

## Defining Software

By Brian Kirkpatrick

When drafting or negotiating software agreements, it is important to understand the definition of “Software.” How software is defined will affect many of the important clauses in an agreement. It is not likely that the software definition will take on a technical or dictionary-like definition such as, “a set of instructions used to control a computer or how to operate a computer or computer programs.”

There does not appear to be a universal way to define software in a software agreement, which can complicate matters from the beginning of a discussion of an agreement. However, there are typical elements used in software definitions:

a. Object code vs. source code

Many software definitions make a distinction between the object code that is the executable files of a program and the source code that is the modifiable portion of the code. Software licensing code. Software licensing agreements tend to make it clear that only the object code is being licensed. Alternatively, in development agreements, the software definition may make it clear that software includes the entire source code.

b. Documentation

The policies, procedures and written directions for operating the software make up the documentation for the software. Documentation is commonly included as a set of electronic files provided with the software. In those cases, documentation may be included in the definition of software.

c. Product Names

In simple licenses, a product name may be used to define the software. For example, “the software is defined as the product provided by the publisher as Macrohard Panes 2015.”

There is no one correct way to define software in an agreement. How software is defined can depend on the nature of the agreement. More complicated agreements may require more complicated software definitions or even different variations of software definitions that differentiate software by 1) where the software originated, 2) where it resides, 3) which party is providing it, or 4) specific functionalities or program names. Regardless of how software is defined, it is important that both parties clearly understand the definition of software before discussing other terms and conditions of the agreement.

How software is defined can be a theme that impacts the entire agreement. When drafting or negotiating software agreements, it can be helpful to employ the assistance of legal counsel experienced in advising clients in properly defining the software.



**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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