

Heard about Mars v. Oracle? Explore Oracle Audits with Experts, Attorneys

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Agenda

1. Introductions
2. The Oracle Agreement
3. Licensing Oracle in the Cloud
4. The Oracle Audit
5. Mars v. Oracle
6. Beyond Mars v. Oracle: The Oracle Audit Playbook
7. Preparing for & Responding to the Inevitable Oracle Audit

Introductions

Your Presenters



Nathan Biggs, CEO
House of Brick
Technologies



Arthur S. Beeman,
Partner
Crowell & Moring



Joel T. Muchmore,
Partner
Crowell & Moring

About House of Brick

- Founded in 1998
- Independent professional and managed consulting services
- Oracle and SQL Server business-critical systems
- Architecture and cloud services
- Software license consulting services
- SaaS-based Oracle and SQL Server license management
 - Entitlement tracking
 - Usage monitoring
 - Alerting on non-compliance events

About Crowell & Moring LLP

- **Crowell & Moring:** An international law firm headquartered in Washington, D.C., with offices in New York City, Irvine, Los Angeles, San Francisco, London, and Brussels. As of 2016, Crowell & Moring is ranked in The American Lawyer's "AmLaw 100" list, based on gross revenue.
- **VMware:** Crowell & Moring has represented multiple clients in contentious and high-stakes licensing disputes against Oracle. With little exception, these disputes begin with Oracle targeting their customers' use of VMware.
- **Mars v. Oracle:** Art and Joel represented Mars in *Mars v. Oracle*, the only publicly-filed complaint addressing Oracle's licensing-based attack on its customers' use of virtualization.

Understanding the Oracle Agreement

Distinguish between:

- Applicable Licensing Terms
- Non-contractual Policy Statements

Licensing is Processor-Based

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ORACLE LICENSE AND SERVICES AGREEMENT V121510

“Processor: shall be defined as all processors where the Oracle programs are installed and/or running.”

- **Installed** = past tense event, but presently applicable
- **Running** = present tense
- There is nothing prospective in the contract

OLSA_V121510_US_OPN.doc <http://www.nu-solutions.com/downloads/us-olsa-037355.pdf>

Entire Agreement Clause

ORACLE

ORACLE LICENSE AND SERVICES AGREEMENT V121510

“You agree that this agreement and the information which is incorporated into this agreement by written reference (including reference to information contained in a URL or referenced policy), together with the applicable ordering document, are the complete agreement for the programs and/or services ordered by you, and that this agreement supersedes all prior or contemporaneous agreements or representations, written or oral, regarding such programs and/or services.”

OLSA_V121510_US_OPN.doc <http://www.nu-solutions.com/downloads/us-olsa-037355.pdf>

