



Surviving a Software Audit

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FOERSTER

What is a Software Audit?

*A **Software Audit** is the review of an enterprise customer's installation and/or usage of a software publisher's products as governed by a license agreement**

*Software Audits can vary in terms of, and not limited to: scope, parties involved, process, and duration. This definition has been provided to set context for today's discussion.

Software Audit Clause

- Audit clauses are common in software license agreements, but can differ in terms of specificity of scope, process, timing, fees, and other obligations

Example 1: *Within 45 days of written notification, you agree to comply with [Company's] audit. Audit will not unreasonably interfere with your business. To agree to pay for non compliance within 30 days. If you do not pay within 30 days, [Company] can terminate the agreement.*

Example 2: *During the term of this Agreement and for one (1) year thereafter, Licensor may, upon five (5) business days advance written notice to you, audit you for the purpose of verifying your compliance with this Agreement. You understand and agree that the audit may take place in person or Licensor may use technological means to perform such audit. You agree to provide Licensor with all reasonable assistance required hereunder.*

Who performs Software Audits?

- Software Publishers
 - Examples: Microsoft, Oracle, IBM, SAP, Adobe, & others
- Trade Associations
 - Business Software Alliance (BSA)
 - Software and Information Industry Association (SIIA)
- Other 3rd Parties on Behalf of Publishers
 - Accounting Firms
 - Boutique Consulting Firms
- Customers
 - Self Audits

Software Audits on the Rise

- Increasingly, Software Publishers are executing their contractual rights to perform software license audits at enterprise customers
 - 63% of organizations with over 1,000 employees in 2012 reported a software audit compared to 35% in 2007
Source: Gartner. Survey Analysis: Software Audits Are on the Rise and Your Enterprise Might be Next. 30th April 2013.
 - 53% of organizations reported being audited at least once in the last two years
Source: Express Metrix. 2013 Software Audit Industry Report. November 2013.

Why?

- Software Publishers are increasingly conducting Software Audits for a variety of reasons, including to:
 - Protect IP
 - Recover revenue leakage
 - Address piracy & unlicensed / unauthorized use
 - Increased emphasis on corporate governance
 - Gain insights into customer's product usage
 - Educate customer's on licensing requirements
 - Replicate success of competitor's programs

What to Expect:

Report - Deployment v. Entitlement

- A key output of a Software Audit is a report that provides a measurement of a product's deployment and/or usage, within a customer's environment, compared to the licenses purchased/entitled
 - The **Deployment v. Entitlement Report** identifies:
 - License Short-falls: Over deployment of software
 - License Surpluses: More licenses than deployed software
 - Mis-use: May identify areas of product mis-use
 - Example: Use of internal use only software to provide services to external customers. This may require a Service Provider agreement with different terms and conditions, and pricing compared to an internal use agreement.

SAMPLE:

