

## What is a “Hosting” Violation Really Worth?

By Christopher Barnett

Using third-party software as components of business solutions delivered to customers over the Internet can be risky. Almost all major software publishers include terms in their license agreements prohibiting or restricting the use of their products for “hosting services” or in connection with “hosted environments.” However, what is level of exposure associated with violating the anti-hosting terms in a software license.

In another [post](#), I discuss the legal complications that may arise in trying to assert a copyright case based on license violations that do not affect a copyright owner’s exclusive rights under U.S. copyright law. If a court were to hold that a hosting violation does constitute copyright infringement, then the resulting damages would be relatively easy to calculate. A copyright plaintiff may elect an award of statutory damages in an amount set by the court or (more likely here) actual damages, which typically are based on unpaid license fees.

However, if a court were to agree that hosting cannot constitute copyright infringement, then the answer to the damages question would be more complicated. Most courts will hold (based on state law principles) that contract-breach damages are to be determined by what the plaintiff reasonably expected to receive as a benefit of its contract with the defendant. With a case that arises from mere overdeployment of software – too many installations on too many computers – then a publisher’s expectation damages often can be easy to calculate based on license terms requiring licensees to purchase a license for each copy of a product installed. However, if the license mentions hosting only to prohibit it, then any damages associated with a hosting-related breach arguably would be speculative and difficult or impossible to calculate. Prevailing on that point in court could be very advantageous for a defendant.

However, the fact that contract-based damages arising from hosting violations may be difficult to calculate does not mean that there is no exposure in such cases. For most businesses, the biggest threat is simply termination of the license, which potentially could be backed by an injunction regardless of whether copyright principles are in play. Without the ability to use the third-party components, many hosted-services providers would find themselves in the position of incurring high switching costs to identify alternative components, and that is if they manage to avoid potentially crippling service interruptions.

For these reasons, even though the value of a hosting breach may be a challenge to estimate, it is best to treat it as being significant and to work diligently to ensure that all third-party components are properly licensed and used within the scope of applicable license terms.



### 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.

Get in touch: [cbarnett@scottandscottllp.com](mailto:cbarnett@scottandscottllp.com) | 800.596.6176