Mitigation Strategies for Managed Services Provider Agreements

By Brian Von Hatten

Typical service provider agreements are usually drafted by the service provider, and at least early during the negotiation phase, will likely try to shift much of the legal risk to the customer. In these types of business transactions, the customer is often seeking a “turn-key” solution for management of its technology needs. Depending on the level of outsourcing contemplated, the service provider may be installing software applications for the end user, and installation of software on computers that is not licensed could expose the end user to significant legal and financial liability.

One strategy for mitigating this risk is in the representations and warranties section of the agreement. The end user should ensure that the service provider specifies precisely what they will do and what they will not do in performance of the services, and such warranties by the service provider should include not installing any unlicensed software in the end user’s environment. Other strategies include indemnification and insurance provisions in the agreement covering the installation of unlicensed software by the service provider. This can be through a professional liability policy covering the service provider as well as provisions by the service provider indemnifying the end user for any infringement actions arising out of the service provider’s performance under the agreement.

The service provider is in the best position to be able to control what their employees and contractors do, and because copyright infringement is a strict liability offense, the fact that the end user did not know the service provider was installing unlicensed software would provide little relief in the event of an audit. The key to managing this risk is to overcome it during the negotiations phase.



About the author Brian Von Hatten:

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