

# Media Mention: Alex Dale Explains Software Contract Management for Businesses

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Wilmington business and litigation attorney Alex Dale recently contributed an article to Greater Wilmington Business Journal "Insights" section sponsored by UNC Wilmington's Center for Innovation and Entrepreneurship (CIE). Below is the article that was published in Greater Wilmington Business Journal's online edition:

## **Software Contract Management: A Topic Every Growing Business Should Take Seriously**

Now that your business has grown, have you read your software license agreements lately?

If you are like many small business representatives, you tapped your approval of a software license quickly through a click-wrap licensing agreement, or you glossed over the fine print in the signed licensing agreement from the software provider. The idea of software contract management may be foreign to your growing company, but software licenses dictate the universe of operation in a software environment and have considerable importance.

Software license agreements usually limit the scope of use of software and restrict the number of users who can access software. Growing companies are especially at-risk for walking outside of the terms of their license agreements, as growth outpaces software asset management. Growth businesses are increasingly being targeted by software providers with "audit" or "license verification" requests, so your company needs to be ready to respond.

### **What Is A Software Audit?**

In their license agreements, software companies often retain the right to compel customers to "audit" the usage of licensed software to ensure compliance with the terms of the license. The software audit request typically will require the customer to identify the type, scope and volume of use, as well as the number of copies in use.

Software license agreements regularly give the software provider or its agent the right to perform the audit on-site at the location where the software is being used. However, the typical request asks the business to self-identify the software usage and to establish compliance, which is described as a "self-audit" or a license verification process.

In initiating the audit process, the software provider is most frequently worried about the number of

copies made of the software. This is why growing companies especially need to be sensitive to their software licenses, so they can maintain compliance with the license's grant for the number of copies that can be made for employees to use the software. However, an audit request might also be made if the software provider is concerned that the business user is trying to manipulate the software or otherwise trying to infringe on some intellectual property associated with the software.

### **Who Initiates The Software Audit?**

Your business could receive an audit request directly from the software company. Some software companies, such as Microsoft, initiate their own audit requests.

Other software providers will rely on "agents" to make the audit request or to perform the audit. Your business may receive an audit request from BSA/The Software Alliance, the Software and Information Industry Association, or some other trade organization. Law firms also may make an audit demand on behalf of the software provider or agent.

### **What Should You Do When You Receive An Audit Demand?**

In almost all situations, your company will need to respond to the audit request. Most businesses will have agreed to the audit when the software was first licensed. This agreement may take the form of a signed signature on a written agreement, or it may be a clicked approval on a click-wrap or browse-wrap agreement.

However, each situation will be different. There is no one-size-fits-all approach to audit requests. Some software providers or agents are approaching the audit to make sure a software user is fulfilling its responsibilities and, if not, to get the user to pay extra for the additional use. Other software providers are looking to punish offenders who violate their license and are more interested in recovering damages in court for willful infringement than recovering an extra fee under the license agreement.

Ward and Smith, P.A. represents companies in responding to these audit requests. In counseling companies, we examine many issues with the client, such as:

- Who is targeting the client for the audit? Is this a common event for this software provider?
- Is there something unique about the usage of the software that would concern the software provider?
- Do the client's computers have multiple versions of the software on them? How is this relevant to the licensing issues?
- Is the evidence of software usage properly preserved?
- Does a computer seller or software re-seller have information to show the client's proof of payment?
- How can the investigation process be protected through attorney-client privilege to ensure a thorough and robust investigation?
- How can resolution be negotiated to put the client in the best position possible, even if violations have been found?

In the end, it is important to maintain accuracy and honesty in responding to an audit request. A license violation can be costly and put your business into litigation, but the failure to maintain evidence, to make false or misleading statements about the usage, or to omit information in the audit can have significant adverse consequences.