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Negotiating Software License Disputes

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Common Causes of Software License Disputes



- Frequently millions of dollars in controversy
- Switching costs can be extremely high
- License agreements are complex and often ambiguous
- Parties frequently disagree on license scope and terms
- Communication deteriorates as distrust builds
- Business values, and often the parties, change from time original license agreement is executed to the time of dispute
- Publishers level unfounded accusations of license violations or end users are not forthcoming

Negotiating a Resolution – Getting from Impasse to Resolution in Seven Steps



- Assessing the licenses at issue
- Valuing the dispute
- Understanding each party's perspective
- Improving communication and decision making
- Restoring trust between publisher and end users
- Negotiating custom agreements based on mutual business value
- Reconciling the terms of maintenance and support agreements with the custom license agreements

Assessing the Licenses at Issue



- Many enterprises have multiple license agreements for the same publisher
- The terms of the license agreements are often not clear
- The publisher and end user often have conflicting interpretations of the license agreements and each party's obligations
- The license interpretation offered by the Publisher often conflicts with information provided by the publishers' in-house or outside sales teams

Valuing the Dispute



- Assessing each party's arguments and the probability of success on the merits
- Off balance sheet liabilities
- Maintaining an appropriate financial reserve
- Predicting settlement value and litigation costs
- Responding to audit disclosure requests pursuant to FAS-5

End-Users' Perspectives



- Fees for support and maintenance exceed value the software provides to the organization
- Ambiguities increase confusion and risks
- Sales team lied during the sales process
- Audit demands and accusations of copyright infringement are insulting and exaggerated
- They have already paid millions and should not have to fight over licensing
- Compliance management is unduly burdensome
- Ongoing business value is difficult to determine and competitors' offer better value

Publishers' Perspectives



- Salvage the business relationship if possible
- Contractual ambiguities increase revenue
- Sales team promises are irrelevant
- They are contractually entitled to audit
- They deserve to be paid for their products
- End users are dishonest or not forthcoming regarding relevant deployment details
- They should treat all clients fairly
- Revenue recognition, tax, and incentive compensation may become relevant drivers

Improved Communication and Decision-making

- Successful communication and effective decision-making are difficult because the wrong parties are communicating
 - The publisher's legal team is communicating with the end user's IT professionals
 - The end user does not escalate the issue soon enough and continues to compound the issue until the parties are at an impasse
- Often third-party intervention is helpful to bring the right parties into the discussion and to get communications back on track

Restoring Trust Between Publishers and End Users



- Publishers do not trust that end users are forthcoming regarding installation counts
- Using a framework where each party can share information without fear of reprisal or liability
- End users do not trust information they receive from publishers because it is often inconsistent or impossible to understand
- It is imperative to restore trust between the end user and publisher and to concentrate on a resolution that is fair, reasonable, and based upon mutual business value

Negotiating Custom Agreements

- Use the dispute as an opportunity to simplify the contractual relationship between the parties and improve the likelihood that each party is receiving business value from the continuing relationship
- Avoid the temptation to modify complicated agreements with overly simplified addenda
- There is an inverse correlation between flexibility and price and while global, perpetual, unlimited licenses may be available, they are not inexpensive
- In some instances, it is preferable to discontinue using the product than to agree to onerous terms

Incorporating Settlement Terms into New License Agreements



- Make sure the license agreement contains all negotiated terms from the settlement agreement
- Carefully review maintenance and support agreements to determine whether the negotiated licenses can be jeopardized for failure to renew maintenance or support payments
- New agreements should be easy to understand and manage

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