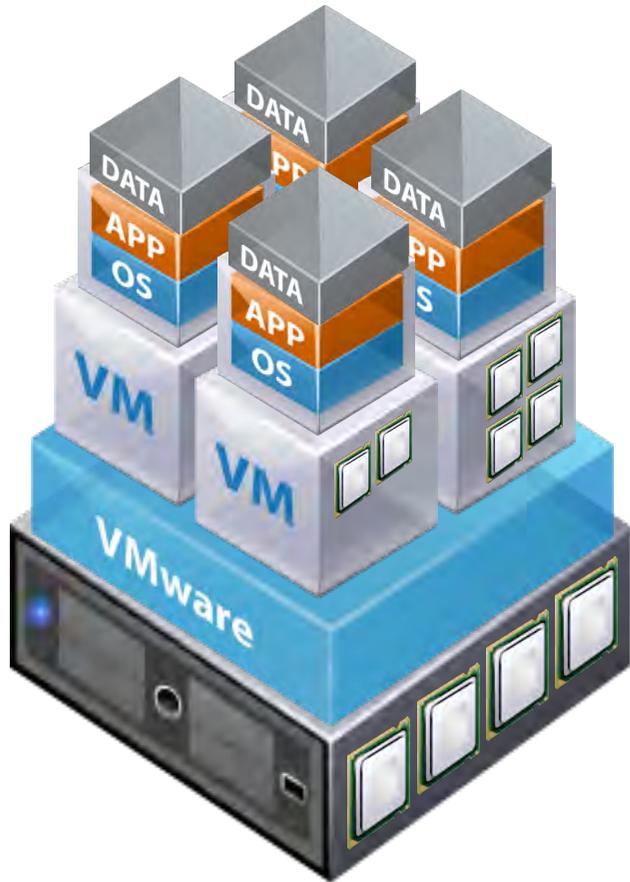
Contractual vs. Non-Contractual

Oracle Document	Contractual?
Technical Support Policies	Yes
Core Processor Factor Table	Yes
Ordering Document	Yes
Software Investment Guide	No
Licensing Data Recovery Guide	No
Technology Hosting	No
Partitioning Policy	No
Cloud Computing Environment Policy*	No

* The cloud policy is non-contractual. It differs, however, from the other policies in that it arguably offers ancillary licensing terms not addressed in the typical license agreement (rather than restricting licensing rights, such as the partitioning policy). In our experience, Oracle tends to willingly adhere to this public grant, despite its non-contractual status. However, any specific licensing terms between Oracle and a licensee would obviate these genericized terms.

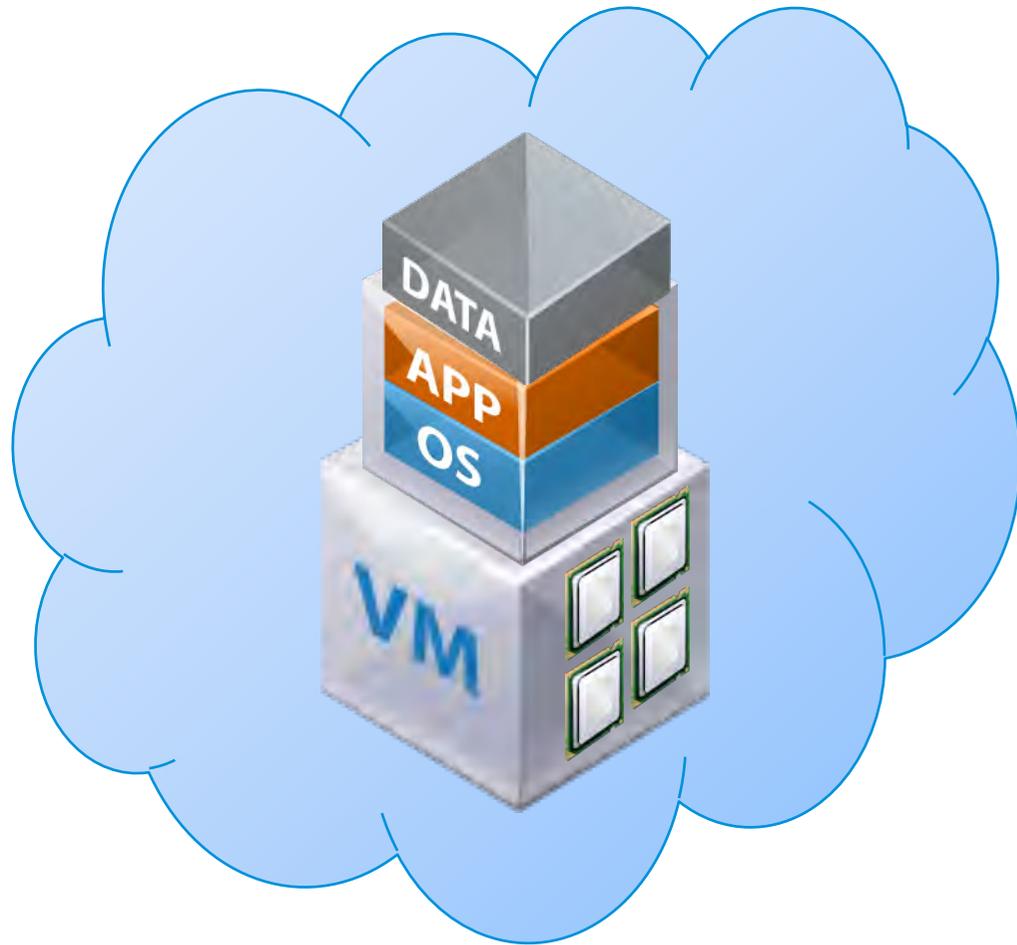
Licensing Oracle in the Cloud

Counting Cores for Standard Oracle Licensing



- Count all physical cores where Oracle is “installed and/or running”
- Apply core factor (0.5 for x86)
 - $\text{Cores} * \text{Core Factor} = \text{Processors of License}$
- No contractual ability to license by vCPU

