



# When Publishers Sue

Presented by Robert J. Scott  
Managing Partner Scott & Scott, LLP

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# Speaker

**Robert Scott**



# Publisher Enforcement on the Rise

- BSA Audits
- SIIA Audits
- SAM Engagements
- Big Four Audits
- Publisher Enforcement Programs

# Investigation & Evaluation

- Inventory of Software Installed
- Review and Analysis of Purchase Documentation
- Analysis of License Agreements
- Understanding Use Cases

# Determining the Amount in Controversy

- May be difficult to determine because contractual audit provisions often do not specify a formula for resolving licensing gaps.
- Two to three times MSRP is usually a good target.

## Calculation of Damages

- The copyright plaintiff can elect either statutory damages or lost profit.
- Software compilations should be treated as one work for purposes of calculating damages.

# Venue & Choice of Law

Carefully consider choice of law and venue selection clauses before finalizing strategy.

## Individual Liability

- State law protections such as corporation and LLC do not apply in copyright cases.
- Individuals become liable when they have the ability to control and benefit from infringement.



# Calculating Switching Costs

Switching costs may change the balance of power especially if termination provisions are present.

# Assessing the Publisher's Case

Probability of success on the merits of ambiguous contractual provisions may be the most likely scenario for litigation.

# The Importance of Ambiguities in Software License Agreements

Determine whether the license in question contains a provision indicating that ambiguities will not be construed against the drafter.

# The Importance of Ambiguities in Software License Agreements

The Parol Evidence Rule states that the parties may introduce extrinsic evidence to prove that their interpretations of the contract are consistent with the parties' intent when entering into the contract.

# Summary Judgment vs. Trial

Triable issues of fact regarding software license contracts with ambiguous provisions generally favor the end user instead of the publisher.

# When to File a Declaratory Judgment Action

- A declaratory judgment action can be an excellent forum shopping strategy.
- Often changes the dynamics and stakeholder with the publisher organization.

## How to Avoid Escalation

- Software audit disputes usually evolve over a period of months or years.
- Many disputes can be resolved through improved communication.

# Negotiating when Litigation is Probable

- Clients should cooperate without jeopardizing their legal rights.
- There is a “right” resolution framework for each situation.
- Litigation is necessary in rare cases.



# Drafting Settlement Agreements

- Update license terms including grant, 3<sup>rd</sup> party access, and geographic rights.
- Secure a broad release of all claims.
- Secure audit forbearance for 1 to 3 years.

# Questions?

# Contact Information

**Robert J. Scott, Esq.**

Managing Partner

Scott & Scott, LLP.

1256 Main Street, Suite 200

Southlake, TX 76092

**Phone:** (214) 999-2902

**Fax:** (214) 999-0333

**E-Mail:** [rjscott@scottandscottllp.com](mailto:rjscott@scottandscottllp.com)