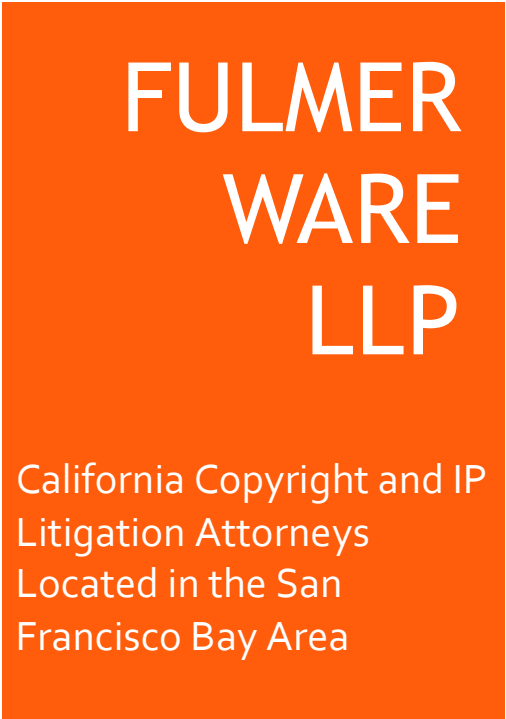


BIG FIRM QUALITY | SMALL FIRM PRACTICALITY



FULMER WARE BLOG POST

MAKING THE RECORD

by Pam Fulmer

When responding to any software audit, companies must look to the terms of the license agreement that governs the relationship between the parties. As a threshold matter, it is vitally important to keep all of the actual contractual documents and Order forms together in one place for ease of reference. Also emails and other written communications between the licensor's audit team and the business being audited should be retained as well. The licensor is making a written record and demanding documents and other information, and may be doing so in a way so as to cast the company being audited in a negative light in the event of later litigation.

We have also found that although the licensor's audit teams tend to rely on writings as they attempt to make a record of non-cooperation and non-compliance by the licensee, the licensor's sales teams, which the licensor may be concurrently deploying, will often use the phone and leave voicemail messages, so as not to create a paper trail, which can later be used against the licensor. We recommend that such voicemail messages be transcribed, and if possible an audio recording of the voicemail preserved for use as evidence later on should litigation be initiated.

For example, in the first public filing against Oracle relating to the VMware virtualization issue in the [Mars vs. Oracle](#) case, Mars was able to make use of the written record to support its position that Oracle was in breach of the license agreement and exceeded its audit rights. Care must be taken in any discussions with the licensor, to view every communication to the licensor, with a lens as to how a Judge or jury might view the communication in the event of litigation.

The public filings in the *Mars vs. Oracle* case also amply demonstrate how a licensor (here Oracle) may attempt to use its audit rights to obtain documents and other information that it might not be entitled to under the license agreement. Licensees may want to weigh whether and to what extent to grant the licensor access to their confidential and proprietary information. Often audit clauses require that the audit be reasonable, and even if it does not, courts are likely to read such a requirement into the contract. Therefore, be careful and proceed cautiously before turning over all information demanded by a licensor. Make sure to read and understand your legal rights and consult with skilled technical and legal experts to prepare an appropriate audit response strategy.



California Counsel

Assisting client to make a winning record to best protect your company in disputes over the interpretation of various provisions in the Oracle software license.



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