

Disguised Software Audit Clauses

By Brian Kirkpatrick

Agreements often contain clauses allowing the parties to review books and records, “Books and Records” clauses. These are often boilerplate clauses included agreements without much consideration from the contracting parties. When a Books and Records clause is used in a software agreement without a software audit clause, it can lead to serious consequences. It is not likely that a major software publisher will use an agreement without a software audit clause, but it is always recommended to review the software audit clause from any publisher. If you do not see one, then look for the Books and Records clause. Such a clause can act as the software audit clause if one does not exist elsewhere in the agreement. Here is a sample of typical language:

“BOOKS AND RECORDS

Upon reasonable notice, Licensor may examine the Licensee’s books, records, and supporting information during Licensee’s normal business hours to ensure compliance with this Agreement.”

Although such a clause may seem completely reasonable at first glance, it is important to consider the issues that are either not addressed or addressed too broadly. Here are a few to consider:

1. Access – Inspections could lead to access to the Licensee’s physical premises. Physical access can also lead to access to computers and even computer files behind firewalls.
2. Scope - The right to examine without any limitation means that the examiner may have free reign to inspect physical documents, including the non-relevant information lying around on employee’s desks. In addition to obvious risks of compromising trade secret or other intellectual property, such a simple clause could give rise to the Licensee’s breach of its confidentiality agreements with third parties.
3. Duration – How long should the Licensor have access to inspect? The clause above has no limitation to the duration of the inspection. The time and resources that a Licensee has to dedicate to such a process can be substantial.
4. Costs – Even if the clause above stated that the inspection would be at the Licensor’s cost, what happens when the Licensor finds a license deficiency? It can be helpful to lock in price protection and limit penalties in the agreement before a deficiency is discovered, or worse, a dispute arises.

A well-developed audit clause can set reasonable parameters and establish a clear understanding of the expectations during a software audit. Consulting with an attorney familiar with drafting and negotiating audit clauses can help ensure that a potential software audit is reasonable and properly limited in scope.



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.

Get in touch: bkirkpatrick@scottandscottllp.com | 800.596.6176