

Software License Compliance

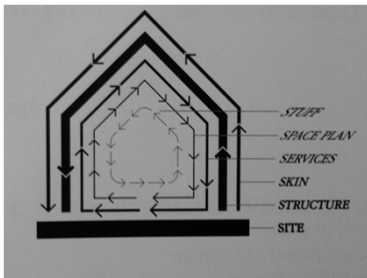
(a/k/a “Software Asset Management” or “SAM”)

Why It’s *Relevant To All Compliance Professionals*, *Hard*,
Intensifying, and Sub-Radar, & *What To Do*
To Risk-Mitigate and Contribute Effectively

17th Annual Compliance & Ethics Institute
Society for Corporate Compliance & Ethics
October 23, 2018, Las Vegas

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Software Licenses Compliance = Targeting A Moving Target



Concept & Graphic
From The Book
How Buildings Learn:
So How Does
Your Compliance
Strategy, Leadership,
& Risks Mitigation
Learn?

Quick Audience Profiling

- Now *Responsible* For Software License Compliance?
- *Participated* In 1 Software License Compliance *Vendor* Audit? >5? >10? *Self*-Audit(s)?
- Have Financial (Non-Software) Audit Training Or Experience?
- Depend On -Not-Specialist Software Lic'g. In-House Lawyer? Contracting Resource?
- Global Scope Of Responsibilities?
- Now Have Protocol For Hiring Outside Specialists Via Legal To Protect *Privilege*?
- Now On *CyberSecurity* Team?
- Experienced Publisher “Crazy Stretch” Contract Interpretation Assertion(s)?
- Studied & Understand “Declaratory Judgment” Lawsuit Options?
- Studied Publisher-User Software Lawsuits?
- Studied *Publisher-Publisher* Software Lawsuits?
- Know Old BSA & SPA (n/k/a SIIA) PC-Centric Software Enforcement Cases?
- Contracts Training: Studied Actual v. Attempted Contract Amendment? Novation?
- Contracts Training: Studied “Meeting Of The Minds”? “Ambiguity Construed v. Drafter”?
- Know Oracle Lawsuits Against Indie Support Vendors?
- Use Litigation Pleadings As Internal “Compliance Training & Coaching” Resource?

Quick Speaker Profile

- 38.5 Years 80% Software Work
- Both “Offense” (Vendor Work) & “Defense” (Customer Work)
- In-House @ 6 I.T. Vendors; Twice as G.C.; Once V.P. I.P. Development
- Blended, Hands-On Roles (Mongrel) (Product Dev., Sales, etc.)
- Failures Insight: Initiated Audits of Licensees In 1st Job, Yielding \$\$s
- Failures Insight: 10+ “Software Asset Management” Conferences
- Failures Insight: Granular, Frequent, Expensive Pleadings “Mining”
- Failures Insight: Granular “Open Records” Requests Results
- Failures Insight: 36 “Post Mortem” Projects For Niche Insurer
- 200+ Talks in 5 Countries; 25+ Published Articles
- Houston Based, Austin Leaning, Globally Working
- “Preventive Law & Business Processes” & Training Passion

“Begin With The End In Mind”: Conclusions

Bad News:

- Your Organization Is **Non-Compliant** (& Will Get Caught)
- Your Initial Software In-Licensing Likely Is Inadequate
- Your Post-Signing Software Licenses Administration Is Inadequate
- Software Vendors Are Motivated & Resourced To Audit & Assess \$\$s
- Software Vendors Steer, Lead, & Stampede Your IT Colleagues/Clients

Good News:

- Others’ Painful Litigations & Other Disclosures Provide “Roadmaps”
- Sometimes Well-Prepared, Skilled “Pushing Back The Vendor” Works
- Cybersecurity’s Increasing Criticality = Ally & Motivator
- Career Expansion Opportunity?

