

Software Licenses: When Termination is Too Severe

By Brian Kirkpatrick

As software license customers, we're all familiar with license fees, maintenance fees, support fees, and access fees. If a licensee doesn't pay, then a publisher may have an option to prevent a licensee from using the software. On the surface, it only seems reasonable that a licensee has to pay to play. And when a customer doesn't pay, a publisher may seek to invoke its' "termination" rights – effectively shutting down the use of the software.

Before a business agrees to such termination rights, a business should consider:

1. How critical is the software;
2. What contingencies are in place in the event the software is not available;
3. How long can the business function without the software; and
4. How long will it take to implement replacement software?

Often, businesses build policies and processes around the use of a single software product. Some software may ultimately be the primary way a business develops or delivers its own products and services.

Consequently, businesses should consider alternatives to the standard publisher termination rights. A lost payment, misallocated payment, or withholding a payment due to a legitimate payment dispute may seem like a trivial event until it forms the basis of terminating software critical to the business. If a software package is so critical that shutting it down could cripple a business, then great care should be taken to minimize a software publisher's broad and powerful control over a business by the way of termination rights.

There are a few ways that such a problem can be addressed in a software license to protect both the business and the publisher. It is usually helpful to employ the assistance of someone experienced with drafting software licenses to ensure that the publishers do not overstep their termination authority.



About the author Brian Kirkpatrick:

Brian practices exclusively in intellectual property and technology law. He has drafted and negotiated hundreds of software contracts with a wide breadth of complexity including large-scale master services agreements (MSA's), software as a service (SaaS) agreements, and End-User License Agreements (EULA's). Before entering the legal profession, Brian was a licensed securities representative and Vice President level middle-market commercial banker.

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