Technical Challenges Associated with "Hosting" Restrictions in License Agreements

By Christopher Barnett

Most software publishers put limits on (or under some circumstances simply prohibit) the use of their products in connection with solutions delivered over the Internet to third-party end users. The license terms imposing such restrictions often can be difficult to interpret (as discussed previously). However, even in cases where the controlling language is relatively clear, it can remain difficult for CIOs to determine how to accurately and correctly track "hosted" deployments and "non-hosted" deployments for licensing purposes.

For example, a company may have a web server to which end users directly connect, an application server containing the core of the solution offered to those users by the company, and a database server that delivers content to the application server. It also may be the case that while the web server and application server require the company to obtain some kind of "commercial hosting rights," the database server in this configuration does not, for one reason or another, require the same rights. (Note: This is only a hypothetical example. Please DO NOT assume any database server deployments to be outside the scope of any publisher's "commercial hosting" requirements.) It therefore may be theoretically possible for this company to license the web server and application server under one licensing agreement (say, a Services Provider License Agreement (SPLA) for Microsoft products) and the database server under a different agreement (say, a Select or Enterprise agreement).

The problem for many businesses in considering such an option is at least three-fold:

1. **Added Audit Complexity.** Software asset management (SAM) is complicated enough without having to differentiate between "hosted" and "non-hosted" servers for inventory purposes.

2. **Resource Sensitivity.** It may make sense for resource-management purposes for the three servers to be virtualized partitions on the same physical machine, making such a possibility even more cumbersome (if not impossible under standard licensing models).

3. **The Real World.** Most IT environments are significantly more complex than the simplified example provided above, making it that much more difficult at the outset to draw the "hosted"/"non-hosted" line in a way that the publisher would approve.

For these and other reasons, many businesses try to find a one-size-fits-all option for the entire environment. Microsoft, as one example, has two: internal-use rights provided under SPLA and the Self-Hosted Applications benefit under Software Assurance. However, not all publishers offer this level of flexibility. Therefore, it makes sense for IT teams to work closely with knowledgeable legal counsel in selecting a licensing model that represents the best fit for the environments in question and then negotiating custom licensing terms to address areas of potential risk.

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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