“Begin With The End In Mind”: Recommendations

- Understand How Software Supply Chains = Mission-Critical, Deep, & Varied
- Understand Why Software Licensing Is Often Partly Ambiguous & Broken
- Recognize That Compliance Rules Are More Varied & Faster-Changing Than In Other Compliance Domains (e.g., Per Many Vendor, Mergers, Etc.)
- Appreciate Your Analysis & Process Skills Can (& Should) Be “Ported” Here
- Advocate Software In-Licensing As Corporate Compliance Issue / “Turf”
- “Partner” With CyberSecurity Leaders & Subject Matter Experts (Allies!)
- Educate & Motivate Peers With Software Audit “Pain & Suffering” Details
- Enable & Strive For Your Peers (& Your) Updating Licensing Skills
- Cross-Training = Respect: Do Software-Specific Homework, For Credibility

What Are Software License “Compliance Audits”?

- Threat To Corporate Brand & Reputation?
- Indicator Of Gaps In Other Corporate Processes & Controls?
- New Threat To Regulatory Compliance For Some Customers?
- “D.J.’s”: New Cause Of Dozens Of Unpublicized “Declaratory Judgement” Lawsuits By Customers Against Vendors?
- New Threat To CyberSecurity (“E.T. Phone Home” Features)?
- New & Growing Threat To I.T. Budgets & Financial Projects?
- New 7- & 8-Figure Line-Item Unplanned Spend For Many?
- New Interruptions, Tasks, & Worries For Managers & Executives?
- New & Growing Threat To I.T. & Overall Operations?
- New, Key “Sales Channel” & Profits Source For Software Vendors?
- New & Growing Spotlight On I.T. Procurement Quality Questions?
- New Driver For Acquisitions & Mergers Of Software Companies?
- New Opportunity For Compliance Career & Responsibilities Growth / Expansion?
- Answer: All Of The Above!!!

Who Is Doing It? (Which Vendors Audit Aggressively?)

Answer: Your Organization’s Suppliers (& More Each Year)!

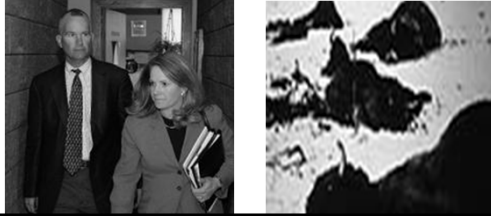
- Oracle
- IBM
- Microsoft
- Micro Focus (& Acquired Attachmate, HPE, etc.)
- SAP?
- Adobe
- Autodesk
- Symantec
- Versata
- Parametric
- VBCConversions
- Various Industry-Specific Or Silo-Specific Niche Vendors
- Many, Many Others!!

Why Are Software Supply Chains Hard? Fluidity – More Mergers, Acquisitions, Partial Divestitures, & Roll-Ups” Than Other Industries



Are Software Vendors Tougher & More Motivated Than Government Compliance Regulators?

Software Vendor CEO Gets 10 Days In Jail For Arranging The Slaughter Of A Neighbor's Free-Ranging Livestock



Why Are Software Vendors So Motivated To Audit?
(Many Different Reasons – Including Repeated, Confirmed Customers' Non-Compliance!)



"Software Is Hard; Hardware Is Easy"

Why Software In-Licensing \neq Other "Sourcing" & Isn't Easy!

- Always = Mix Of Thing + Services
- Foundation = I.P., Not Uniform Commercial Code
- Multiple Pieces: Multiple Transaction Documents To Integrate ("Battle Of The Forms")
- "Go Fish": Vendors Increasingly Place Some Deal Terms On Website!
- Procurement Personnel: Limited Domain Expertise & Training? Over-Confidence?
- Waves Over Time: Cascading Deliveries Over Deal Duration: New Versions & Products
- Changing Vendors' Business Models Over Time (e.g., to SaaS, PaaS, IaaS, XaaS)
- Changing Vendors' Identities (e.g., M&A & Private Equity)
- "Rogue Buyers" (including "Bring Your Own Device" ["B.Y.O.D."])
- Lack Of Comprehensive, Easy, Or Free Inventorying Tools
- Other
- Industry Consensus: Results Often = Actual Grade ~"C-" or "D+," Not Assumed "A-" or "B+"