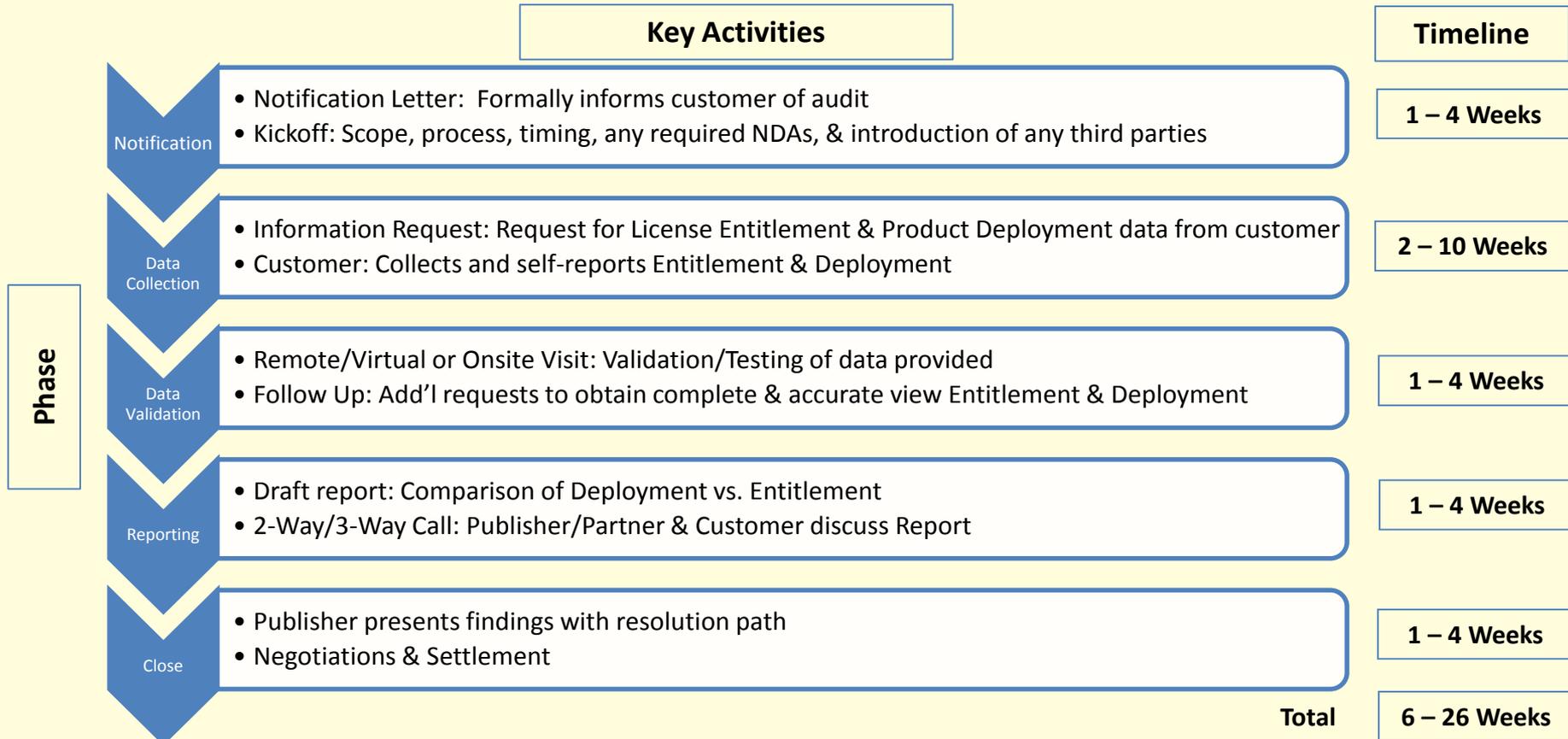
Report - Deployment v. Entitlement

- Deployments and License Entitlements are often depicted for each Product per Edition and Version
- In many cases, there will be both **license short-falls** and **license surpluses** identified in the report

Product	Edition & Version	Deployment	Entitlement	License Difference
Product ABC	10.0	15	12	-3
Product ABC	Standard 11.0	18	20	+2
Product ABC	Enterprise 11.0	6	6	0

What to Expect: Audit Process Overview

- Sample, high-level process overview:



The timeline provided is a sample and an actual timeline depends on a number of factors including (but not limited to) scope, approach, complexity of environment, and terms and conditions of licensing agreements.

How you can Prepare

- Assemble a **Project Team** with **Executive Support** that consists of stakeholders from across the organization
 - A project team is more than Legal and IT personnel!
 - Executive Sponsorship: Informed and Accountable
 - IT: IT Infrastructure, IT Operations and IT Security
 - Legal
 - Procurement
 - Vendor Management
 - Others, as appropriate

How you can Prepare

- Define the **scope**
 - **Agreements**: What agreements govern the software?
 - **Products**: What products are covered by the audit?
 - **Geographies**: Global, regional, site specific, etc.?
 - **Legal Entities**: Organizational entities, business units, M&A
 - **Time**: Often a point in time, but is there a look-back?
- Understand **approach**
 - **Roles and responsibilities**: Publisher and Customer
 - **Project timeline**: Anticipated timing
 - **Software discovery tool(s)**: Any provided by the Publisher?
 - **Entitlement records**: Who is responsible for compiling ?

How you can Prepare

- Communicate
 - Communication: 2/3-way communication is essential
 - Transparency: Request transparency in process; reciprocate
 - Status meetings: Establish internal and 3rd party status meeting cadence. Raise issues, seek resolution asap
- Software Asset Management (SAM)
 - Organizations with mature SAM programs identify cost savings, mitigate license non-compliance risk, and more effectively manage software
 - Successful SAM Programs require executive commitment combining the right people, process and technology... it's not all about discovery tools!

