Your EHR License Agreement: Critical Issues

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This article discusses several key provisions and concepts in software license agreements for electronic health records. It offers insight into what physician practices can expect to find in their license agreements, as well as practical advice on beneficial provisions. The article examines contractual language relating to term and termination, technical specifications and support, and compliance with governmental programs.

KEY WORDS: EHRs; license agreements; contractual terms.

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As physician practices increasingly use electronic health record (EHR) software, they must contend with license agreements. Faced with a "hard sell" scenario where a discounted price is set to expire only days after receiving the license agreement itself, you may be tempted to forego reading the agreement thoroughly. You may have been assured that the license agreement is "standard." The agreement may appear to be "mere boilerplate." However, as with any other type of contract, you should avoid the temptation to sign first and read later (or not at all). The vendor may have presented you with a sweetheart of a deal, but you should still take the time to understand its terms.

SNARES AND TRAPS

An August 2013 case from the Western District of New York highlights the importance of carefully reading your EHR license agreement and understanding its requirements. [*Clinical Insight, Inc. v. Louisville Cardiology Medical Group*, PSC, 2013 WL 3713414 (WDNY, 2013).]

A cardiology practice was sued by its EHR vendor for breach of contract and copyright infringement when the practice failed to pay license fees but continued to use the software after the license agreement had expired. The practice claimed that its vendor had failed to provide a billing component that operated in accordance with the practice's expectations. The practice further claimed that it had been given an evergreen license under an oral agreement.

However, the court found that the oral agreement was invalid and superseded by the written license. The court further held that the license stated that the billing module would function *in accordance with the documentation provided*, rather than the practice's expectations, and thus the vendor had not breached its obligations. Moreover, even if the vendor had breached, the court found that the practice was entitled either to terminate the agreement, or notify the vendor and continue the contract; it was not permitted to breach the contract itself, while continuing to enjoy the benefits of the software. Lastly, the court found that the practice's continued use of the software after the agreement had expired constituted copyright infringement, against which it had no viable defense.

It is critical to understand the terms of your license agreement.

This case highlights several key issues for physician practices in dealing with EHR vendors. First, it is critical to understand the terms of your license agreement, including any technical criteria. The practice above made a critical mistake in assuming that its understanding of the functionality of the billing module was accurate and relying on oral assurances of module functionality when the documentation said otherwise.

Second, the case demonstrates the importance of *not* "self medicating" your way out of a license dispute. The law requires certain steps to be taken, and the license agreement itself may require additional steps (such as arbitration) to resolve disputes. The case does not state whether the practice acted on its own to resolve the dispute. However, had the practice consulted legal counsel, it might have been advised that: (1) the license would expire

on a specific date; (2) the terms of the license required the return of the software to effectively terminate the license (rather than mere notification of an intent to terminate); and (3) the billing module was operating in accordance with the specifications listed in the documentation.

A better understanding of the license agreement—both in terms of how the document would govern day-to-day operation of the software and in terms of how the practice could terminate the agreement—and careful initial negotiation of the license agreement terms would have saved the practice the cost of litigation, as well as the damages it ultimately incurred by breaching the agreement and violating copyright law.

The remainder of this article focuses several different topics that can be crucial in how an EHR license agreement operates. These include: (1) term and termination; (2) technical specifications and technical support; and (3) compliance with government program requirements.

TERM AND TERMINATION

How an agreement ends is as important as the process you go through in entering into the agreement. With that in mind, the term of a license agreement is as critical as the sections that address termination and post-termination obligations. In the abovementioned case, the practice believed it had an evergreen (or automatically renewing) license. Many license agreements do operate in that way. Others, however, may have a finite end-date, after which point the parties may choose to: (1) sign another agreement on the same terms; (2) sign another agreement on different terms; or (3) terminate their relationship.

Each approach offers advantages and tradeoffs. An automatically renewing agreement allows for less hassle and administrative burden. The parties will not be required to renegotiate terms; the agreement will simply continually renew. On the other hand, an agreement with a finite term can be beneficial if the parties wish to negotiate for more favorable terms. For physician practices, however, automatic renewal may be preferable, as long as subsequent changes to the terms (such as a rate increase) allow the parties to terminate if they do not agree with the change.

This raises the issue of termination itself. Typically, an EHR license agreement will permit the parties to terminate for breach if either party fails to perform as required by the license agreement. Licenses also often permit at least the practice, and sometimes the vendor, to terminate the agreement without cause. You should be able to terminate your license agreement without cause, at any time during the agreement, upon notice, although the length of that notice may vary (common lengths are between 15 and 90 days). In the case example above, if the license included language permitting termination without cause, the practice should have either terminated for breach (on the basis that the software had failed to perform as required under the agreement) or terminated without cause (if breach could not be proven, and/or the practice was simply dissatisfied with the performance of the software).

The license agreement will need to include a HIPAA business associate agreement.

