Surprises and Gotchas in Your IBM License Agreements

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Agenda

o IBM Agreements
  o Negotiating Favorable Licensing Terms
  o Audit Provisions
  o Revisions and New Agreements

o IBM Acquisitions

o Types of IBM Licenses
  o Full-Capacity Licenses
  o Sub-Capacity Licenses

o Responding to IBM Audits

o Investigating License Compliance

o Resolving IBM Audits

IBM Agreements

o Agreements are not easy to understand and manage

o Often contain complex, expensive, and onerous provisions

o Most leverage at the beginning of relationship or renewal of the agreement

o Many customers have power to negotiate custom clauses

o Little or no leverage when user is already in breach

Negotiating Favorable Licensing Terms

o Evaluate how the software will be used

o Understand the license requirements, especially if virtual environments or clusters are present

o Try to identify and resolve ambiguities before agreement is signed

o Ensure that the license expressly grants usage rights required for architecture being used

o Confirm what rights exist upon termination or expiration of the license

o Get legal involved at the outset of the relationship, or anytime there is a license revision

Audit Provisions

o   Rights Under the License Agreement are Usually Onerous

o   Typically Provisions Contain:

    o   Right to Enter and Inspect business to Confirm Compliance

    o   Use of a Third-Party Auditor

    o   Penalties, Including Back Maintenance and Interest for 2 or 3 Years

o   IBM Will Occasionally Negotiate Audit Provisions

o   Easier to Negotiate Before License Purchase

Revisions and New Agreements

o Difficult to determine what agreements are effective

o Relationship sometimes spans decades

- o Sometimes an amendment or addendum is signed rather than a new agreement

- o Often no one affirmatively accepts new licensing terms

o IBM can usually revise agreement without a signature if customer fails to object to e-mail

o If there are many competing agreements, important to insist on an agreement that covers current relationship

IBM Acquisitions

o In 2015, IBM acquired 11 companies

o IBM regularly changes the licensing metrics for software it acquires

o New license metrics are often unfavorable to IBM's customers

o Many customers find themselves under-licensed after an IBM conversion

Types of IBM Licenses – Full Capacity

o Processor Value Unit (PVU)

   o Most common license

   o Based on cores, not chips or sockets

o Authorized User License

   o Named users cannot be reassigned unless original user replaced on a long-term basis

o Concurrent Users

o User Value Units

   o Usually for Tivoli products

   o Number of licenses needed decrease as users increase (i.e., 5000 users need 5000 UVUs but 10,000 users need 7,500 UVUs)

Types of IBM Licenses – Sub-Capacity

o   For large servers and virtual environments, IBM offers sub-capacity licensing

o   Requires customers to install IBM's License Metric Tool (ILMT)

o   Requires monthly or quarterly reporting

o   Can lead to extensive exposure if ILMT not properly deployed and managed

o   Lack of ILMT is primary source of liability in an IBM audit

Responding to IBM Audits

o Establish Framework for Audit

    o Scope

    o Auditors

    o Whether On-Site Meeting Will Be Allowed

o Confidentiality and 408 Agreements

o Timeframe

o Consequences of Non-Compliance – Buy or Uninstall

o Will be governed by audit provision in the relevant agreement(s)

Investigating License Compliance - Deployments

o   Automated process designed to identify all software products installed on corporate computers

o   Discovery of all assets is challenging

o   Reporting is unreliable

o   Validation is difficult

o   IBM recommends or requires ILMT

o   Make sure all data is protected by Attorney Work-Product Privilege

Investigating License Compliance - Entitlements

o IBM contracts often contain entitlements

o Review all contracts with publishers who were acquired by IBM

o Collect recent software services & support invoices

o Determine whether IBM has issued to your organization a Proof of Entitlement (POE) for any of its software

Resolving IBM Audits

o Evaluate settlement demand to ensure the math and the analysis are accurate

o IBM usually sends an audit resolution quote instead of a formal demand

o The amount due is often negotiable

o IBM may allow customer to substitute a needed product

o It is important to ask for a release

Case Study / Issues

o Customer has many types of IBM agreements

  o Issue 1: Original license sales cannot be validated by customer or IBM

  o Issue 2: Customer changed from full-capacity to sub-capacity licenses without installing ILMT

  o Issue 3: IBM purported to change license terms for acquired products without customer acceptance

Case Study / Possible Resolutions

o   <u>Issue 1</u>: Consider updating IBM agreements to consolidate all use cases on a single set of documents.

o   <u>Issue 2</u>: Evaluate potential exposure and viability of installing and running ILMT. Determine whether there are any licensing metrics already in place.

o   <u>Issue 3</u>: Ensure that IBM agreements and purchase documents contain language restricting IBM's ability to revise without customer signature.

Questions?

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