Benefits of Negotiating a Source Code Escrow Agreement in a Software Vendor Contract

Many businesses have software licenses that are tailored to the business' needs, and are for business operations on a day-to-day basis. But what happens if the software provider goes out of business or discontinues support for the software? In short, the business may not have meaningful access to necessary software after it is no longer offered or supported by the publisher. That is, unless the business negotiated a source code escrow agreement, writes **Stephen Pinson** in **Scott & Scott**'s Software & Copyright Law Blog.

A source code escrow agreement is an agreement to deposit the source code of the software with a third party escrow agent. During the negotiation of the software license agreement, the licensee (the business seeking the software for its business needs) can request that the publisher place the source code into escrow and release the source code upon a defaulting event. A defaulting event is usually defined as insolvency, or the filing of bankruptcy by the software provider, or the inability of the software provider to maintain or update the software as promised under the software license agreement.

Normally, a software license agreement conveys access to the object code for the software. However, when there is a source code escrow agreement in place, the source code remains with the escrow agent, and when there is a subsequent defaulting event, the source code is released to the licensee by the escrow agent.

The agreement's terms are heavily negotiated, because the events that trigger the release of the source code effect the licensor's possession and control of the source code. Some

important defaulting events that should be included in the agreement and negotiated by a licensee are the following:

1. Bankruptcy
2. Insolvency
2. Assignment to the software publisher's creditors
4. Appointment of a receiver
5. Failure to provide maintenance and/or support agreed upon
6. Failure to correct any material malfunction, defect, or nonconformity of the software functionality
7. Change in control of the provider
8. Default by the licensor after ample opportunity to cure
9. Laying off a substantial number of employees who provide support for the software

Finally, the licensee should negotiate the software provider to escrow the names, phone numbers, and addresses of the software's programmers so that the licensee can contact them and hire them if needed in case of a defaulting event.

It is important to seek advice from experienced counsel in order to understand all the risks involved when negotiating software licensing agreements.