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TECHNOLOGY ATTORNEYS



Legal Risks in IBM Licensing

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Agenda

- IBM Agreements
  - Negotiating Favorable Licensing Terms
  - Audit Provisions
  - Revisions and New Agreements
- IBM Acquisitions
- Types of IBM Licenses
  - Full-Capacity Licenses
  - Sub-Capacity Licenses
- Responding to IBM Audits
- Investigating License Compliance
- Resolving IBM Audits

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IBM Agreements

- Agreements are not easy to understand and manage
- Often contain complex, expensive, and onerous provisions
- Most leverage at the beginning of relationship or renewal of the agreement
- Many customers have power to negotiate custom clauses
- Little or no leverage when user is already in breach

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Negotiating Favorable Licensing Terms

- Evaluate how the software will be used
- Understand the license requirements, especially if virtual environments or clusters are present
- Try to identify and resolve ambiguities before agreement is signed
- Ensure that the license expressly grants usage rights required for architecture being used
- Confirm what rights exist upon termination or expiration of the license
- Get legal involved at the outset of the relationship, or anytime there is a license revision

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Audit Provisions

- Rights Under the License Agreement are Usually Onerous
- Typically Provisions Contain:
  - Right to Enter and Inspect business to Confirm Compliance
  - Use of a Third-Party Auditor
  - Penalties, Including Back Maintenance and Interest for 2 or 3 Years
- IBM Will Occasionally Negotiate Audit Provisions
- Easier to Negotiate Before License Purchase

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Revisions and New Agreements

- Difficult to determine what agreements are effective
- Relationship sometimes spans decades
  - Sometimes an amendment or addendum is signed rather than a new agreement
  - Often no one affirmatively accepts new licensing terms
- IBM can usually revise agreement without a signature if customer fails to object to e-mail
- If there are many competing agreements, important to insist on an agreement that covers current relationship

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IBM Acquisitions

- In 2011, IBM acquired 17 companies for $6 billion
- IBM changes the licensing metrics for software it acquires
- New license metrics are often unfavorable to IBM's customers
- Many customers find themselves under-licensed after an IBM conversion

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Types of IBM Licenses – Full Capacity

- Processor Value Unit (PVU)
  - Most common license
  - Based on cores, not chips or sockets
- Authorized User License
  - Named users cannot be reassigned unless original user replaced on a long-term basis
- Concurrent Users
- User Value Units
  - Usually for Tivoli products
  - Number of licenses needed decrease as users increase (i.e., 5000 users need 5000 UVUs but 10,000 users need 7,500 UVUs)

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Types of IBM Licenses – Sub-Capacity

- For large servers and virtual environments, IBM offers sub-capacity licensing
- Requires customers to install IBM's License Metric Tool (ILMT)
- Requires monthly or quarterly reporting
- Can lead to extensive exposure if ILMT not properly deployed and managed
- Lack of ILMT is primary source of liability in an IBM audit

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Responding to IBM Audits

- Establish Framework for Audit
  - Scope
  - Auditors
  - Whether On-Site Meeting Will Be Allowed
- Confidentiality and 408 Agreements
- Timeframe
- Consequences of Non-Compliance – Buy or Uninstall
- Will be governed by audit provision in the relevant agreement(s)

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Investigating License Compliance - Deployments

- Automated process designed to identify all software products installed on corporate computers
- Discovery of all assets is challenging
- Reporting is unreliable
- Validation is difficult
- IBM recommends or requires ILMT
- Make sure all data is protected by Attorney Work-Product Privilege

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Investigating License Compliance - Entitlements

- IBM contracts often contain entitlements
- Review all contracts with publishers who were acquired by IBM
- Collect recent software services & support invoices
- Determine whether IBM has issued to your organization a Proof of Entitlement (POE) for any of its software

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Resolving IBM Audits

- Evaluate settlement demand to ensure the math and the analysis are accurate
- IBM usually sends an audit resolution quote instead of a formal demand
- The amount due is often negotiable
- IBM may allow customer to substitute a needed product
- It is important to ask for a release

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Case Study / Issues

- Customer has many types of IBM agreements – OEM, Passport Advantage, ASP
  - Issue 1: OEM sales cannot be validated by customer or IBM
  - Issue 2: Customer changed from client-server model to a hosted model without changing licensing prices or agreement
  - Issue 3: IBM purported to change license terms without customer acceptance

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Case Study / Possible Resolutions

- Issue 1: Implement accounting procedures to capture IBM sales separately and periodically audit end users
- Issue 2: Consult with IBM in planning/scoping stage to effectively gauge impact on current agreement provisions and pricing
- Issue 3: Ensure that IBM agreements and purchase documents contain language restricting IBM's ability to revise without customer signature

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