HOW TO

Improve Your Company's Form Software License Agreement

PART 4: REPRESENTATIONS AND WARRANTIES

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ATTORNEYS

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KEY TAKEAWAYS

As a starting point, a licensor should include the following in its form software license agreement:

1. a narrow warranty of function (further described below);
2. a specific warranty period during which the warranty of function applies;
3. warranty disclaimer and no-reliance language; and
4. sole and exclusive remedies for the customer if the licensor breaches the warranty of function.

For purposes of this article, we will treat representations and warranties synonymously and refer to them collectively as "warranties." In essence, a warranty is a statement of a past, present, or future fact or condition with a guarantee that such past, present, or future fact or condition remains true for a certain period of time. Warranties are distinct from contractual obligations or covenants that are promises to do, or refrain from doing, certain acts in the future. A party to a contract may be liable to the other party for various damages and remedies if a warranty it provides is or becomes untrue.

Licensors with extreme leverage may be able to provide their software "as-is" with no warranties of any kind, but most licensors will be expected to provide a basic warranty of function in their form software license agreement. Some licensors may include, and some customers almost certainly will request, additional warranties addressing viruses, intellectual property rights, quality of services, data security, open source software, and other various topics. Whether or not a licensor should proactively include, or provide in response to a customer's request, such additional warranties is a fact-specific determination that depends on a variety of factors, including the license fees being paid for the software, size and sophistication of the licensor and customer, mission criticality of the software, and historical relationship of the licensor and customer. For most licensors who license software on a form software license agreement, inclusion of a warranty of function and no other warranty is a strong starting point for the licensor.

A warranty of function is a guarantee that the software will operate as promised for a certain period of time. The warranty should be limited to a guarantee that the software will perform as set forth in the licensor's

technical software documentation. A licensor should avoid warranting that the software will operate as promised by its sales team, on its website, or in marketing materials.

The warranty of function should also be limited to apply during a relatively short period of time, typically two to three months to no more than one year from the date the software is made available to the customer. Software, by its nature, will eventually require updates, upgrades, bug fixes, etc. In practice, the warranty of function provides free maintenance and support services to the customer. Accordingly, if the warranty of function is not limited to a certain warranty period, a licensor may be required to provide free maintenance and support services for the duration of the software license agreement via the warranty of function. After the specified warranty period, the licensor should require the customer to purchase maintenance and support services to obtain updates, upgrades, bug fixes, etc.

The licensor should further protect itself by including warranty disclaimer and no-reliance language. This language says that certain warranties that default law implies into every software license agreement are not applicable and that the only warranties enforceable against the licensor are the warranties expressly set forth in the software license agreement itself. If drafted properly, this language also protects the licensor from other warranties and liabilities that may be implied by default law or asserted by a customer.

Further, a form software license agreement should set forth specific remedies for the customer if the warranty of function fails during the warranty period. Typically, a licensor agrees in the software license agreement to repair the software so that it complies with the warranty of function or replace the software with new software that provides substantially similar functionality in accordance with the warranty of function. If the licensor is not able to successfully repair or replace the software, the software license agreement may permit the licensor to terminate the agreement and refund the customer all, or some portion of, amounts paid under the agreement. Importantly, if the licensor agrees to a warranty of function for a relatively long warranty period, it should avoid providing a full refund of all amounts paid as a remedy because the customer may have used and benefited from the software for months or years without issue.

Finally, a form software license agreement should contain proper “sole and exclusive remedy” language. This language says that the remedies described in the preceding paragraph are the only remedies available to the customer if the software does not operate in accordance with the licensor’s technical software documentation. So, the customer would not have the right to sue the licensor for additional damages if the software “didn’t work” during the warranty period, so long as the licensor repaired or replaced the software or provided the customer a refund as set forth above. This protection can be critical for the licensor because, without this language, the licensor may be “on the hook” for the express remedies set forth in the software license agreement in addition to money damages claimed by the customer in a potential lawsuit.

This article is one part of a ten-part article published by Koley Jessen to help software licensors improve their form software license agreements.

Please contact Koley Jessen’s Commercial and Technology Contracts Practice Group for further assistance.