Types of Audits in Software License Disputes
By Robert J. Scott

A variety of resolution frameworks are available to businesses involved in a software license dispute. An audit is the most common such framework and entails an analysis of the organization's network for software installations compared against its licenses. The types of audits initiated by software publishers and trade associations include self audits, independent audits, software asset management ("SAM") engagements, and publisher-staffed audits.

Self Audits
Self audits are the least disruptive of all software audits. They are a mechanism often employed by trade associations acting on behalf of software publishers. The trade associations, and in some instances, the publisher itself, requests that the target company conduct a self audit and report the results of the audit to the trade association or publisher. Companies that agree to conduct a self audit must inventory the applicable software on the computers within the scope of the audit and report the number of installations, the number of licenses, and the number of license deficiencies.

When evaluating whether you should cooperate or litigate after a request for a self audit, you should consider the benefits of a self audit compared to the other types of audits. For instance, in publisher and third-party audits, you usually have a contractual obligation to participate in the audit and provide information to the auditors. When conducting a self audit, you have some control over the timing of the audit and the allocation of resources. That flexibility is not always present in other types of audits.

Additionally, outside auditors are not always required to be impartial and may submit incomplete or inaccurate audit results. For these reasons, regardless of the type of audit requested by the software publisher, companies faced with an audit should request the opportunity to provide a self audit rather than an independent audit, a publisher-staffed audit, or (usually) a SAM engagement.

Independent Audits
An independent software audit involves the use of a third-party auditor to gather the facts
relevant to the dispute. This audit method may be the most costly and time consuming option for the audit target.

Many software licenses incorporate audit provisions allowing the software publisher to request an independent audit. Such provisions must be carefully analyzed to determine the potential business impact of the audit and liability that may result from the audit.

In an independent audit, the organization has no input into the selection of the auditor, how long the audit will last, or the scope of the materials the auditors may review. The target company must also bear the costs of the audit if the auditor finds a licensing discrepancy of more than 5%. If the auditors conclude there is a discrepancy, the publisher has the contractual authority to unilaterally determine the license price for the software necessary to become compliant. Independent audits have significant business impacts and should be avoided if possible. Nonetheless, independent audits are preferred over SAM engagements and publisher-staffed audits because the auditor is usually ethically obligated to remain independent.

SAM Engagements
SAM engagements are also conducted by third-party auditors or consultants, but there is no obligation that the auditor

in a SAM engagement be independent. The software publisher requests that the target allow a third party to audit its software installations and report the results directly to the publisher. In these engagements, the publisher pays the auditor, and the target is required to purchase licenses to cover any deficiencies in its software licenses. Microsoft's SAM engagement has been extensively used in lieu of traditional software audits with mixed reviews from the end user's perspective.

Participation in a properly managed SAM engagement may be in the client's best interest because such engagements typically provide some flexibility and a lower total cost of resolution than self audits and independent audits. In many instances, the publisher seeks no compensation for alleged past infringements in exchange for an agreement to come into compliance on a go-forward basis.

Publisher-Staffed Audits
Publisher-staffed audits are the most intrusive and least impartial of all software audits. In these audits, the publisher's employees collect information relevant to the dispute. In many instances, publishers request a company's confidential information or access to a company's network to conduct the audit. Although a publisher may arguably have a contractual right to request that it be allowed to examine its customers' computer network, it is never advisable to agree to a publisher-staffed audit without examining all of the alternatives first.

About the author Rob Scott:

Robert represents mid-market and large enterprise companies in software license transactions and disputes with major software publishers such as Adobe, IBM, Microsoft, Oracle and SAP. He has defended over 225 software audit matters initiated by software piracy trade groups such as the BSA and SIIA. He is counsel to some of the world's largest corporations on information technology matters including intellectual property licensing, risk management, data privacy, and outsourcing. Robert ensures that Scott & Scott, LLP continues its focus on cost-effective strategies that deliver positive results.

Get in touch: rjscott@scottandscottllp.com | 800.596.6176