Be Wary of Changes in New SPLA Contracts

By Christopher Barnett

Companies that have long relationships with Microsoft know that the company's form licensing agreements have steadily evolved over time, and typically for the worse. If software licensing can be said to have any "natural laws," certainly the First Law could be paraphrased to something like: "If you agree to an inch, be prepared to give a mile." So it is with Microsoft's standard-form Services Provider License Agreement (SPLA).

The most recent iterations of the SPLA include a handful of noteworthy changes, relative to the forms that many current SPLA licensees may have signed at the beginning of their relationships with Microsoft. Those changes include the following:

- **End User License Terms (EULTs) now apply to all end users.**
  In the past, the EULTs – a form end-user license agreement for SPLA providers to include in their customer contracts – were necessary only in connection with services that included Client Software or Redistribution Software. All other end user agreements needed to include terms that aligned with a laundry list of requirements that was set forth in the SPLA. The laundry list now is gone, and all end user agreements now must incorporate the EULTs. As a result, all SPLA providers will need to be familiar with the EULTs and will need to be prepared to incorporate them into their customer agreements.

- **No limitation of liability when defending Microsoft.**
  The new SPLA now expressly provides that the standard, mutual limitation-of-liability included in the Microsoft Business and Services Agreement (the master agreement to which the SPLA is attached) no longer applies to a licensee's duty to defend Microsoft against certain third-party claims. Thus, a SPLA licensee could have effectively unlimited exposure arising from such claims. That state of affairs may be inconsistent with a licensee's internal insurance or risk-management policies.

- **Extensive new audit rights for Microsoft.**
  The most troubling new developments pertain to audits. The audit clauses in all of Microsoft's license agreements has become more and more burdensome for licensees over recent years, and the new SPLA forms are no exception. Past SPLAs said very little regarding audits, leaving most of the parties' audit-related obligations to be defined by the MBSA. However, the new forms contain language broadly obligating licensees to provide Microsoft's software auditors with "access to all servers running the Products," without defining what that "access" entails. In addition, in some forms Microsoft has incorporated extensive, new provisions related to "anti-corruption" policies, recordkeeping and audits. Those anti-corruption audits theoretically would be limited to confirming a licensee's compliance with the new SPLA's anti-corruption requirements. However, those requirements include an obligation to maintain an accounting system that would enable Microsoft to probe every aspect of a licensee's finances related to SPLA.

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Prospective and renewal SPLA licensees with bargaining power should seriously consider mounting a determined effort to seek appropriate amendments to the above (and other) terms in the new SPLA form. Absent appropriate amendments, companies providing hosting services may want to think about organizing their infrastructures and business models to minimize or eliminate their reliance on SPLA licensing.

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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