



Obligations under Software License Agreements

Antonia Herfurth, LL.M., Attorney at law in Munich and Hanover

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Every company uses third-party software – be it from Microsoft, SAP or Oracle. The contractual relationship is characterised by an imbalance between the dominant software manufacturer and the dependent software user.

This Compact provides an overview of the content of software license agreements and classifies them according to the law. Based on this, some typical clauses are examined in more detail. The Article concludes with an overview of license management.

Overview of software license agreements

In the case of software license agreements, the manufacturer allows the user to use its software and the user pays a fee.

Manufacturers conclude either standard contracts or individual contracts with the user. In the case of standard contracts, the manufacturer provides the user with existing, standardised software. Standard contracts are usually used by large providers such as Microsoft and SAP. In the case of individual contracts, a specific user mandates the manufacturer to develop new, customised software.

In addition to software license agreements, maintenance contracts are often concluded, sometimes also contracts for user training.

Interests of manufacturer and user

The manufacturer's interest is to protect its intellectual property in the software (e.g. copyright, patent law, trade mark law, know-how) and to exploit its product as economically as possible (see also Alliuris Compact "Legal protection of software", January 2025). For this reason, it is interesting for him to formulate his contractual terms as narrowly as possible and to be able to adapt them unilaterally at any time.

The user's interest is legal certainty and economic calculability. It is important for the user to know which rights and obligations arise from the software license agreement, in particular the scope of the right to use the software, as well as which services and benefits are not covered by the agreement. In addition, open formulations are advantageous for the user, as they allow room for argumentation. The user wants contractual terms and conditions that remain in place, and he also wants his intellectual property to be protected.



Legal nature of software license agreements

As a rule, software license agreements are mixed-type contracts consisting of several elements (software licensing, maintenance, training, etc.). In detail, the following picture emerges:

Standard contracts

In the case of standard contracts, the manufacturer provides the user with a pre-formulated license agreement for a large number of cases. These are general terms and conditions. If the manufacturer provides the user with the software for a limited period of time in return for payment, this constitutes a rental agreement. If the manufacturer provides the software to the user for a permanent period in return for payment, this constitutes a purchase agreement.

Standard license agreements can also be differentiated according to whether the software is provided on premise or in the cloud. Software in the cloud is usually provided for a limited period of time, meaning that a rental agreement exists. There is also a greater focus on services in the cloud, as the cloud provider must guarantee the functionality of the cloud (see also Alliuris Compact “Cloud Computing”, January 2023).

Individual contracts

In the case of individual contracts, the user does not want to purchase standard software but requires customised software. There is a contractual relationship between the user and the manufacturer in which the focus is on the creation of the new software. This is usually a service contract.

Maintenance contracts

In addition to software license agreements, manufacturers offer maintenance contracts. The manufacturer’s services covered by the maintenance are usually not precisely defined. However, a maintenance contract usually covers the rectification of errors and

the implementation of improvements. A maintenance contract is a service contract.

Training contracts

Contracts for training or further education can be concluded in addition and are useful for complex software. They represent service contracts.

Common contractual clauses in software license agreements

A contract should be understandable and transparent for each contracting party. In particular, large software manufacturers systematically draft their licence agreements in a vague and non-transparent way. This is to the detriment of the user, as rights that are not included in the agreement are deemed not to have been granted. The following is a selection of clauses:

Rights of use

Every software license agreement regulates the user’s rights of use. Rights of use are the manufacturer’s exploitation rights to the software, which he grants to the user. In common parlance, rights of use are also referred to as licenses. The user must comply with the scope of use granted to him by the manufacturer. This is because large software manufacturers in particular know when the rights of use granted have been exceeded and demand subsequent licenses, sometimes retroactively for several years and amounting to several thousand euros.

Duty to cooperate

Software license agreements contain obligations to cooperate on the part of the user. These can be obviously regulated in the agreement but can also be hidden. The user must be clear about which obligations he has to fulfil and whether he can actually fulfil them. If he does not fulfil his obligations to cooperate, the manufacturer may be able to sue him for breach of contract.