Counting vCPUs for Oracle Cloud Licensing



- When applying the Cloud policy, count vCPUs, not physical cores
 - Even if you can count physical cores
- No Core Factor
 - **Cannot run RAC with Cloud Policy**
- With AWS Hyper-threading
 - 2 vCPU = 1 Processor license
- With NO AWS Hyper-threading
 - 1 vCPU = 1 Processor license

Oracle DB License Options in AWS

AWS Deployment Option	SE License Included (LI) from AWS	Oracle Cloud Environment Policy*	Standard Core-Based License	Unlimited License Agreement
RDS				
EC2 Compute				
VMware Cloud on AWS				
Dedicated Hosts on EC2				
EC2 Bare Metal Instances				

* Oracle Real Application Clusters (RAC) is not included in the authorized software list by Oracle. Only standard core-based licenses can be used for RAC in the cloud.

The Oracle Audit

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TECHNOLOGIES

What is an Oracle Audit (OLSA 0.5)?

- Oracle has the right in your master agreement (SLSA, OLSA, or OMA) to perform an audit of your usage of their technology
 - 45 Day written notice
 - You agree to cooperate and provide assistance and access at your own cost
 - Oracle typically agrees that the 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 that exceed what you have paid for
 - If not, Oracle “may”
 - End your technical support, terminate your licenses, or terminate the whole agreement

The Oracle Audit: Typical Audit Triggers

Bottom line... VMware

The Oracle Parking Garage



Oracle Audit Triggers

There is no set list of triggers...only anecdotal evidence of certain activities that seem to have preceded audits with our customers:

- Oracle discovers that you are using VMware
- The customer is hosting proprietary applications without the hosting right from Oracle
- Recent growth or M&A that has become public

- Rejection of an Oracle sales proposal, especially Oracle cloud
- Rejection of Oracle's bid submission in an RFP process
- Certifying off of an Unlimited License Agreement

When Oracle Seems to Avoid Audits

Situations where Oracle seems to avoid auditing customers:

- The customer has support fees that are above market rates for their products
- The customer makes considerable new purchases from Oracle on an annual basis
- The customer is on an Unlimited License Agreement (especially a large encompassing one)
- The customer is using Oracle cloud and/or Oracle hardware for significant workloads

Avoiding an audit is not necessarily a good thing. It typically means that you are paying more than you should for software and support, and Oracle is leaving you alone.

Mars v. Oracle

Mars v. Oracle

- **Mars v. Oracle:** The only publicly-filed complaint against Oracle regarding Oracle's attempts to control a customer's use of virtualization.
 - After over a year of failed negotiations, and with a license termination date only days away, Mars filed a complaint for declaratory relief, and a few days later, filed for preliminary injunction.
 - The matter was immediately stayed by joint agreement of Mars and Oracle.
 - Matter was dismissed, with prejudice, less than two months after filing.
- **Note:** All facts contained in this section are part of the public record.

Mars v. Oracle

Operative Agreement – 1993 License and Services Agreement, as modified by multiple Ordering Documents.

- **Oracle’s Contractual Audit Right** – Granted Oracle limited right to audit Mars’ “use” of Oracle programs.
- **“Users”** – Defined as an “individual employed by [Mars] who is authorized to use the Programs, regardless of whether the individuals are actively using Programs at any given time.”
- **“Processor” Metric** – Per Ordering Documents, Processor count includes processors on which Oracle products are “installed and/or running.”

Mars v. Oracle

Oracle's Audit Request – In sum, Oracle demanded that Mars provide a listing of all clusters and servers included in Mars' VMware environments. Specifically, Oracle argued that:

- **Installed and/or running** – Mars must purchase licenses for “all processors where the Oracle programs are installed and/or running.”
- **Live migration** – “VMware technology specifically is designed for the purpose of allowing live migration of programs to all processors across the entire environment.”
- **Available for use** – As such, Oracle programs “are installed on any processors where the programs are available for use.”

