

IBM's Audit Rights Take a Turn for the Worse

By Christopher Barnett

The software-audit language contained in IBM's standard license agreements never has been anything that anyone would mistake for customer-focused or even very [fair contract terms](#). However, in August 2014, IBM released a new version of its Passport Advantage Agreement (PAA) that applied immediately to all new business that now is in the process of being incorporated into IBM's legacy relationships by virtue of the rights that IBM conveniently retains to implement unilateral contract changes. While IBM has characterized the PAA changes as "enhancements" in its announcement letters, the changes made to the audit clause are decidedly not in licensees' best interests, as follows:

- **More Wiggle Room.** Older PAAs included an objective "fence" around the scope of IBM's auditors' inquiries, in that licensees were required to provide information "sufficient to provide auditable verification that Customer's use of all Eligible Products is in compliance with the Passport Advantage Terms." In practice, the "sufficiency" language could be used to cut off duplicative or out-of-scope inquiries. However, the newer PAA terms provide for a less stringent audit scope, to encompass all information "reasonably necessary for IBM and its independent auditor to verify Client's compliance with this Agreement."
- **What Business Disruption?** In the past, like audit clauses used by other publishers, the PAA terms specified that "verification will be conducted in a manner that minimizes disruption to Customer's business." The new terms contain no such restriction.
- **Two Years More Money – Now Guaranteed!** IBM's settlement demands following audits typically have included two years' worth of subscription and support fees on top of the fees required to purchase licenses associated with shortfalls. However, while that settlement component was arguably included within the scope of what IBM could demand per the audit terms, licensees also had no meaningful notice that it could be included in a demand. No more:

Client is responsible for retaining adequate records. If Client's records are inadequate to determine IBM Subscription and Support or Selected Support charges, IBM's charges for any excess usage will include two years of associated maintenance and IBM Subscription and Support or Selected Support.

IBM has very complex licensing rules, and IBM audits can be nightmarish ordeals for many companies. The changes IBM has implemented to the PAA likely will have the effect of making that process materially worse. Businesses contemplating significant license purchases from IBM should take the opportunity to seek amendments to the standard terms that provide for more equitable treatment during compliance reviews.



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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