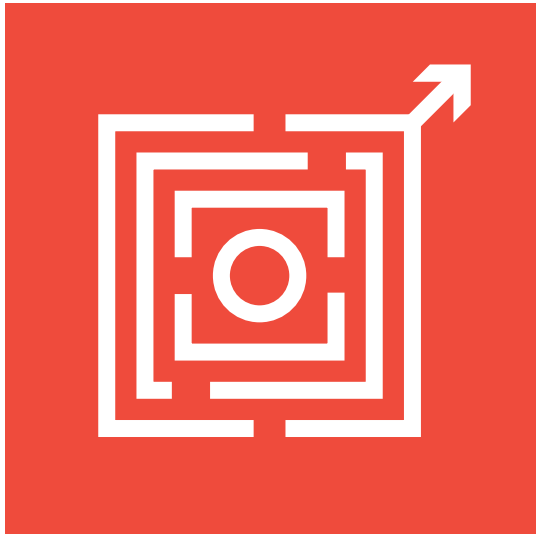


Cerno

Audited by Oracle?

Eight reasons why you are in the driving seat

Analysis report: Oracle Audit Rights

The prospect of an Oracle license review is fearful. Despite the best efforts of your business, substantial costs on SAM and an eye-watering amount paid over every year to Oracle, your sinking heart knows that the audit will result in a huge and unexpected demand.

But what are Oracle's audit rights? And can they really come in anytime and search your systems for any evidence of non-compliance? Despite Oracle's US $170bn might, and a 39-year time frame to have fashioned the toughest contracts to their benefit, the truth is that Oracle's audit rights are weak and ambiguous. And they do not give Oracle the rights they and CIOs all assume.

Here are eight reasons why the wording of Oracle's audit rights means that you may still be in the driving seat:

Oracle's audit rights are weak and ambiguous

1

No right to enter onto your company's premises

UK and US law give strong protections to the rights of individuals and businesses to protect and control their property. The laws continue to follow an English 1765 case where it was declared: 'Our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave'

Rights to enter therefore can never be assumed – there has to be justification in the form of unambiguous and clear consent. Even where there are statutory rights to enter – such as by the police or trading standards officers - there are many cases where such access has been found to be unlawful because of a minor infraction of, for instance, the Police and Criminal Evidence Act 1984.

For Oracle representatives to have any right to enter onto any of your premises, they would need an explicit and unequivocal right to enter coupled with a prior consent given by the license. Neither are in Oracle's current audit clause – unlike, for instance Microsoft's and IBM's audit clauses which do give more effective rights.

Furthermore, if access is effected for a purpose not authorised by the licence, the initial entry will amount to a trespass. It follows that if you do (voluntarily) choose to give any permission to Oracle LMS to come in to your data centre, it is recommended that this consent is given in writing and strictly limited to the rights in the audit clause and no more.

Lesson: You are under no obligation to consent to Oracle LMS or other appointed consultants entering your premises.

2

No obligation to run Oracle's requested scripts

Oracle's audit rights in Schedule P-Programs say this:

"Upon 45 days written notice, Oracle may audit Your use of the Programs. You agree to cooperate with Oracle's audit and provide reasonable assistance and access to information. Any such audit shall not unreasonably interfere with Your normal business operations. You agree to pay within 30 days of written notification any fees applicable to Your use of the Programs in excess of Your license rights. If You do not pay, Oracle can end (a) Program-related Service Offerings (including technical support), (b) Program licenses ordered under this Schedule P and related agreements and/or (c) the Master Agreement. You agree that Oracle shall not be responsible for any of Your costs incurred in cooperating with the audit."

It can be seen that the right is to 'audit' your use of the Programs. This means checking and/or examining your records or evidence as to usage. There is no reference to any contractual obligation to run specific scripts and if, reasonably, you can deliver the information in another robust and credible format, then that is enough.

Oracle can then audit your report and raise the further questions they wish.

3

Oracle's right is limited to auditing use of the programs - not of your IT infrastructure

An important point is that the audit is of 'Your use of the Programs'; it is not an audit of your infrastructure or indeed areas or clusters where you are not using the programs.

The information you give out to Oracle should explain fully your use of the programs as at the response date. Where necessary, eg in relation to processor-based metrics, it should give details of the servers and hardware on which the programs are being used.