Mars v. Oracle

Mars' Response – Mars provided 233,089 pages of documents in response to the audit. However, Mars refused to produce the requested documentation of its VMware environments. Specifically, Mars argued that:

- **Actual “use” is the proper metric** – Mars is required to purchase licenses only for servers that use Oracle software, not for processors where Oracle programs are merely “available for use.”
- **Live migration is not enabled** – Mars' VMware servers and clusters are configured so that each VMware cluster has a specific purpose. As configured, processing in one cluster cannot be moved to another. Neither can dedicated storage be accessed by different clusters.
- **Corroborated by video evidence** – Mars provided video evidence that one VMware cluster cannot access another.
- **Mars has complied** - By sending screenshots of all VMware clusters that “use” Oracle software, Mars has complied.

Mars v. Oracle

Notice of Termination – During the last push of these negotiations, a 30-day notice of termination was pending.

- Per Oracle's notice:
 - *“If Mars continues to refuse [to cure the breach], then Oracle will terminate its license agreement with Mars on October 26, 2015. Should Oracle terminate the agreement, Mars will be prohibited from all further use of the Oracle programs.”*
- Several times Oracle agreed to extend the termination date, but only by a day or two at a time.
- We have observed that threatening termination of the operative license agreement is an essential part of Oracle's licensing strategy.

Beyond Mars v. Oracle

The Oracle Audit Playbook

Audit Perspective from Inside Oracle

The following quotes are from an active legal filing against Oracle. This filing can be viewed in its entirety at

<http://houseofbrick.com/wp-content/uploads/2019/05/Consolidated-Class-Action-Complaint-v-Oracle.pdf>

[Former Employee 1] confirmed that the sales teams and LMS closely coordinated to use audits in order to sell unwanted cloud subscriptions. [Former Employee 1] also stated that sales would direct LMS to target clients for audit. In particular, [Former Employee 1] stated that the sales team would “identify large clients they thought they could get more money out of and threaten them with audits,” instructing LMS to say the Company had suspicions that they were out of compliance. Indeed, [Former Employee 1] stated that the sales teams would actually write out the threatening audit letters and give them to LMS to then send to the client. [Former Employee 1] stated that frequently, neither sales nor LMS had real evidence that customers targeted for audits were noncompliant, but that the mere threat of an audit would put the customers under so much pressure, because of the enormity of the potential penalties, that customers had no choice but to agree to Oracle’s demands that the client purchase cloud products. [Former Employee 1] stated that once the cloud sale was complete, the sales team would tell LMS that the customer had trued up, and LMS would close the file without even following-up with the client (making clear that the audit was initiated as a mere pretext to push the cloud sale through). [Former Employee 1] stated that “any statements from Oracle that LMS was independent from sales are a lie.”

Audit Perspective from Inside Oracle

[Former Employee 6] stated that it was a “regular practice” for sales representatives to contact LMS to start an audit when the customer was not going to buy cloud product, and tell LMS “[t]hey’re not going to buy anything from me so let’s just audit them.” LMS would find a compliance violation, and the representative would start negotiating from there. FE 6 confirmed that these “extortive” tactics were a “common practice.”

The Audit Playbook

- 1. Oracle Issues Audit Report** – The report invariably finds an extreme licensing deficiency, often with a magnitude of 50 to 100 fold.
- 2. The shortfall is largely predicated on licensee’s use of virtualization software** – Publicly available sample from Oracle:
 - “Oracle programs are installed on any processors where the programs are available for use. Third-party VMware technology specifically is designed for the purpose of allowing live migration of programs to all processors across the entire environment. Thus, Oracle Enterprise Edition is installed and available for use on all processors in a V-Center”
 - At times there is a legitimate compliance shortfall.
- 3. Oracle demands that customer resolve the finding within 30 days** – Oracle demands that the licensee resolve the findings within 30 days in order to remain compliant.

