

The Risks of IBM Sub-Capacity Licensing

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I am an intellectual property attorney specializing in defending end-users in software audit matters including those initiated by IBM. We get hired by targets of IBM audits to facilitate the flow of information and protect the client's interest in the audit process. The most significant compliance claims we have encountered arise under Virtualization Capacity (Sub-Capacity) License terms in IBM's Passport Advantage Licensing offering. According to IBM, Sub-Capacity licensing "allows flexible software licensing using advanced virtualization capabilities such as shared processor pools, micro-partitioning, virtual machines and dynamic reallocation of resources." Sub Capacity Licensing is very attractive in data center environments because "it enables customers to license software for only the processor core capacity available to the partition hosting the IBM software." Although very attractive, Sub-Capacity licensing can create very significant legal liability under two common fact patterns.

1. Customer Purchases for Sub-Capacity but servers are not capped - in this scenario IBM entitlements are purchased under certain assumptions regarding the server capacity and eligibility for sub-capacity licensing. For whatever reason during the initial deployment or afterwards the hardware is not capped and the processor core capacity available to the partition hosting the server software is much greater than originally believed resulting in significant financial exposure under IBM's Processor Value Unit (PVU) calculations.

2. Customer Purchases for Sub-Capacity but fails to deploy ILMT - in this scenario IBM entitlements are purchased under the assumption of eligibility for sub-capacity licensing and is correctly deployed using appropriate capping. However, because the client fails to deploy the ILMT discovery tool or to otherwise maintain the required monthly reports, IBM claims that customer owes for the full capacity of the hardware under PVU calculations notwithstanding the use of capping. IBM argues that because IBM Passport Advantage PVU-based offerings license terms require ILMT reports be created, verified, adjusted, signed, and saved, any customer that fails to comply with the ILMT requirements forfeits its rights to use sub-capacity licensing and therefore owes as if the hardware had not been capped.

While there are many issues that arise in IBM audits, the issues involving sub-capacity licensing are the most prevalent and involve the most financial exposure based upon our experience.



About the author Rob Scott:

As the managing partner of Scott & Scott, LLP, Robert has built a global practice representing clients on issues where technology, media and the law intersect. A boutique firm with international reach, Robert ensures that Scott & Scott is committed to legal excellence, unparalleled customer service, and cost-effective strategies that deliver positive results. Representative clients range from multinational corporations to local mid-market businesses spanning all industries.

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