

Windows Desktop Licensing Can Be As Perilous As Any Other Microsoft Product

By Christopher Barnett

In any software audit, there are two over-arching categories of information that must be collected: data regarding what products are deployed on a business' computers and records demonstrating the licenses that the business has acquired to use those products. With regard to the entitlements, some kinds of licenses often are relatively easy to document. For example, in Microsoft audits, entitlement records for server applications like SQL Server or Exchange Server often do not require significant effort to locate, simply because they either were expensive (and, thus, were saved in the ordinary course of business with records regarding other significant purchases) or were acquired through one of Microsoft's volume licensing channels, resulting in purchase records being available either from Microsoft or from the business' reseller. However, other kinds of license records may be less easy to locate, resulting in a potential source of audit exposure when deployments captured in the inventory cannot be reconciled against documented entitlements. Windows desktop operating system licenses are one of the best examples.

Windows often is a significant source of audit exposure, due to the facts that it is running on most (if not all) of a company's workstation computers and that Windows licenses typically are not acquired in stand-alone purchases. Instead, Windows licenses in most cases are acquired with new system purchases from workstation manufacturers like Dell or HP. This can create a documentation problem, since workstation resellers do not always identify in their invoicing the operating systems that ship pre-installed on the computers they sell. (Dell is one exception to that rule, and we often are able to assist our clients in obtaining Dell purchase histories that include information regarding pre-installed operating systems.) In cases where register receipts or other non-detailed documents are the only records demonstrating system purchases, companies should take the time to attach those documents to other information, like packing slips or manufacturers' spec sheets, demonstrating that the models purchased were built with Windows OS.

Other problems with Windows arise when companies try to save money by purchasing less expensive licenses for the product. Full-version Windows licenses are available through only two channels: OEM licenses, which are pre-installed on new computers, and retail licenses, which often are sold individually in boxes via resellers. OEM licenses sometimes are offered for sale individually through resellers for much less than retail licenses, but those sales are always suspicious – by their terms, OEM licenses live and die with the computer systems where the software is installed, and they are not intended for sale apart from the hardware. They also may not be transferred to other computers when the original system malfunctions, is damaged or becomes obsolete (though they may be re-installed on the same machine). Companies that purchase OEM licenses apart from computer systems run the risk of those licenses being ignored in the event of an audit.

Certain Windows licensing rights also are available through Microsoft's System Builder program and through its various volume licensing options (like Open, Select and Enterprise Agreements). However, System Builder licenses (often sold in packs of three or more for much less than retail prices) only allow a licensee to install the software on new computers and to sell those computers to third parties (conveying OEM licenses to the purchasers). System Builder licenses do not allow for any internal use of the Windows software by the licensee. By contrast, Windows entitlements acquired through volume licensing channels do allow for internal use, but those licenses always are upgrades, requiring the licensee to own qualifying, underlying, full-version Windows licenses (OEM or retail) in order for the licensee to use the upgrade benefit. Full-version Windows desktop licenses are not sold through any Microsoft volume-licensing agreement. Many of our clients have made the mistake of assuming that the upgrade licenses they acquired through their expensive Select or Enterprise Agreements were sufficient to cover all of their desktop operating systems, only to face the unpleasant surprise during an audit of not having documentation for underlying Windows licenses to permit their use.

License documentation is absolutely crucial in the event of an audit, and companies need to be diligent and attentive in ensuring that they can produce, on demand, records for all software license purchases – even for purchases where the products purchased may be less easy to identify from a reseller’s invoice.



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 | 800.596.6176