The Audit Playbook

4. **Follow-up Communication From Oracle Sales** – Shortly after the Audit Report, Oracle Sales may calculate the cost of the needed licenses, including past unlicensed use and support.
5. **Cloud Migration Proposal/ULA/Deep Discount** – Oracle then offers to resolve the shortfall if the customer will consider a cloud migration. This is different from the past where they would first offer deeply discounted perpetual licenses. They may also offer an unlimited license agreement to replace existing licenses.
 - **Note on cloud migrations:** Crowell & Moring and House of Brick have heard that, as part of Oracle’s push to be a competitor in cloud services, that sales representatives are rewarded with the highest percentage commission on cloud sales than with regard to any other Oracle product.

The Audit Playbook

6. Oracle Partitioning Policy – In side or official audit communications, the sales or audit representatives will refer to the “Oracle Partitioning Policy.”

(This policy is available at <http://www.oracle.com/us/corporate/pricing/partitioning-070609.pdf>)

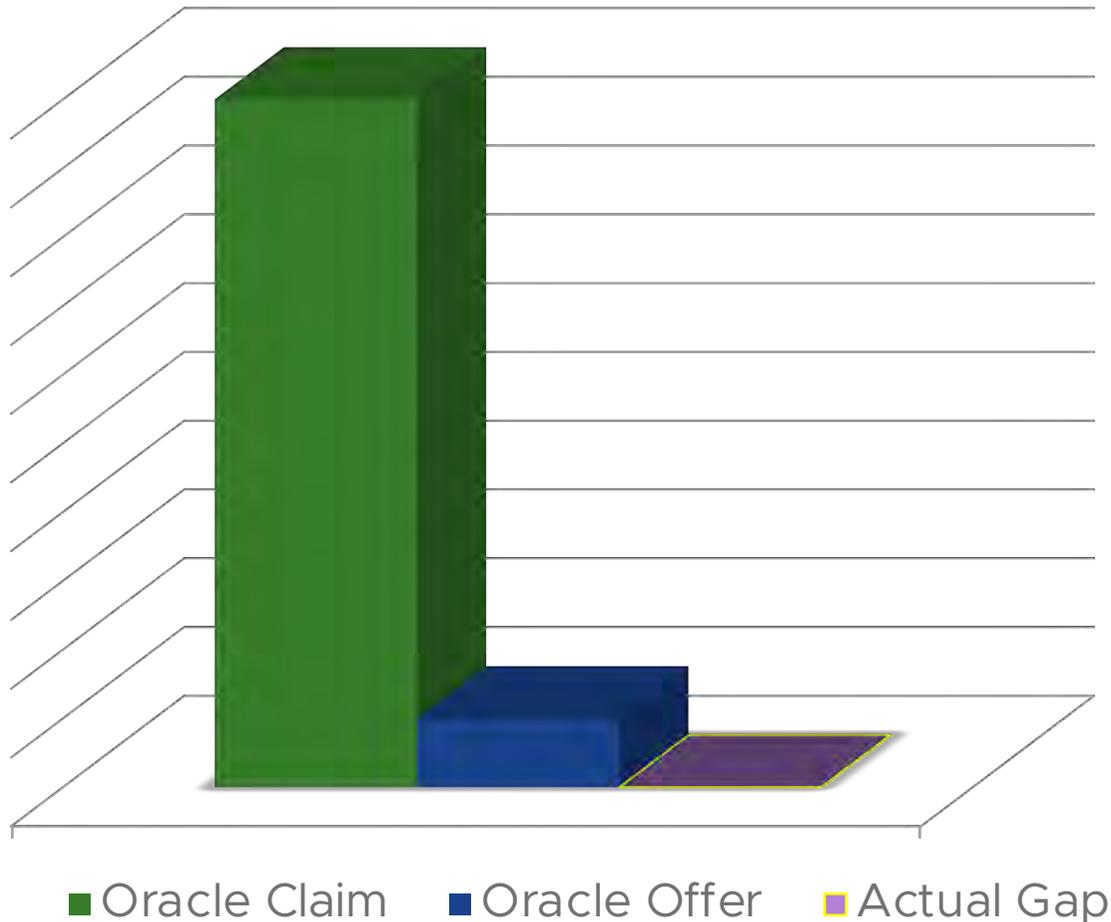
- **Oracle uses this policy to respond to the Licensee’s typical argument that live migration is disabled.** Most licensees ultimately argue that whether or not live migration could be enabled is irrelevant; it is specifically not enabled as configured. However, Oracle treats the disabling of live migration as “soft-partitioning,” which they claim cannot delimit the number of licenses.
- **The partitioning policy document is non-contractual.**

