



A Non-Authorized Software Claim? What to Do When the Letter Arrives

Presented by:

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Agenda

Software Audits

- Scope & Confidentiality
- Legal Issues
- Common Mistakes
- Software Discovery, Analysis, Audit Materials
- Negotiating Resolution, Settlement Agreements

Scope & Confidentiality

Most software publishers, by default, include relatively onerous audit-rights provisions in their form agreements

- Only “reasonable” restraints on audit timing and frequency
- No express limitations on scope of potential audits (either legal, geographic or product-specific)

Scope & Confidentiality

Most software publishers... (cont'd)

- Few or no meaningful protections for information disclosed by the enterprise during the course of the audit (either as to confidentiality or to admissibility in court, in the event litigation arises)

Scope & Confidentiality

Most software publishers... (cont'd)

- Burdensome resolution terms:
 - License purchases for unlicensed deployments, regardless of use
 - Back-maintenance purchases for unlicensed deployments (or, in some cases, a percentage over the MSRP licensing costs)
 - Obligation to pay the publisher's third-party auditor, in the event that any compliance gap exceeds a stated threshold

Legal Issues Arising in Software Audits

- Breach of contract liability
- Copyright infringement liability
- Successor liability resulting from mergers or acquisitions
- Individual liability for officers and directors

Common Mistakes Made in Software Audits

- Failure to negotiate audit procedures
- Reliance on IT staff to deploy discovery tools
- Failure to understand and gather proper proof of purchase documentation
- Failure to produce audit results as of the effective date
- Scrambling to buy software products in response to an audit letter

Software Discovery

- Automated process designed to identify all software products installed on corporate computers
- Discovery tool selection is critical to success
- Discovery of all assets is challenging
- Reporting is unreliable
- Validation is difficult
- Make sure all data is protected by attorney work-product privilege
- Attorneys experienced with software licensing should analyze the data

Proof of Purchase Analysis

- Process of gathering and documenting proof of ownership of software licenses
- License agreements, manuals, media, purchase orders, and checks are not sufficient proof
- Dated proofs of purchase are required
- Valid proof must show product name and version
- The entity listed in the invoice or other proof of purchase must match the entity being audited
- Clients should leverage vendors to help compile entitlement data

Gap Analysis

- Process of analyzing gross installation information against gross invoices for each specific product
- License types, use characterizations, and downgrade rights must be considered
- Must include products not included in software discovery reports such as client access licenses, and remote user licenses including terminal server, VPN and Citrix users
- Calculate the potential fine exposure for the client prior to producing the audit results

Producing Audit Materials

- Schedules and supporting documentation representing all relevant software products installed on the client's network as of the effective date
- Secure a Federal Rule of Evidence 408 Agreement
- A summary with columns for product name, number of installations, number of proofs of purchase, and excess/deficiency is required
- Organize the supporting material by product with supporting proof of purchase for each product
- Obtain management approval before producing final results

Negotiating Resolution

- Discussions occurring after production and continuing through settlement
- Carefully scrutinize the auditor's analysis
- Explain the basis for any challenges to the proposed deficiency counts prior to engaging in a monetary negotiation
- Understand both monetary and non-monetary considerations before negotiating
- Challenge the legal basis for arguments advanced in settlement correspondence

Settlement Agreements

- Make sure that executive management understands that audit results are being certified as accurate as of the effective date
- Understand that the release is predicated on the accuracy of certifications and in many instances future performance
- Make sure you are getting a full release of all potential liability
- Non-monetary provisions have “costs” as well
- Confidentiality is sometimes negotiable

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