This can be limited to the hardware where the technology or applications are either (a) running or (b) installed. The possibility that a program might be accessed by, for instance, more individuals - or that there are processors in the cluster which might be utilised but are, in fact, not used – is not information that you need to give to Oracle. Oracle's right is about the present use of the programs.

There are doubts over Oracle's rights to demand license fees for all processors in a virtualised clusters and this should be considered and accommodated in any response you give as to 'use' of the programs.

4

The word ‘audit’ means a checking or inspection of existing records – not an investigation from scratch

Audit does not mean license review. Nor does it mean a SAM review. The word ‘audit’ is not defined in Oracle’s License Definitions and Rules; it therefore must be given its ordinary and natural meaning.

Here are three standard definitions:

- A systematic review or assessment of something [Oxford Dictionaries]
- An official examination and verification of accounts and records, especially of financial accounts [Dictionary.com]
- A careful check or review of something [Merriam-Webster]

What does this tell us? It tells us that an audit is against pre-existing material. It is not a report created from scratch but a check being made. So, for Oracle customers, the legal process required by the contract should be:

- The licensee itself prepares its own report, backed up by evidence e.g. screen shots and any scripts it chooses to run;
- It then makes these available to Oracle;
- Oracle then ‘audits’ that material;
- Oracle may reasonably ask questions to determine areas of uncertainty.

That is an audit. It is not a license review.

5

You need to give them ‘reasonable assistance’ – not every assistance

Oracle’s audit rights lack any detail as to how the licensee needs to respond. The obligation is to give ‘reasonable assistance’ and, by implication, any response by your organisation should be enough to permit Oracle to check that your response is adequate as to use of the programs. There is no legal obligation to use Oracle Measurement Tool nor indeed to complete their Oracle Questionnaire.

Oracle has various ‘verified’ tools that it accepts – currently Flexera, iQuate, Hewlett Packard Enterprise, BDNA, Easytrust, Lime Software and Nova Ratio.

If you are certain that you know and understand the information that will be extracted by using these tools then of course you may do so. But if you are doubtful, and would prefer to give information in a different format, and this is adequate to describe and verify your ‘use of the Programs’, then you may do so. You will not be in breach of the Oracle license by responding in a different way to that specified in any notice from Oracle.

6

No obligation to accept license reviews by third parties

Oracle habitually uses Garmendia Consulting and other partners to carry out license reviews on its behalf. It is not part of your contractual obligations under the Audit clause to have to accept this: there, your obligation is to assist 'Oracle' i.e. the specific Oracle group company named in your Oracle Master Agreement (TOMA) – not third parties.

Unlike audit provisions in license agreements of other major vendors, Oracle have neglected to include a right to impose inspection by 'duly appointed consultants, agents and partners'.

7

Lack of co-operation by the business in giving immediate access does not result in a court order

If you are in breach of permitting the audit within Oracle's 45-day time period, what can they do? Can they injunct you? Will they immediately issue High Court proceedings? The answer is no.

In the UK, the court's Civil Procedure Rules (CPR) have an overriding objective that all cases are addressed 'justly and at proportionate cost'. Central to this is a mandate to comply with a 'Pre-Action Protocol' whereby parties must first seek to settle case with exchanges of information - without the issue of legal proceedings - and, preferably, with a consensual mediation first[1] . If not, then the High Court will tend to penalise the party that precipitately issues the proceedings unless all other avenues have been exhausted. In the words of the protocol 'Litigation should be a last resort'.

High Court proceedings can often cost, through until trial, upwards of £250,000 for each side. The prospect therefore of an 'adverse costs order' being made against a clamant because the protocol was not followed – even if the claimant finally wins the case – is a major risk. This means that, unlike before 1999 (when the CPR were first introduced), lawyers are extremely reluctant now to press the button on the issue of High court proceedings - however insistent the client may be.