Audits

Software license agreements often contain audit provisions. These grant the manufacturer non-incident-related rights to information from the user. This allows the manufacturer to determine whether the user is actually only using the licensed software to the extent granted in the agreement or is using it in a way that exceeds the scope of the license. Experience shows that the manufacturer only carries out audits if the contractual relationship has already been damaged. In addition, audits usually result in the user having to re-license and consequently pay extra. Although the copyright law itself provides for a right to information, this is only granted on an ad hoc basis. Consequently, the audit provisions in standard license agreements are disadvantageous for the user.

Intellectual property rights

Not only the manufacturer seeks protection of its intellectual property in the software, the user also seeks protection of its intellectual property. This is because the manufacturer can gain access, particularly in the context of maintenance, servicing, consulting or similar services. The user should contractually prevent this, even more if the intellectual property constitutes its unique selling point. The dominant software manufacturers have become big by siphoning off and using the know-how of their users. If the manufacturer must have access in order to provide its service, the user should at least agree that the manufacturer may not use the intellectual property, especially not in its standard software and standard license agreements.

Maintenance

Maintenance contracts are a lucrative additional service for the manufacturer. It is interesting to note that, under German law, the user would not need to conclude these to the extent that they are usually offered by manufacturers. This is because sales and rental law already provide the user with warranty rights (*Mängelrechte*), in the case of purchase for two years from the transfer of risk and in the case of rental for the entire period of use. However, maintenance contracts

are useful for some services, as they are not covered by the warranty rights, e.g. on-site maintenance, 24-hour telephone support, updates. Since 2022, there has been an update obligation in the EU for a “reasonable period depending on the circumstances”; an average of five years is being discussed. However, the obligation only applies to consumers.

Contract amendments

In the case of standard license agreements, the manufacturer can amend the agreement unilaterally. He does not personally notify every user of contract amendments; instead, he publishes the amended contract on the internet or in a customer portal and it is up to the user to stay up to date. This procedure is not user-friendly, as the user must determine for himself to what extent the published contract corresponds to his previous contract. The situation is different with individual contracts, where one party cannot unilaterally amend the contract and impose the amended contract on the other party.

Termination of contract

When terminating a contract, the user must remember to terminate all contracts that are no longer required. It may be that he terminates the software license agreement, but the maintenance contract is decoupled from it. In order to save unnecessary services and costs, the user must check the termination provisions of all contracts and, if necessary, terminate each contract individually.

License management

License management particularly affects companies as users who have concluded a large number of license agreements. With the help of internal license management, it is possible for users to keep track of their existing software licenses and know their risks. The user’s license management usually focuses on the licenses of its standard software, but the licenses of any individual software should also be kept under control.



License management also helps to correctly account for software and licenses.

Inventory recording and inventory management

In the first step, the inventory is recorded and the software licenses used are compiled, recording the contractually permitted use and the actual use. In this way, deviations in usage can be determined (e.g. number of users or installation location) and any over- or under-licensing can be identified. The second step is inventory management. This means that new data must be entered and existing data must be kept up to date. This also includes any unilateral changes to the contract by the manufacturer.

Tabular overview of clauses

The user should create a tabular overview of common clauses. For each clause, the benefits and risks are pointed out and the company-internal priority of the clause is shown. In addition, instructions should be developed for each clause. In this way, many processes can be standardised and only special questions need to be clarified within the company or with the help of a lawyer. License management programs are useful for large companies with many software licenses. The market now offers its own programs for individual licenses, e.g. for software-as-a-service, SAP software or department-specific software. Such programs often cost a six-figure sum.

Summary

Users should carefully check whether they can comply with the obligations contained in software license agreements, otherwise there is a risk of legal consequences. License management helps to record the current status and identify risks due to deviations in use.

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The Alliuris Group

The Alliuris Group consists of 20 law firms and 400 business lawyers within Europe, Asia and America.

Contact	Ulrich Herfurth Alliuris Communication
Web	www.alliuris.law
Mail	info@alliuris.org
Fon	+49-511-307 56-20
Fax	+49-511-307 56-21

IMPRINT

EDITORS: ALLIURIS A.S.B.L. ALLIANCE OF INTERNATIONAL BUSINESS LAWYERS | BRUSSELS

MANAGEMENT: Luisenstr. 5, D-30159 Hannover
Fon +49-511-307 56-20, Fax +49-511-307 56-21

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