You should also closely examine the post-termination obligations. For example, you should ensure that the vendor will return your practice's data upon termination, in a nonproprietary format, capable of being read by other EHR software, or at least in a form allowing for relatively easy re-entry into another EHR. Failing this, the vendor should at an absolute minimum provide you with PDF copies of such records. This obligation should be explicitly stated in the license agreement, since practices have their own legal obligations, under both HIPAA and state licensure laws, to retain copies of their patient records. Because the vendor is providing services that likely give it access to your practice's protected health information, the license agreement will need to include a HIPAA business associate agreement (BAA). If the vendor cannot return your practice's records, the BAA should specify that the vendor will continue to honor its obligations as a business associate until the records can be returned to you and deleted from the vendor's system. Other post-termination obligations usually include that you will return any copies of software and EHR documentation to the vendor and that you certify that you have deleted the software from your practice's computers (if the software is actually installed on them).

TECHNICAL SPECIFICATIONS AND SUPPORT

As the cited case illustrates, a clear understanding of technical specifications and performance parameters of the software is also critical. This is especially true in an era with increasing usage of EHR software through Web-based applications, although it is equally important when software is installed on practice computers.

The range of technical specifications themselves that could be addressed in a license agreement is too broad and varied for the scope of this article. Depending on the software suite purchased or leased, you might want your EHR software to be able to communicate or integrate with separate billing or patient portal software. Alternatively, you might expect the software to be useable on certain devices, such as tablets, as well as on traditional desktops and laptops. Whatever your expectations regarding the software's performance are, if you would consider the failure to meet such expectations a breach, they should be

explicitly addressed in the body of the agreement and be considered obligations of the vendor.

Similarly, the license agreement should address technical support issues. For example, with a Web-based application, pay close attention to language regarding scheduled downtime as well as "uptime" guarantees; these are not the same thing. An uptime guarantee is a statement that the software/service will be available for you to use a certain amount of the time. By contrast, scheduled downtime has more to do with vendor maintenance of the software or the servers on which it resides.

The ideal uptime guarantee is constant access.

The ideal uptime guarantee is constant access (e.g., "100% uptime," "24/7/365 access," etc.). Realistically, however, vendors are more likely to guarantee something less (e.g., "99% uptime"). This language will also usually state that the vendor is not responsible for the unavailability of the service due to communication issues *between* the vendor and you, or on your end. In other words, the vendor cannot be held responsible if your Internet service provider experiences an outage, but the software was still available. With respect to downtime, for example, the agreement may permit the vendor to schedule downtime for maintenance with several days' prior notice. However, scheduled downtime should also include expectations regarding frequency, such as "between the hours of 8 AM and 12 PM PST, one Sunday per month."

Other technical support issues may address how the vendor will "tier" support services. For example, a low-level support issue might only warrant e-mail consultation within 24 to 48 hours of notification, whereas a high-level support issue might warrant a telephone consultation within 1 hour. Vendors may also make support services contingent upon your practice having designated a person who will act as a point of contact with the vendor. If this is the case, consider having more than one point of contact (if permitted), in case the designated individual is unavailable when you need support.

GOVERNMENT PROGRAM COMPLIANCE

Physician practices also currently face an array of government programs relating to EHR software, including Meaningful Use and the E-Prescribing program. Programs such as these typically require the use of EHR software that can perform a variety of functions and that meets certain established criteria. Therefore, if your practice intends to participate in these programs, be sure the license agreement addresses the software's compliance with program requirements and what steps the vendor will take to maintain such compliance.

For example, while you can independently verify certification (a list of certified EHRs for Meaningful Use may be found at http://oncchpl.force.com/ehrcert), if you would not buy or lease the software without such certification, the license agreement should explicitly state that the vendor represents and warrants that the software is currently certified and will continue to be certified throughout the term of the license. If the software is not currently certified or falls out of certification, the agreement should state that the vendor will patch the software to bring it into compliance within a time period to allow you to meet your reporting requirements under the programs in which you participate.

The license agreement should protect you from vendor noncompliance.

Ideally, the license should also include indemnification language protecting your practice from any damages it might suffer as a result of the vendor's failure to ensure compliance. Vendors may resist the inclusion of such terms, given the risk of repayments and/or potential False Claims Act liability for improperly reporting compliance with Meaningful Use or E-Prescribing. You should remain adamant that the license agreement protect you from vendor noncompliance.

We represented a physician group that initially indicated to the government that it had met its requirements to participate in a government program involving incentive payments. After it had received the payment from the government, it discovered that its EHR vendor had never met its compliance requirements to participate in the program, and the group ultimately had to return its incentive payments. Unfortunately, its license agreement (which we did not have the opportunity to review before the practice signed) included no guarantees of compliance and no indemnification language in the event that the practice was damaged as a result of the vendor's failure to comply. Had the license agreement included such language, the practice would have been in a considerably better position to demand payment from the EHR vendor.

CONCLUSION

Electronic health records—and the license agreements that accompany them—are rapidly becoming a fact of life in the new healthcare system. If your practice plans to adopt an EHR, get a legal review and make sure you have a clear understanding of what your license says. Avoiding the temptation to sign first and read later can save you many headaches and much expense in the future.