What does this mean? It means that, despite increasingly agitated letters threatening 'escalation' to Oracle legal, and even alarming Solicitors' letters, Oracle almost never take the final step of issuing court proceedings against their licensees except in cases of clear cases of infringement of copyright (piracy) or trade mark (counterfeiting). You should take your time in considering how best to respond to an audit notification and in what form: legal proceedings simply do not follow after 45 days. ➔

[1] Para 3 Pre Action Protocol CPR: 'Before commencing proceedings, the court will expect the parties to have exchanged sufficient information to-(a) understand each other's position;(b) make decisions about how to proceed;(c) try to settle The issues without proceedings;(d) consider a form of Alternative Dispute Resolution (ADR) to assist with settlement;(e) support the efficient management of those proceedings; and (f) reduce the costs of resolving the dispute'

Even in the notorious 2016 US California case between Mars, Incorporated and Oracle Corporation, and despite Oracle's constant threats to 'escalate to Oracle's legal team', no proceedings were ever issued by Oracle; in fact, it was Mars – not Oracle - that, after 14 months of correspondence and meetings, determined to apply to the court for a declaratory judgment.

Lesson: Take your time; prepare thoroughly and, if the 45 day period does not suit you, then continue to wait. Work with your license review consultants until you are fully prepared and only then allow the start of any audit or license review process. You may receive increasingly agitated letters from Oracle. You should not ignore these but, fairly and reasonably, you should respond by pointing to the need to continue with normal business operations and that preparations are being made to respond to Oracle. Period.

You should take your time in considering how best to respond to an audit notification and in what form: legal proceedings simply do not follow after 45 days

[2] Mars, Incorporated and Mars Information Services, Inc v Oracle Corporation and Oracle America, Inc Case no: CGC-15-548606 (Supreme Court of California, County of San Francisco) October 23, 2015

8

Consider the need for undertakings from Oracle

All businesses and public sector organisations have substantial commitments as to data privacy and security for their operations. In addition, many have onerous contractual commitments to partners or customers to safeguard entry onto their premises and to restrict access.

In many cases, an uncontrolled permission giving free rein to a software vendor to access all areas is wrong. Against the backdrop of your giving 'reasonable assistance' to Oracle must be a pre-condition that your business and organisation must be controlled in accordance with (1) your internal security standards, (2) any regulations applicable to your sector or functions, (3) data privacy rules and (4) general business prudence.

Consider therefore whether it is appropriate to call on Oracle or any specified license review consultant appointed by Oracle (if you agree to permit them rather than LMS to inspect) for a letter of undertaking or equivalent agreement. This may fairly cover some or all of the following:

- Acknowledgments as to confidentiality and undertakings to protect this in various ways;
- Approval and identification of relevant individuals;
- Declarations as to whether any data is being transmitted outside the European Economic Area;
- Restrictions on access to your systems;
- Copies of any materials or information found being copied to you;
- Commitments not to share any information, data or outputs with any third parties;
- Restrictions to the contractual audit rights namely to 'use of the Programs' and no more; and
- Any other controls that, reasonably, you should impose.

These commitments may be applicable in whole or in part where there is on-premise inspection but will equally also be relevant where there is any remote access to your systems. You may need to involve your lawyers, compliance and/or your data privacy officer.

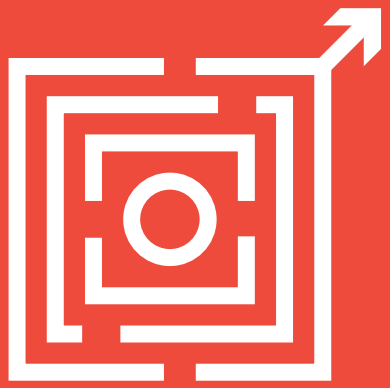
Conclusion

All major businesses seek to be compliant with their software licensing and do expect occasional license reviews. But the opacity and ambiguity of licensing rules, the incorporation of multiple applications and packs when downloading a base program, and ever-shifting technical possibilities means that full compliance is rarely easy even for the most diligent and committed organisation.

The costs of even trivial non-compliance with penalties, back support and the imposition of (rarely used) list prices can be massive. It makes sense therefore for businesses to prepare carefully, and with intense scrutiny, before any license review.

The key message here is that Oracle's rights are far more limited than either LMS or most CIO's presume. Many lawyers would consider Oracle's audit rights to be defective. Use this to your advantage. Prepare carefully with a consultancy, independent of Oracle or any reseller. Allow access on your own terms. And then be ready to give the reasonable assistance which you are required to do.

Many lawyers would consider Oracle's audit rights to be defective



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For further information or to request a meeting, please contact:
nick.preston@cerno-ps.com Tel: 07789 000122
www.cerno-ps.com

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