

## FREQUENTLY ASKED QUESTIONS WHEN LICENSING SOFTWARE

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### 1. ***What software warranties should be included?***

The most common software warranties are (i) the software will conform in all material respects to its documentation, (ii) the software will be delivered free of viruses, (iii) the software will operate in accordance with the minimum hardware and software requirements set forth in the software documentation and (iv) the software will not infringe the intellectual property rights of any third-party.

The software warranties should survive for a reasonable period of time (e.g., 90 to 180 days) after you have implemented the software into a production environment. If the software warranties are breached during the warranty period, then the software vendor should correct the breach within a reasonable period of time. If the warranty breach is not corrected within a reasonable period of time, or if multiple breaches (e.g., 3 or more) occur during the warranty period, you should have the option to terminate the license agreement and receive a refund of the money you paid for the software.

The warranty that the software does not infringe any third-party's intellectual property rights should survive for the duration of the license agreement. If the intellectual property infringement warranty is breached, then the software vendor should be required to indemnify and defend you from any infringement claim.

2. ***How do I protect myself if the software does not perform as advertised?*** In addition to the warranties described in point 1 above, you should include acceptance testing provisions in your license agreement. Once the software is initially installed by the software vendor, you should have a reasonable period of time to test the software to make sure it operates in accordance with the software documentation or other agreed upon specifications. If it does not properly perform, then the software vendor should have a reasonable period of time to correct any issues and you should then have the opportunity to re-test. The testing and re-testing procedure should occur up to three times. If, after the third testing, the software still does not properly perform, then you should have the right to terminate the license agreement and get your money back.

3. ***How many copies of the software should I be able to run?*** You should be permitted to run a copy of the software in a production environment as well as have the right to run the software for disaster recovery, backup, testing and development purposes.

4. ***Is a provision limiting the software vendor's liability acceptable?*** Typically, the software vendor's liability will be limited to a set dollar amount. Often, this amount equals the fees you pay the software vendor. However, it is not unusual to see the amount limited to 12-months worth of fees. Although a limitation on the vendor's liability is reasonable, there are certain types of claims that should not be limited. These types of claims include (i) claims by a third-party that the software infringes the third-party's intellectual property rights, (ii) claims arising from any personal injury or property damage caused by the software vendor while on your premises and (iii) claims arising from the software vendor violating the confidentiality provisions of the license agreement.

5. ***What happens if the software vendor goes bankrupt or no longer supports the software?*** You should consider requiring the software vendor to escrow the source code for the software with an independent third-party escrow agent. The escrow agreement should provide that (i) the software vendor will escrow all updates it makes to the software and (ii) you will receive a copy of the source code, including all updates and documentation required to understand the source code, upon certain release events. The release events should include the software vendor filing for bankruptcy, the software vendor breaching its support obligations and not curing the breach within a reasonable period of time and the software vendor deciding to cease providing support services for the software.

6. ***What issues should I be concerned with regarding software support?*** The software support provisions should include the following:

- a. A description of the hours of support.
- b. A requirement that the software vendor provide you with all bug fixes, new releases and updates for the software.
- c. Time periods by which the software vendor will respond to your requests for support and resolution times by which software issues will be fixed. The response and resolution times should be based on the severity of the software issue. For example, a severity 1 issue (e.g., the software is not performing a material function) should be responded to and resolved much faster than a severity 3 issue (e.g., a minor feature is not working).
- d. Remedies if the response and resolution times are not met. For example, if a severity level 1 issue is not responded to or resolved within the agreed to timeframe, then you should receive a service credit for each day the issue remains unresolved. If there are persistent failures to meet the response and resolution times, then you should have the right to terminate support and receive a pro rata refund of your support fees.

e. Limits on how much support fees may be increased (e.g., no more than 5% every 12 months).

f. A requirement that the software vendor continue to support prior versions for a set period of time once it releases a new version.

7. ***Should the software vendor have the right to audit my use of the software?*** It is reasonable for the software vendor to be able to audit your use of the software to ensure that you are using the software in accordance with the terms of the license agreement (e.g., to make sure you are not exceeding the number of authorized users). However, you should include limits on the audit rights such as (i) limiting audits to once per year, (ii) requiring prior notice of audits, (iii) requiring the software vendor to provide you a copy of the audit results and to keep the audit results confidential and (iv) requiring the audits to be conducted during your normal business hours on a date agreed to by the parties.

8. ***Are there special provisions that need to be included in the license agreement if the software vendor is hosting the software or providing the software as a service?*** When the software you are licensing is not going to be located on your servers, but rather hosted by the software vendor or another third-party hosting company, then there are additional terms that you should include in the license agreement. These terms include the following:

a. You should include an uptime guarantee (e.g., the software will be available 99% of the time during each month) and server response time guarantee (e.g., the server response time when accessing the software will be less than \_\_\_ seconds). If the uptime or server response time guarantees are not met, then you should receive a service credit or refund of a pro rata amount of the fees you have paid the software vendor. If there are persistent failures to meet the uptime and server response time guarantees, then you should have the right to terminate the license agreement and receive a pro rata refund of your hosting fees.

b. Since the software vendor will be storing your data, you need to have stronger data security provisions than a standard confidentiality provision. For example: (i) you need the right to audit the data centers where your data will be stored, (ii) the software vendor should have multiple data centers so that the software will continue to be accessible if one of the data centers goes down, (iii) the software vendor should be required to back-up and store your data at an offsite location, and (iv) the data center should be Type II SAS 70 certified. In addition, at the termination of the license agreement, you need the software vendor to return to you a copy of all your data in a format reasonably acceptable to you. Also, the software vendor should be required to permanently delete all copies of your data.

c. Most contracts include a force majeure clause. A force majeure clause basically allows the software vendor to be excused from its non-performance for events outside of its control, e.g., a hurricane destroys a data center. When the software vendor is hosting the software for you, however, the software vendor should not be relieved of its obligations because of a force majeure event. Rather, if a force majeure event prevents you from accessing and using the software, you should receive a service credit or refund of a pro rata amount of the hosting fees for each day you are not able to use the software. In addition, if your use is prevented for a

reasonable period of time (e.g., 30 days), you should have the right to terminate the license agreement.

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