General Trends in BSA and SIIA Cases Against Businesses

- Most cases the result of a whistleblower
- Whistleblower typically a former IT employee
- About 90% of settlements from small businesses

BSA Offers Rewards to Whistleblowers

BSA Raises the Stakes In Fight Against Software Piracy

Software Group to Reward Individuals Up To \$1 Million for Qualified Reports of Copyright Infringement

Washington, DC (July 2, 2007) –

The Business Software Alliance (BSA), the global organization representing the nation's leading software manufacturers, today announced that it will intensify efforts to battle software piracy in the workplace by increasing its current rewards incentive from \$200,000 to \$1 million from July to October 2007.

BSA – Reward Payment Guidelines

Settlement Paid by Company	Potential Reward Payment
\$15,000 - \$100,000	Up to \$5,000
\$100,001 - \$200,000	Up to \$10,000
\$200,001 - \$400,000	Up to \$20,000
\$400,001 - \$600,000	Up to \$30,000
\$600,001 - \$800,000	Up to \$40,000
\$800,001 - \$1,000,000	Up to \$50,000
\$1,000,001 - \$2,000,000	Up to \$100,000
\$2,000,001 - \$3,000,000	Up to \$150,000
\$3,000,001 - \$5,000,000	Up to \$250,000
\$5,000,001 - \$10,000,000	Up to \$500,000
\$10,000,001 - \$15,000,000	Up to \$750,000
Over \$15,000,000	Up to \$1,000,000

SIIA Offers Rewards to Whistleblowers

Software & Information
Industry Association
www.siaa.net



News Release

Contact: Keith Kupferschmid, SIIA 202-789-4442, keithk@siaa.net

SIIA Software Piracy Report Reward Ceiling Raised to \$1 Million

17 People Received Rewards Totaling \$78,500 in 2006

Washington, DC – February 14, 2007. The Software & Information Industry Association, the principal trade association for the software and digital information industry, today announced that in 2006, SIIA paid \$78,500 to sources who reported software piracy and that it is increasing the maximum reward available under its software piracy reward program from \$200,000 to \$1 million.

Through its Anti-Piracy Reward Program, SIIA offers rewards -- ranging from \$500 for a settlement of \$10,000 to \$1 million for cases with settlement amounts over \$20 million -- to eligible individuals who report verifiable instances of corporate software piracy. The maximum reward, as well as other reward amounts available under SIIA's software piracy Reward Program, was raised to be consistent with SIIA's recently announced Reward Program for reports of content piracy (see www.siaa.net/press/releases/CCAP-reward-program.pdf)

In 2006, SIIA issued seventeen rewards to individuals who reported incidents of software piracy that went through to settlement. The average reward was \$4,618.

Confidentiality of Whistleblower Identity Where No Case Filed

- Solers, Inc. v. John Doe, No. 05-3779 (D.C. Sup. Ct. Aug. 16, 2006)
- Court quashed subpoena issued to SIIA, seeking identity of informant who allegedly falsely informed SIIA that Solers infringed SIIA member copyrights
- In light of the First Amendment protection claim, Court held Solers was not entitled to discovery because it failed to state a defamation claim (no actual injury)
- SIIA argued informant's identity protected by work product doctrine and the First Amendment

SIIA Members Will Sue

Case 3:07-cv-08161-PJH Document 1 Filed 12/05/2007 Page 1 of 12

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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT
10

11 ADOBE SYSTEMS INCORPORATED, a
Delaware corporation, COREL
12 CORPORATION, a Canadian corporation,
SONIC SOLUTIONS, a Delaware
13 corporation, SYMANTEC
CORPORATION, a Delaware corporation,
14 and SYMANTEC OPERATING
CORPORATION, a Delaware corporation;
15 Plaintiffs,
16
17 v.
18 FOX ROTHSCHILD LLP, a Pennsylvania
limited liability partnership;
19 Defendant.

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COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF CASE NO.

- Fox Rothschild LLP
- AmLaw 200 law firm
- Whistleblower case
- SIIA cannot sue in own name
- Filed in N.D. Cal.
- 19 Adobe, Symantec, Corel, and Sonic programs

BSA Members Will Sue

- Action Group, Inc.
- BSA cannot sue in own name
- Filed in E.D. Ohio
- 6 Adobe, Autodesk, and Corel programs

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

OCT 12 2011 10:50

ADOBE SYSTEMS, INCORPORATED;
AUTODESK, INCORPORATED; AND
COREL CORPORATION LIMITED
PLAINTIFFS

VS.