Compliance Requires Pro-Active
Advance Planning, Processes, & Action



Session's "Level" & Assumptions

- Attendees = Compliance, Only Limited "Geek" / I.T. Fluency
- "Licensing Law = Evolving "Operating System" For Software Sourcing"
- "Epidemiology (Finding & Studying Illness & Mortality) Helps Prevent & Cure Disease": Finding & Studying Software Audit Lawsuits, + "Open Records" Research (Government Customers Research), Enables "Preventive Medicine" In Both Software Sourcing & Overall Compliance
- Exclusion From This Session (But Still Increasingly Important Re. I.T. Finance, Compliance, Security, Quality, & Strategy): Free & Open Source Software

How Well Do You Know Your Organization's
Operations, Infrastructure & "Innards"?



Scope Exclusion Today: "Free & Open Source" = Big, Impactful, Counter-Intuitive & Growing Part Of Business Software & Operations



Today's Focus = "On-Premises" Software, But Remote "Software-As-A-Service" ("SaaS") Merits Compliance Professionals' Involvement Too!

- Which Data Are Out-Loaded?
- Who Owns Newly-Created Data?
- What Are Specific Rules For Data Secure Custody?
- How Will Data Custody Be Audited & Confirmed?
- By Whom, With What Skills, With What Tools, With What Frequency?
- Any Out-Loaded Data Owned By Business Partners & Covered By NDA's?
- To What Extent Are SaaS Vendor's Tasks & Resources Outsourced?
- How Will SaaS Vendors' Subcontractors' Compliance Be Confirmed?

So, How's Your Licenses Compliance & Audits Readiness, Actually?



What Really Is “ ‘The’ Contract(s)”?!?!?
(Often I.T., Procurement, & Others Don’t Really Know!)

- #1 Error In SAM = Assuming Same Understanding of Deal Documents & Terms Between Customer & Licensor
- Did Corporate Purchasing Consider & Cover Impact Of Licensor’s Predictable Post-Contracting, At Later Software Delivery, At-Installation Clickwraps?
- Do Your Software Contracts Include Robust “ Only Written Amendment,” “Entire Agreement,” & “Order Of Precedence” Wording Effectively Governing Among Paper, Ink-Signed Procurement and Electronic-Only Purported ‘Agreements’?



Got Unmanaged Impacts Of Click-Wraps?

Exemplar: 10/9/15 Canada Court Ruling in
Honda Of Canada v. Micro Focus:

“ ... Honda argues that ... the **software update was installed by Honda’s AIX co-ordinator**. ... a technical role within the **information systems department**. ... **not ... authority to contract** ... reserved for the department manager. The latter individual was not identified ..., nor was evidence provided ... respect to the ordering or installation of the 2003 ... upgrade. ... the record is inadequate to make a finding that installation was performed without notice of, or reference to, any licensing agreement that may or may not have come to the attention of this department manager at the time. ... ”

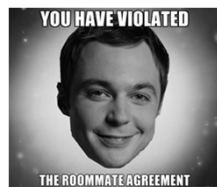


Besides “Paying Your Rent,” Are You Complying With Other , Non-Monetary “Lease” “Fine Print”?

2/24/17 Court Filing:

“.. . Micro Focus ... requests that the Court ... order compelling Express Scripts to ... respond ... [specifying and documenting] **controls** and use of Rumba ... products at issue rather than a separate software program ...

