

## Know the Publisher's Audit Rights: Frequency

By Brian Kirkpatrick

When it comes to software license compliance, being compliant with the publisher's licensing rules can be daunting enough. But compliance won't stop a software audit.

When a company receives an audit notice, the first stop should be the end-user license agreement (EULA). There are some key themes to look for, and they may not always be so obvious – such as a specific Audits section. It's important to find an answer to the question: **How Often Can the Publisher Audit?**

The frequency of audits can vary dramatically from one publisher to another. A typical frequency tends to be every 12 months. However, some publishers will leave the frequency to a *reasonable* number, which means a number reasonable to the publisher. Even worse, there may be no frequency mentioned at all so that there is no limit to the number of times a company may be audited.

For companies that have not yet experienced an audit, once a year may sound reasonable. Parties rarely negotiate EULAs, and if they do, it is extremely unusual for anyone to negotiate the audit framework in the EULA. A typical software audit can last several months, and if the publisher can audit each year, the audits may seem perpetual.

Every time a person on the IT staff accepts a click-wrap agreement, a publisher likely gets the right to audit. Many companies are facing multiple software audits at a time, so a best practice would include limiting a publisher's right to audit to once each two or three years.

It is usually helpful to employ the assistance of someone experienced with responding to software audits to make sure the publishers do not overstep their audit authority.



### About the author Brian Kirkpatrick:

Brian practices exclusively in intellectual property and technology law. He has drafted and negotiated hundreds of software contracts with a wide breadth of complexity including large-scale master services agreements (MSA's), software as a service (SaaS) agreements, and End-User License Agreements (EULA's). Before entering the legal profession, Brian was a licensed securities representative and Vice President level middle-market commercial banker.

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