ACTION GROUP, INC.
DEFENDANT

C2-04-277

CIVIL ACTION NO. _____

JUDGE MARBLEY

MAGISTRATE JUDGE KING

COMPLAINT

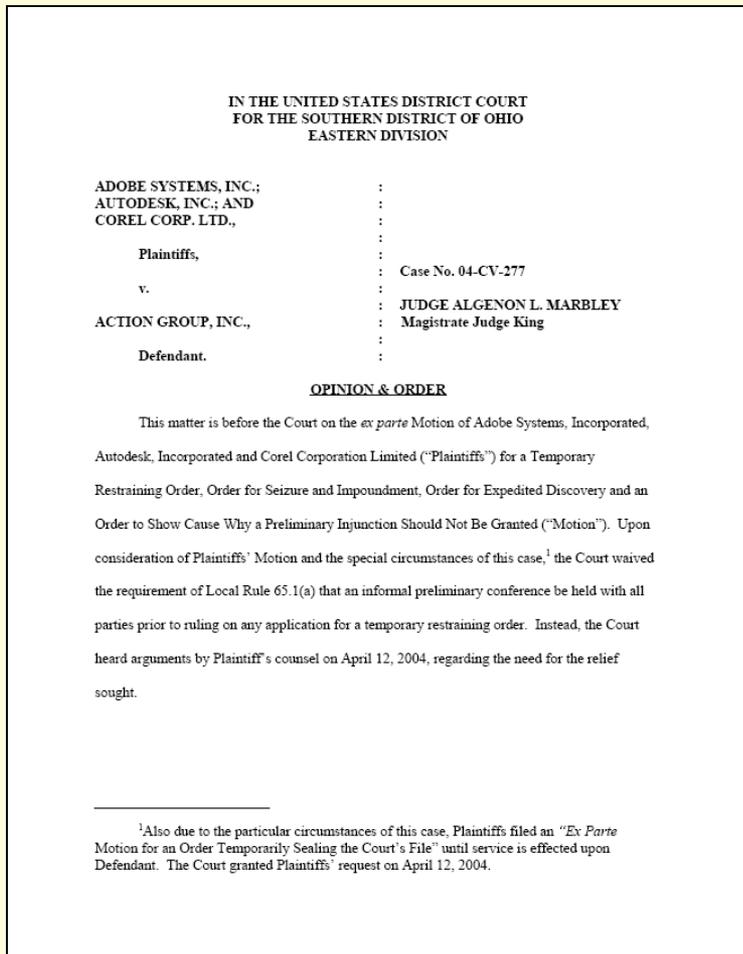
Plaintiffs ADOBE SYSTEMS, INCORPORATED, AUTODESK, INCORPORATED and COREL CORPORATION LIMITED (collectively referred to hereinafter as "Plaintiffs"), through counsel, hereby file their Complaint against Defendant, Action Group, Inc. ("Defendant"), and allege as follows:

PARTIES

1. Plaintiff ADOBE SYSTEMS, INCORPORATED ("ADOBE") is a Delaware Corporation having its principal place of business at 345 Park Avenue, San Jose, California 94903.
2. Plaintiff AUTODESK, INCORPORATED ("AUTODESK") is a California corporation having its principal place of business at 111 McInnis Parkway, San Rafael, California.
3. Plaintiff COREL CORPORATION LIMITED ("COREL") is a corporation formed under the laws of Ireland and having its principal place of business in Ottawa, Ontario, Canada.

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It Can Get Ugly



- Ex parte seizure and impoundment order authorizing BSA with assistance from U.S. Marshal's Service to examine hard drives
- Ex-employee whistleblower named in Order

Microsoft May Be More Reluctant to Sue

- Adobe Systems Inc. v. Ernie Ball Inc., 2:00-cv-08385-CBM-JWJ (C.D. Cal. Aug. 2000)
- Microsoft obtained order preventing deletion of programs
- Ernie Ball settled and then ordered all Microsoft products removed from company computers within sixty days
- USA Today ran story about how Ernie Ball became “Microsoft Free”