A 2015 audit concluded that Express Scripts ... installed Rumba on its Citrix servers and gave all 35,236 employees access to numerous versions of Rumba. ... ” (underlining added)



Does Your “Landlord” Really Own The Building?: Checking Resellers’ Purported *Rights*

1/6/17 Gov’t. Filing:
“planet9 studios, inc.
Bitmanagement License
January 17, 2012 ...
Here is our proposal for your review. ...
20 existing + 18 new copies of BS Contact Geo version
7.215 to be network (concurrent) license enabled by
NAVFAC using Flexera Software’s FlexWrap utility of
the AdminStudio software suite.
Yearly Product Support ...
We will provide a non-exclusive, paid in full, perpetual
license for the deliverables. ... “

\$576K Sought From U.S. Navy
By German Vendor, But
Customer Claims
Authorized Reseller
Offered
“Concurrent,”
“Perpetual”
License Model

“Watch This Space”: Pending *NetApp v. Yam a/k/a GoDaddy*

- 6/11 Master Purchase Agr.;
EULA Shipped With Products
- 3/15 Audit Notification
- 5/15 Vendor Advises Violations
- 10/27/16 Lawsuit Filed
Claiming \$923K Over-
Deployment + 5 No-License Boxes
\$1.6M + Unauthorized O.S.
Upgrades \$737K
- 2/23/17 Court Tentative
Ruling: Customer Objections Re.
Contracting Process Details Don’t
Fly
- TBD / “Watch This Space”

SUPERIOR COURT OF CALIFORNIA	
COUNTY OF SANTA CLARA 16CV301833	
UNLIMITED JURISDICTION	
NETAPP, INC., a corporation,	Case No.
Plaintiff,	PLAINTIFF NETAPP, INC.’S COMPLAINT
v.	Cause of Action for:
YAM SPECIAL HOLDINGS, INC., a corporation; GODADDY.COM, LLC, a limited liability company; GO DADDY OPERATING COMPANY, LLC, a limited liability company; GODADDY, INC., a corporation; and DOES 1-10, inclusive,	(1) Breach of Contract (2) Breach of Implied Covenant of Good Faith and Fair Dealing (3) Common Count for Goods Sold and Delivered (4) Unjust Enrichment (5) Unfair Competition Law (Bus. & Prof. Code Sect. 17200)
Defendants.	

Got Teeth In Your Deals’ “Fine Print” Helping Your New Security Priorities?

- Vendor Concern: “Our I.P. = Our Whole Business!”
- Customer Opportunity: Negotiate For New Pro-
Active Vendor Obligation: “Implement & Report To Us
Your ‘Controls’ For Our Safety”: Got Weekly or
Monthly Vendor Security Action Obligations?



"X" Marks What?: The Infamous Microsoft Head-Fake O.S. Version Upgrade "Assent"

- "Getting Slammed" = Too Much Alcohol Or Vendor Unethical Practices In Changing Terms Or Provider?
- SAM Proven Precedent & Best Practice: Clarify "Boilerplate" To Specify Future Contract Changes Only Via Both (i) Narrow Specified Senior-Personnel Action & (ii) Particular Media!
- Speaker War Story: \$800K Fight: Vendor Claims Junior I.T. Staff On-Web Order Changing Support Specs. "Novated" (Replaced) Prior Corporate Paper, Traditional Contract, Per Nearly-Hidden, Multi-Step Links Between Web Internal Pages!



What's Proper Auditing *Process*?

- "Contracts 101": Undefined Terms = Bad Contract Quality
- "Audit" Obligation: How?, By Whom?, When?, Using What Tools?, With What Comment / Correction Stage?, With What Skills?, Under What Compensation Arrangement?, Under What Performance Assessment Context?
- Learn From Other, More Mature Industries
- Audits = Needed New Separate Contract Exhibit!!
- Apparent Netherlands Litigation / Ruling



What's "Fair" Notice Of Audit Initiation?

