A Global Definition for Software "Hosting"
By Christopher Barnett

I previously have discussed what "commercial hosting" means when it comes to Microsoft software, but the universe of problems created by the "hosting" ambiguity obviously is bigger than just Microsoft. Almost all software publishers restrict or prohibit – to varying degrees – their customers' ability to use the software products they license in connection with solutions delivered to end users over the Internet. And, like Microsoft, almost all software publishers provide vague guidance (or no guidance) regarding how to correctly apply those restrictions or prohibitions in their IT environments.

Microsoft sets the gold standard for ambiguity when it states in its Product Use Rights (PUR):

> *You may not host the products for commercial hosting services.*

For its part, IBM says in the International Program License Agreement (IPLA):

> *Licensee* [must] *not sublicense, rent, or lease the Program.*

And for a third example, Adobe takes the everything-and-the-kitchen-sink boilerplate approach when it says in its EULA for ColdFusion (a popular software platform for Internet content):

> *…Licensee is prohibited from…renting, leasing, lending or granting other rights in the Software including rights on a membership or subscription basis…*[or]*…providing use of the Software in a computer service business, third party outsourcing facility or service, service bureau arrangement, time sharing basis, or as part of a hosted service…*

The central problem with all of these definitions is that it is that they all speak either expressly or impliedly of "using" the licensed software without helping the licensee to understand when software is "used" for "hosting" purposes. Does such "using" mean merely that customers are *accessing* the output of the products in question, or is something more needed?

In this writer's opinion, an accurate definition of "hosting" should include something more than mere access – some kind of independent business value that customers derive through the use of the product in question. For instance, Amazon.com uses third-party software products in its e-commerce platform, and Amazon customers log in and are authenticated to those products when they access the platform. However, their "use" of those products is strictly constrained by Amazon, and they cannot meaningfully control the functionalities of those third-party product outside the parameters that Amazon programs. Contrast that to Salesforce.com, which (theoretically) gives its customers the ability to meaningfully control the functionalities of any third-party CRM products that it uses in its hosted solutions, as though those products were installed on the customers' own servers. I think many businesses would understand that model to be squarely within the scope of "hosting" and would understand the Amazon.com model to be outside that scope, even though customers in both cases are logging in and are being recognized by the third-party products used in each solution.

This question is a critical one because in the event of litigation, a court likely would look to each party's intent and even to popular definitions of words used in a license agreement in order to determine respective rights and obligations. If businesses that license a publisher's software products understand "hosting" to require something more than mere access to a product's output, then the publisher's failure to draft a less ambiguous agreement could be construed against it in attempts to enforce a more expansive interpretation of those terms. Given the rise of business solutions delivered under SaaS models, in coming years it seems likely that we will start to see a growing set of case law looking at this question and exploring its effects on license agreements that purport to restrict or prohibit "hosting." Those developments will be very interesting to watch.

Note: The author will be presenting a complimentary webinar on the Legal Risks of "Commercial Hosting" on August 8th. If you would like to be notified when registration begins, email ascott@scottandscottllp.com.

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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