Common Issues – Evidence of Licenses

- BSA or SIIA will initially insist on copy of license agreement
- BSA or SIIA may be more flexible in some cases
 - Pictures of operating system sticker with license number
 - Receipts from purchases of software
 - Evidence from manufacturer websites of software loaded on computer when delivered, Dell, HP, Gateway, Apple, etc.
 - Other types of evidence of a license

Common Issues – MSRP or Retail Price

- The BSA or SIIA will typically calculate its settlement demand based on the MSRP of the software programs
- The MSRP is often far greater than the retail price that would be paid

Common Issues – Software Suites

- The BSA will typically calculate its settlement demand based on the component parts of a Software Suite
- For instance, the price of the Microsoft Office Suite is far less than its component parts

Common Issues – Other Terms

- Certification of accuracy of self-audit
- Software Code of Ethics
- Three year right to semi-annual audit
- Attorney's fees (typically small)
- Compulsory attendance at software asset management training (not common)

Most BSA Settlements Relatively Modest

Computer Services Firm Agrees to Pay \$500,000 to Settle Claims of Unlicensed Software Use

WASHINGTON – February 6, 2012 –

The [Business Software Alliance](#) (BSA), the voice of the world's commercial software industry, today announced a settlement with [PCS-CTS](#) of Houston, TX. PCS-CTS agreed to pay \$500,000 to BSA to settle claims that it had unlicensed copies of Adobe, Filemaker, Microsoft, and Symantec software installed on its computers. As set forth in the settlement agreement, the company agreed to delete all unlicensed copies of software from its computers, acquire any licenses necessary to become compliant and commit to implementing stronger software asset management (SAM) practices. The agreement does not however constitute an admission of liability on behalf of PCS-CTS. BSA was alerted to the unlicensed software use by a confidential report made on its web site www.nopiracy.org. The settlement announced with PCS-CTS is the largest BSA settlement in Texas to date.

Software Audits: Exposure Analysis

- Internal assessment of financial exposure critical before any information is disclosed to the auditing entity.
- Identify inventory data that may be erroneous or infrastructure details that may affect licensing obligations.

Software Audits: Resolution

- Negotiate defined audit-resolution terms at the licensing stage.
- During the audit, license terms give the publishers an unacceptable amount of leverage when it comes to driving the audit process.
- Offer to purchase licenses of equal value to cover prospective needs.
- Instead of retroactive support or maintenance, offer to commit to a longer or higher-level support term going forward.
- Obtain a release from the publisher at the end of the audit in order to confirm the legal resolution of any compliance discrepancies.

Determining the Amount in Controversy

- May be difficult to determine because contractual audit provisions often do not specify a formula for resolving licensing gaps.
- Two to three times MSRP is usually a good target.

Calculation of Damages

- The copyright plaintiff can elect either statutory damages or lost profit.
- Software compilations should be treated as one work for purposes of calculating damages.
- Actual Damages (17 U.S.C. § 504(b))
- Statutory Damages (17 U.S.C. § 504(c))
 - Willful Infringement: \$150,000 per work
 - Infringement: \$30,000 to \$750 per work
 - Innocent Infringement: \$200 per work
- Attorney's Fees and Costs (17 U.S.C. § 505)

When Publishers Sue

Venue & Choice of Law

- Carefully consider choice of law and venue selection clauses before finalizing strategy.

Individual Liability

- State law protections such as corporation and LLC do not apply in copyright cases.
- Individuals become liable when they have the ability to control and benefit from infringement.

Calculating Switching Costs

- Switching costs may change the balance of power especially if termination provisions are present.

Assessing the Publisher's Case

- Probability of success on the merits of ambiguous contractual provisions may be the most likely scenario for litigation.

The Importance of Ambiguities in Software License Agreements

- Determine whether the license in question contains a provision indicating that ambiguities will not be construed against the drafter.
- The Parol Evidence Rule states that the parties may introduce extrinsic evidence to prove that their interpretations of the contract are consistent with the parties' intent when entering into the contract.

Summary Judgment vs. Trial

- Triable issues of fact regarding software license contracts with ambiguous provisions generally favor the end user instead of the publisher.

When to File a Declaratory Judgment Action

- A declaratory judgment action can be an excellent forum shopping strategy.
- Often changes the dynamics and stakeholder with the publisher organization.

Drafting Settlement Agreements

- Update license terms including grant, 3rd party access, and geographic rights.
- Secure a broad release of all claims.
- Secure audit forbearance for 1 to 3 years.