IBM v. BGC

- Vendor M&A Context
- Purportedly Replaced (Different) Vendor Contract & Terms (Original, Lost Informix License versus IBM's IPLA)
- Customer Claim: Vendor Intentional Fraud, To Set Up Web Site When Ordering Tech. Support Linking Supposed Mandatory Change to IPLA (New, Different Contract!) From Prior, Agreed Contract
- After Hard-Fought Long Battle, Some Results Open & Some Oblique, Lawsuit Settles Confidentially



Literally, *Who's To Know*, If Your Shop
Maybe, Or Definitely, Didn't Comply!?

- Who Will See *Self-Audit* Results?!
- Want Your Self-Audit Outputs To Be Confidential? & Emails?
- Did Your Tech. Consultant Warn You That Their (Usually "Bad News") Report Could Be Subpoenaed & *Used Against You*?
- Did Your Tech. Consultant Offer, Or Urge, They Work Through Outside Legal Counsel Under Dispute Context "*Attorney-Client Privilege*"?



Learning From *Among-Vendors Audit Fights*:
Phoenix Tech. v. VMware
(i.e., If Specialist Vendors Can't Agree, It's Hard!)

1/17/17 Joint (Agreed) Statement Of The Case

"...Phoenix asserts that ... VMware exceeded the scope of that license and committed copyright infringement by incorporating Phoenix's BIOS into VMware products that do not fit within the definition of Licensee's Products and that violate other terms of the Agreements. ... willful infringement ... that ... continues to this day VMware asserts (1) that the agreements permit it to modify and use the BIOS in its products, (2) that the VMware products meet the contract definition of Licensee's Products; (3) that Phoenix has always known about how VMware uses the BIOS and never complained, and (4) that Phoenix has made up the copyright infringement claims to unfairly benefit from VMware's success. ..."

Are External Consultants "Conflicted"?:
Software Customers Must Identify & Clarify
Reseller & Consultant Multiple Constituencies
& Possibly Inconsistent Loyalties

End User 8/4/16 Motion To Compel,
After \$695K Payment:

"... Microsoft responds that it will produce its agreements with Anglepoint that relate to the Reading True-Up and/or this litigation, with the exception of the confidential Joint Defense Privilege and Common Interest Agreement between Microsoft and Anglepoint. ..."

Upgrade By Coordinating With Corporate Strategy Finance Team

2/10/17 New Silicon Valley Lawsuit:
Software Vendors Seeks “Kicker” Later Payment Per
Customer Getting Acquired

- 8/20/14: Contract (“USSLA”) + Order Form
Containing “Extraordinary Corporate Event” Clause
- 9/16/16 Customer Acquired Via “Multi-Entity
Merger”
- 10/6/16 Vendor Invoices Customer For Extra
Payment

Does Your Resolution Model Include All Reasonably Possible Phases? What’re The Costs, Risks & Benefits Of Litigating?

- Beware “Each Side Pays Their Own Counsel” Fine-Print
- Possible Duration Of U.S. License Interpretation Lawsuit (It Varies)
- Possible Costs Of U.S. License Interpretation Lawsuit (It Varies)
- Recent Exemplar: After \$90K Settlement, Vendors Seeks “2d Bite
At Apple” Against Successor Vendor; Defendant Successfully Seeks
\$184K Litigation Costs Reimbursements (*Genesys Software v.
Ceridian et al.*)

When Do We Know “Who Was Right?” Or “Who Won?”: New Phase In SAM = Lingering Appellate Litigation Efforts

- 12/22/16 Calif. Appellate Court Ruling In *Glovia v. Acuant*
“ ... [Initially, below, at the trial court] The jury returned a
verdict in Glovia's favor on ... conversion ... awarding
Glovia \$1,196,000 in compensatory damages and
\$650,000 in punitive damages. The trial court awarded
Glovia attorney fees of \$1,474,151.75 ... Glovia's expert ...
calculated damages by determining the modules ... using
in 2003 and the price of those modules. ... the license fee
would have been \$650,000, the interest .. as of ... trial was
\$514,234, ... total ... \$1,164,254 (actually \$1,164,234). ...
we affirm the damages award. ... The punitive damages
and attorney fees awards are reversed. ...”

