Top Five Important Provisions in Technology Vendor Agreements

By Andrew Martin

Although technology spending has made up a significant chunk of company's yearly budgets for some time, many organizations have been slow to develop the expertise necessary to review and negotiate the associated technology agreements—and I'm talking about both the customers *and* the vendors. Many of these agreements appear to be based on outdated templates that were customized by someone with an incomplete understanding of the unique risks associated with the technology, the industry trends with respect to specific provisions, or the law. Here, then, are five important provisions to address in (most) technology agreements:

- Intellectual Property Ownership: For either party, it is vital to delineate who owns what. In general, Customers always should own their content and the deliverables associated with any development work they pay for as a "work for hire." Vendors always should own the technology and deliverables they bring to the table. But these are generalities. Both parties should take the time to understand the deliverables, the technology, and the deal and make sure the IP ownership provisions accurately reflect the understanding.
- Audit Rights: If the agreement involves software licensing, the publisher often will ask for the right to audit the customer. The customer should read and understand the requirements and should push back when the publisher demands potentially burdensome audit rights. Ideally, the vendor should be satisfied with the right simply to demand periodic self-audits from the customer.
- Cyber Liability Coverage: Cyber coverage is triggered when there is a data breach event and will cover expenses that are not otherwise protected under a typical professional liability policy. Both parties will benefit from the vendor maintaining this generally affordable coverage.
- Infringement Indemnification: An absolutely critical benefit for the customer. The vendor should be able to warrant that it has not infringed on a third party's intellectual property rights. If it does, and if the customer is sued, then the vendor must step in and cover the costs and expenses related to such action. Customers should be hesitant to enter into any agreements without this protection.
- Assignment Rights: Limiting assignment of the agreement in some circumstances, especially when software is involved, is reasonable. However, it is important to be able to assign these agreements in the event of a merger, acquisition, or other similar event *without requiring the consent of the other.*

As with any top-five/top-ten/best-of/worst-of list, there are going to be near misses and honorable mentions that some will argue are just as important (liability limits, termination rights, and change-management processes come to mind). However, the bottom line is that there is no substitute for being familiar with both the technological and legal methods for managing and balancing the unique risks associated with technology agreements that fit both parties' needs.

About the author Andrew Martin:

As an associate attorney with extensive prior experience advising information technology start-ups, Andrew's practice focuses on finding solutions for his clients' intellectual property issues. Due to his extensive experience in the software and technology industries, Andrew understands both the practical and legal issues involved in IP licensing agreements and disputes. In addition to licensing, Andrew helps his clients find new ways to use existing technologies to assist his clients in areas such as data privacy compliance. Andrew uses his diverse background which includes founding a record label and working for a world-wide concert promoter when counseling the firm's entertainment clients.

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