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Software Agreements and Audits

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Agenda

Licensing Models

- Historic, Copy-centric metrics
- Modern, Infrastructure-centric metrics

Licensing Concerns

- Infrastructure assessments
- Virtualization
- Choosing the right kind of license agreement

Audits

- Scope & confidentiality
- Data collection
- Resolution

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Historic Licensing Models

- Software licensing in the recent past has been the software installation itself.
- Primarily copy-centric metric for determining licensing obligations.
- For each installation of a program, a corresponding license has been required, mostly without regard to the performance qualities of the computer on which the program is installed.

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Historic Licensing Models: Exceptions

- Server/CAL
- For each installation of the server software, a corresponding license is required.
- For each remote client accessing the server software, a corresponding client-access license (CAL) is required.
- Other, additive CALs have been available to "unlock" certain features of the server software (e.g., Terminal Services / Remote Desktop CALs).
- Custom licensing agreements based on unique characteristics of the software to be licensed and the network or networks where it is to be used.

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New Licensing Models: "Custom" is the New Normal

- More options and flexibility for software needs.
- Often complex software asset management (SAM) obligations accompany custom agreements.
- Businesses must equip themselves to recognize the unique challenges entailed with the various options in order to avoid unnecessary licensing exposure.

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New Licensing Models: Workstations

- **Single-seat / stand-alone**
  - Pros: Relatively easy accounting, relatively easy IT support
  - Cons: Inflexible, can be more costly to scale
- **Thin clients**
  - Pros: Easier to scale, central control over deployments
  - Cons: Hardware deployments can be more expensive and technically demanding, more limited vendor options
- **The Cloud**
  - Pros: Easiest to scale, little and sometimes no license-management responsibility
  - Cons: Loss of control, requires special attention to vendor contracting and relationship management

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New Licensing Models: Servers

- **Server installation** (with or without clients)
- **Processor**
  Licenses are acquired based on the number of processor chips activated and available in the computer – typically allows unlimited clients **.**
- **Processor capacity**
  Licenses are acquired based on the strength of the computer's processor(s) – most prominent example is IBM's processor value unit (PVU) licensing model.
- **Function-specific capacity**
  Licenses are acquired based on some other metric that is characteristic of how software is used (e.g., licensing for a backup solution that is based on the volume of data backed up using that solution).
- **The Cloud**

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Licensing Concerns: Infrastructure Assessments

- Businesses must be able to determine what hardware it owns and what software it needs.
- Internal auditing is necessary in order to gather information about the enterprise's IT infrastructure.
- Principal challenges include:
  - Diverse hardware types and configurations can complicate the inventory process.
  - Need to gather division-level or even employee-level input while minimizing division-level and even employee-level involvement in the licensing process.
  - Technical expertise to interpret raw data may reside outside the enterprise.

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Licensing Concerns: Virtualization

Many software publishers limit – in one way or another – their customers' ability to license software in virtualized environments, for example:

- **Microsoft** often caps the number of virtual "operating system environments" in which a software product may be installed, depending on the edition of the software to be deployed (e.g., SQL Server Datacenter versus SQL Server Enterprise).

- **IBM** often requires that a server or cluster be licensed to its full processor capacity for a software product – even if only one virtual machine hosted on the server or cluster is running that product – unless the company agrees to the technical and procedural requirements for "sub-capacity" licensing, allowing for license acquisition at the virtual-server level.

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Licensing Concerns: License Agreement Types

Retail EULA

Retail EULAs do not offer any opportunity for custom terms, and pricing typically is not competitive for large license purchases.

Volume Licensing

Most terms remain "off-the-shelf" forms that offer little, if any, room for customization and that also typically include onerous audit-rights terms in favor of the publisher.

Enterprise-Level Agreements

Increased flexibility may also have higher front-end costs:

- Higher up-front license-purchase requirements.
- Necessity of legal review and (in many cases) negotiation with counsel for the software publisher.
- Need for IT teams to implement new solutions or procedures to correctly track deployments and licenses under the applicable agreement or agreements.

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Software Audits: 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).
- 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).
- 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.

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Software Audits: Preliminary Framework

At the onset of any audit, it is vital to try to obtain the publisher's agreement (in writing) as to:

- Computers and products to be included in the inventory.
- Requirement that all audit materials and audit-related communications be maintained confidential.
- Prohibition on using any audit materials or audit-related communications for any purpose (including litigation). other than conducting and resolving the audit.

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Software Audits: Data Collection

Data-collection challenges within the context of a software audit generally are the same as those within the context of regular inventory processes:

- "Document soup" complicates license tracking
- Tools to assist with network inventories may not capture all necessary information.
- Much heightened need to gather employee-level input while minimizing employee involvement in the audit process.
- Technical expertise to interpret raw data may reside outside the enterprise.

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Software Audits: Exposure Analysis

- Internally 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.

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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.

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Questions?

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