



WHAT'S HIDDEN IN YOUR SPLA?

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Agenda

- What is a SPLA and who needs one?
- Do all publishers have a SPLA?
- What is "commercial hosting"?
- SPLA Road Map Questions and Guidance
- Defending audits involving hosting rights
- Estimating audit exposure
- Negotiating audit settlements
- Questions

What is a SPLA and Who Needs One?

Services Provider License Agreement

- Microsoft Licensing model originally released in 1999
- Standard retail and volume licensing terms prohibit the use of MS software for “commercial hosting services”
- Primary purpose of SPLA-licensed products must be the delivery of hosted or rental software services
- Typical SPLA customers:
 - Data hosts (HaaS, website hosts, file-sharing)
 - Application providers (hosted BDR, hosted CRM, hosted messaging)
 - Scott & Scott LLP
- Allows businesses to license MS products on a month-to-month subscription basis, rather than committing to an up-front license purchase

Do All Publishers have a SPLA

- No, but many publishers have other models that allow customers to host applications for end users
- For Example:
 - IBM previously had Application Specific Licensing (ASL) but now has an Embedded Solution Agreement (ESA) or an OEM agreement
 - Oracle allows Technology Hosting with a properly completed Proprietary Application Hosting Registration Form (PAHRF)

What is “commercial hosting”?

Microsoft:

“You may not host the products for commercial hosting services.”

(Product Use Rights, *et al.*)

- Standard-form EULAs and Product Use Rights do not define “commercial hosting services”
- Additional guidelines in the form of licensing briefs, charts, etc. may not be directly enforceable against MS, but:
 - they often help to illustrate more subtle licensing concepts, and
 - if a court were to determine that the agreements are ambiguous, they likely would be admissible as extrinsic evidence regarding intent
- Example: SPLA Qualification Road Map
 - Flowchart to help guide licensing decisions for Microsoft products
 - Last revision in 2011

What is “commercial hosting”?

Oracle:

“Companies that own and develop a commercially available application that is available to multiple end users and operates with an embedded Oracle program. Companies who develop proprietary applications and embed Oracle technology as the database component within their applications are considered Proprietary Application Technology Hosting companies.”

IBM:

Offering direct or indirect access to IBM products either as embedded technology or bundled technology.

SPLA Road Map Core Questions

Assuming non-anonymous third parties are accessing the hosted solution, the most critical questions pertaining to “commercial hosting” for most businesses are:

- **#4:** *“Is the licensee providing access to software application(s) used for third party business operations?”*
(Data or applications?)
- **#5:** *“Is the third party using the software application as a way to acquire goods or services from the licensee?”*
(Means to an end? Example: Amazon.com)
- **#7:** *“Does the licensee own the business logic, content, or data and deliver the service under its own brand?”*
(Outsourcer?)

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SPLA Road Map Guidance

Microsoft's guidance regarding licensing scenarios:

- **#4**
 - *“Scenario Yes: Company A provides a software application for Company B to use.”*
 - *“Scenario No: Company A hosts Company B’s website.”*

- **#5**
 - *“Scenario Yes: Customers of ABC Bank use the bank’s online banking service, which is built on Microsoft software products, to conduct their banking online.”*
 - *“Scenario No: Company A provides a customer relationship management (CRM) application for Company B to support its customer engagements.”*

- **#7**
 - *“Scenario Yes: A travel company with an online presence is using its own brand to sell its travel services.”*
 - *“Scenario No: Company A is a travel company with an online presence that delivers a corporate travel portal branded in the name of Company B.”*

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SPLA Road Map Outcomes

Three principal outcomes for most businesses:

- **Internal Use**
 - Third-party access (if any) is anonymous / unauthenticated
 - No external client licensing is required
- **Internal Use with External Connectors – Disappearing Soon**
 - Third-party access requires client licensing (CALs, ECs or processors)
 - Services do not require “commercial hosting” rights
- **“Commercial Hosting”**
 - Third-party access requires client licensing
 - That access requires “commercial hosting” rights via SPLA or via Self-Hosted Applications benefit with Software Assurance

Defending Audits Involving Hosting Rights

- Many companies are unaware of hosting agreements/ requirements
- Most SPLA, OEM, ASL, ESA, and PARHFs have auditing rights or are ancillary to Master Agreements containing audit rights
- Critical initial steps:
 - Examine the signed agreements to confirm that the scope and entity(ies) identified in the audit notice letter are correct
 - Obtain an agreement from publishers and their auditors (usually Deloitte, PwC, KPMG or E&Y) regarding the confidentiality of the audit data and the process to be followed during the audit

Estimating Audit Exposure

Potential audit exposure sources:

- Past unreported software usage / extrapolated counts
- “Roll-forward” findings
- Penalty percentage
- Inspection fees

Past exposure can be difficult to estimate:

- Absent historical data, various extrapolation methods applied to audit “snapshot”
- Active Directory or other lists of user counts often used as basis for calculated license requirements
- Licensing models may have changed over time

Negotiating Audit Settlements

- Before negotiating on amounts, it is critical to establish factually accurate assumptions underlying the compliance costs
- Settlement terms:
 - Installment payments
 - Release of liability
 - Audit forbearance
 - Confidentiality
- Consequences of not settling:
 - Termination of Agreement (inability to continuing hosting/reselling)
 - Litigation (possible injunctive relief)

Questions?

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