

## What Is “Commercial Hosting” When It Comes To Microsoft Software?

By Christopher Barnett

Many companies using Microsoft products to deliver services to their customers are familiar with the “commercial hosting” prohibition included in most Microsoft license agreements:

*You may not host the products for commercial hosting services.*

Most CIOs reading that prohibition also are familiar with the feeling of deep confusion that can arise when they notice that Microsoft has utterly failed to include any definitions or guidance in its license agreements regarding what “host” or “commercial hosting services” means.

Like many publishers, Microsoft provides licensing guidance in white papers, licensing briefs and other documents published on its website. While those documents typically are not incorporated in the license agreements, making them directly enforceable against Microsoft, they can be very persuasive in the event of a dispute. If a licensee can show that the license terms are ambiguous, then a court may rely upon them in determining the parties’ intent.

In the past, Microsoft has provided guidance on the “commercial hosting” question in the form of a “SPLA Qualification Road Map,” which is a flowchart presenting a number of use-characterization questions a company can ask itself in analyzing its product deployments.<sup>1</sup> For many service providers, the crucial questions in the Road Map are:

- **Question 4:** “Is the licensee providing access to software application(s) used for third party business operations?” [A “Yes” answer generally makes it more likely that the line of questioning will require “commercial hosting” rights.]
- **Question 5:** “Is the third party using the software application as a way to acquire goods or services from the licensee?” [A “No” answer generally makes it more likely that the line of questioning will require “commercial hosting” rights.]
- **Question 7:** “Does the licensee own the business logic, content, or data and deliver the service under its own brand? [A “No” answer generally makes it more likely that the line of questioning will require “commercial hosting” rights.]

Thus, the answer to the title of this entry is: “It depends.” It depends on the nature of your end users, the nature of your relationship with those end users, the Microsoft software used to deliver services to those end users, how the end users access your services, what those services are, and how those services are related to your business operations overall, among other things. It remains critical to involve legal counsel early in the process of deciding whether and how to license Microsoft software for use in customer-facing environments.

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<sup>1</sup> The last version of the road map was published in 2011, but the links to the document apparently since have been removed from Microsoft’s site. Regardless, unless Microsoft makes it clear to everyone that it has deprecated the road map (which it has not yet done, to my knowledge), it remains a valuable document for current and prospective SPLA licensees. Copies of the road map currently remain relatively easy to locate via a [Google search](#).



**About the author Christopher Barnett:**

Christopher represents clients in a variety of business, intellectual property and IT-related contexts, with matters involving trademark registration and enforcement, software and licensing disputes and litigation, and mergers, divestments and service transactions. Christopher's practice includes substantial attention to concerns faced by media & technology companies and to disputes involving new media, especially the fast-evolving content on the Internet.

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