Software Suppliers ≠ “Business Partners”

- Expect “Musical Chairs In Your Supply Chain”: Private Equity → “Vendor” = New Party, Not Your Prior Supplier
- Vendors’ “Compliance Counseling” Units Have Revenue “Bogies” (Quotas)
- Some Vendors Detect Over-Deployment #S & Then “Sit On It” To “Drive Up #\$\$\$ Exposure”



What’s A “New Product”?!

- The Hard Issue: Later Vendor Deliverables: Are They “New” Products For Which Vendor Can Set New (Higher) Pricing, Or Merely Updates Already Owed Under Prior Contract(s)?
- What’s The “Industry Standard”? : None
- So How Plan Ahead: Negotiate & Draft *Specifically*
- What Determinants: It Depends: “Size,” Which Operating System Software, # Functions, Which Programming Language(s) “Under The Hood,” & Other



Got Software Procurement Competence? R U Sure?

- How many software-specific court rulings have you studied in last 6 months? Which?
- How will new AICPA rev. rec. rules impact software vendors’ fin’l. accounting, business strategy, lic’g. model, spend forecasts, actual spend, sourcing processes, etc.?
- How often do you hunt vendors’ publicly-disclosed actual contracts for negotiating use?
- Better *defense* after *offense*: How many software vendors have you worked for?
- What have you learned from software vendors inter-licensing (OEM deals)?
- How many actual software contracts have you extracted from public sources (like courthouses, S.E.C. filings by software vendors, and open records requests to government software customers) to study & use in negotiations?
- How much work have you done in open source software dev., lic’g. & compliance?
- How does your approach differ in software versus hardware and i.t. services deals?
- Which software industry books have you read in last 10 years?
- Which 3 software industry books do you recommend to newbies?
- How many software license court proceedings or arbitrations have you attended?

Post-Conference Tips For Needed Skills Upgrading & De-Bugging

- “Software Licenses Non-Compliance and Audits: Growing Hazards and New Action Items,” in December 2017 issue of *The Docket* (i.e., magazine published by Association of Corporate Counsel) (co-written with H. Ward Classen, Esq.)
- Learn From I.T. Outsourcing Contracting
- Learn From Software Development Contracting
- Learn From Book Publishing Contracting
- Learn From (Multi-Parties!) Construction Contracting (Got Documents “Flowthrough” & Mandatory Form? Got “Owner’s Rep.”?)
- Bibliography Of Useful, Software-Related Books, Movies, & Blogs Available From Speaker On Request (Just Write “Bibliography” On Back Of Business Card)

Upgrade By Looking More Widely:
Non-U.S. Audit Lawsuits’ Clues

- UK: *SAP v. Diageo*
- Oceania: *Attachmate v. Gov’t.*
- US / UK: *Micro Focus v. AmEx* (Settled)
- Canada: *Honda v. Micro Focus*
- France: *Carrefours v. Oracle*
- France: *A.P.L.A. – Oracle*
- Australia: *Global Health v. The Crown*
- Private (Secret) Arbitrations
- Many More



Who’s Your Team?
Got Real Experts?



Ready To
Change
Your
Software
“Roommate”???



So, How Get There?: Action Recommendations

1. Read my 12/'17 article (request via email or business card)
2. Circulate to colleagues my 12/'17 article (re. risks credibility / scale)
3. Muster relevance evidence: software audits in your industry
4. Muster relevance evidence: # \$\$s settlements, # \$\$s forced project costs, duration of fight & uncertainty, # pleadings, # lawsuits
5. Cybersecurity: study & communicate linkages & similarities!
6. Off-site!: organize away-from-office-and-phones team analysis
7. Detection, for compliance & pain prevention: advocate and co-plan well-architected self-audits (under attorney-client privilege!)
8. Update & de-bug software in-licensing processes, skills & “forms”!

Q&A (& Debate?)
Thanks; And I Hope To Run Into You In
The Future (Professionally)

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