

Varicent Customers Should Plan for Audits by IBM

By Christopher Barnett

In April 2012, IBM [announced](#) that it had reached an agreement to acquire Varicent Software, Inc., an Ontario-based publisher of analytics software for compensation and sales performance management. According to the announcement, Varicent's customers include Starwood Hotels, Covidien, Dex One, Manpower, Hertz, Office Depot and Farmers.

While corporate acquisitions of software publishers do not necessarily affect the customers of the acquired entity negatively, acquisitions by IBM can be a notable exception. A wide array of IBM software was not developed in-house by IBM, but rather was acquired by Big Blue through one of numerous acquisitions it has made over the years. The result of each and every one of those acquisitions has been to bring the licensing of acquired software products within the scope of IBM's aggressive software-audits practice.

This can cause problems for licensees of acquired entities like Varicent. Those licensees may have had fairly close working relationships with licensing and sales teams for acquired entities and also may have enjoyed a reasonable degree of bargaining leverage in the context of license purchases or even compliance matters. IBM customers, on the other hand, typically have little or no meaningful leverage and rarely are able to convince IBM to agree to terms or pricing that it does not want to accept. In addition, where licenses for software published by the acquired company may have included unremarkable audit-rights clauses (or no audit-related provisions), license purchases through IBM universally are made under the terms of IBM's International Program License Agreement. The IPLA includes an onerous audit clause that may come as a shock to new customers. Finally, to the extent that acquired software products may have been licensed on a processor-capacity basis, licensees reasonably can expect to see IBM transition those products to Processor Value Unit (PVU) licensing. Those transitions typically are announced well in advance of their effective dates. However, the complex nature of PVU licensing means that potentially affected businesses should begin assessing now whether they have the resources to contend with that model, if the announcement is made at a later date.

Varicent customers with questions regarding their potential exposure from IBM audits should direct those questions to their attorneys now. For most IBM licensees, compliance audits are not a question of "if," but "when," and audits are the absolute worst time for companies to discover that they have made licensing errors.



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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