

SEVEN SOFTWARE AUDIT SECRETS

By Robert J. Scott

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The following are secrets that I have learned in over 300 software audit cases across the United States, Canada and South America. I am a lawyer who represents businesses in software audit cases initiated by software publishers and their trade groups including Business Software Alliance and the SIIA. I work with a team of lawyers and technology professionals defending software license disputes involving Microsoft, IBM, Autodesk, Oracle and Adobe. My clients range from global multinational corporations navigating enterprise agreements to small architectural firms targeted by Autodesk. Here are the secrets that I have learned in over 300 software audit cases across the United States, Canada and South America.

Software Audit Secret # 1: Limiting the Scope

When I get hired to defend a software audit case my first priority is limiting the scope of the audit as much as possible. I start by understanding the client's corporate structure and developing an understanding of how software assets are held. I pay careful attention to the entity named in the initial communications from the auditor and the entities that are party to any relevant software license agreements. When I represent global companies with multiple divisions, I try to limit the scope by time, business unit, product set, and geography. The time to negotiate the scope of the audit is early on before information starts changing hands.

Software Audit Secret #2: Valuing the Dispute

Senior executives running our client's businesses are focused on business impact. The question they want us to answer is: How much is this going to cost? In my experience, that is not usually a simple question to answer. In order to value a software dispute you must be able to conduct an investigation that includes a reliable inventory of all of the relevant computer software installed on company owned computers. My clients often struggle to obtain reliable inventory information for all software installed on company owned computers. We use automated software designed to quickly identify all software installed and have developed tools to analyze comprehensive data sets from a variety of sources. Once an accurate inventory is obtained, it must be reviewed in light of software entitlements related to the installed products. After reconciling what is installed against what has been purchased, we are then able to take our knowledge of the licensing agreements to estimate an amount in controversy and a probable settlement range. The reconciliation created for valuing the dispute also serves as the basis of our recommendations for remediating any compliance issues we find.

Software Audit Secret #3: Understanding the Publisher's Perspective

If you were in the software business how would you enforce your company's intellectual property against infringement? I spend a lot of my time counseling clients on the publisher's perspective in software licensing disputes. The secret here is to understand that knowledge and intent rarely are considered as mitigating factors because liability for copyright

infringement related to software attaches without regard to fault or knowledge. The publisher wants to be compensated on a per installation basis for its software regardless of how that software came to be installed or used by your company. Publishers frequently seek a penalty in excess of the retail price for the unlicensed software uncovered in the audit. If they settled for just letting you buy the software you need, there would be no incentive to maintain compliance and no deterrent effect created through enforcement programs. Right or wrong, this is the publisher's perspective.

Software Audit Secret #4: Improving Communication & Decision Making

High-stakes software audit disputes do not typically arise overnight. In my experience, they develop over a number of months and years. By the time I get hired, the relationship is already eroded and emotions are often running high. Communication problems usually relate to the inadequate flow of information about software deployments and entitlements. The publisher demands information and the end-user is afraid that whatever is shared will be used against them to extort fees. Decision making is paralyzed because senior executives don't have the information they need and the potential options so they delay. Efforts to delay are perceived as evasive thus hardening the publisher's suspicion that the end-user is attempting to cover-up software piracy within the company. The secret here is entering into an interim agreement regarding information sharing and establishing a resolution framework. We call these Rule 408 agreements because they specify that the information shared will be treated as confidential and will not be used against our client in court. We frequently will include the publisher's agreement not to sue while the audit is being conducted and the agreement to continue service and support on an interim basis. With an appropriate agreement in place, information can start flowing and business leaders can begin negotiating from an agreed set of facts.

Software Audit Secret #5: Restoring Trust

Software disputes destroy trust between the publisher and the end-user. In order to achieve a business resolution trust needs to be restored. When both sides adhere to the 408 Agreement, trust is slowly restored. I am frequently hired when cases are on the brink of litigation and within a few short months the threat of litigation is removed and the parties are moving comfortably toward an out-of-court resolution. The secret here is convincing the publisher that information will be gathered and shared and convincing the end-user that the publisher is going to be reasonable in reviewing the facts and resolving the dispute amicably.

Software Audit Secret #6: Drafting Custom Contracts

When corporate clients purchase software they want flexibility, low cost of ownership, and long-term value for their business. Publisher's licensing models are frequently in conflict with these goals. The time to get licensing model concessions is when you are resolving the dispute. The best starting place for a client is what I call the everything, all you can eat, everywhere license agreement. The secret is to avoid future disputes by getting the contracts properly drafted for the protection of both parties. The more buying power the client has, the greater the number of licensing concessions can be demanded. It's amazing how flexible senior executives in software companies can become when millions of dollars in revenue are at stake.

Software Audit Secret # 7: Implementing Tools and Processes to Manage Compliance

In order for the long term relationship between a software publisher and an end-user to be solid, both sides must agree to how usage and compliance will be monitored and measured going forward. Agreed processes and scheduled True-Ups are critical to avoiding adversarial audits in the future. To avoid future conflicts, the end-user must implement processes and procedures to closely monitor usage and easily count entitlements. The secret here is to ensure that the client can quickly and easily produce information necessary to establish compliance in the future. These disciplines not only avoid liability for copyright infringement but provide the foundation for the effective management of IT assets and costs.



About the author Rob Scott:

As the managing partner of Scott & Scott, LLP, Robert has built a global practice representing clients on issues where technology, media and the law intersect. A boutique firm with international reach, Robert ensures that Scott & Scott is committed to legal excellence, unparalleled customer service, and cost-effective strategies that deliver positive results. Representative clients range from multinational corporations to local mid-market businesses spanning all industries.

Get in touch: rjscott@scottandscottllp.com | 800.596.6176