The Audit Playbook

7. Elements of Resolution of Dispute

- **Declaration of non-migration** – Oracle typically demands a certification from the customer with regard to the continued disabling of live migration.
- **Execution of “Audit Close Letter”**
- **Replacement agreements** – Oracle pressures the licensee to execute replacement license agreements and/or ordering documents that typically serve two functions: (1) leaving licensees vulnerable to future license shortfalls; and (2) making it more difficult for licensees to migrate to a cloud hosting environment (other than Oracle’s).

(All Too Typical) Customer Case



- Large to medium-sized business
 - Use multiple Oracle products
 - Deployed on VMware
- Initial finding from Oracle - \$100's of millions
- Oracle offer - \$10's of millions
- Actual compliance gap - \$0

Preparing for and Responding to the Inevitable Oracle Audit

Be prepared and be resolute

Preparing for an Audit

- **Involve legal counsel early.** Don't wait until a potential legal action to involve attorneys. That is too late.
- **Audits are about people** – Your own employees, consultants and attorneys, and Oracle employees. This is a high-touch process that cannot be automated away.
- **Understand your contractual rights and obligations.** Know what is in the binding agreement and what is not.
- **Be vigilant** – Ensure architectural integrity and monitor regularly to ensure VMs running Oracle stay on licensed hosts.
- **Regular checking** – Annual internal audits and assessments of compliance. Use House of Brick automated compliance monitors and alerts.

Responding to an Audit

- **Don't panic** – You typically have 45 days to respond to an audit notice.
- **Don't over communicate** – Only provide information you are contractually obligated to provide.
- **Keep a written record** – Recording your interactions with Oracle is important.
- **Scrutinize “findings”** – There are almost always false positives and mistakes in the report.
- **Don't be intimidated** – Oracle's initial finding is typically outrageously excessive.
- **Know your position and stand your ground.** If you are on good standing according to your contract, there is no need to give-in to pressure.

Recent Trends and Observations

The more things change, the more they stay the same.

Recent Trends

- **Oracle has Announced a Robust Cloud as its Future.**

Oracle has been clear that it will continue taking aggressive steps to move its existing licensee base to its cloud.

- **Hiding Oracle's Cloud Numbers.**

Oracle continues to refuse to break out cloud revenue from their largest line item of support revenue. This is likely due to their continued sluggish cloud performance.

- **Gartner Left Oracle Cloud as a “Niche Player” in the 2019 Magic Quadrant**

“Oracle is unlikely to ever be viewed by the market as a general-purpose provider of integrated IaaS and PaaS offerings. This is due to the dominance of the hyperscale providers, Oracle's late start with OCI, and the polarizing nature of Oracle in the minds of developers who often are the leading influencers for public cloud IaaS.” (Gartner, *Magic Quadrant for Cloud IaaS, Worldwide*, July 16 2019, ID G00365830)

Recent Trends

- **Expect More of the Same from Oracle.** Oracle's public and financial investment in the cloud wars is substantial. Oracle will likely double down on its plan before it abandons it.
- **With Minor Variation:**
 - Expansion to Java Audits;
 - Increased aggression and frequency of audits; but
 - Continued aversion to litigation.

House of Brick Services

- Oracle License Services (on premises and in the cloud)
 - Pre-audit compliance assessment
 - Audit defense
 - SaaS-based automated compliance monitoring and alerting
 - Managed License Support Service
- Architecture Services
 - Reference architecture and best practices
 - Cloud instance and on-premises hardware right sizing
 - Performance analysis and tuning
 - Migration and re-platform services

Crowell & Moring Services

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Arthur (Art) is a partner in the San Francisco office of Crowell & Moring. He focuses on the trial and management of complex intellectual property and commercial litigation and has extensive experience handling matters in the telecommunications, internet, software, hardware, medical device, and construction machinery industries. Art's cases have involved cutting-edge legal issues in patent, trademark, trade secret, and copyright law. An accomplished trial lawyer, Art has successfully represented his clients over the years in numerous "bet-the-company" disputes.

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Questions

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