

Anatomy of a Software License: *Negotiation Perspective*

Celia Bauer, Esquire
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Presentation Agenda...

- **Introduction**
 - Leverage: A Matter of Perspective
 - Two Sides to Every Bargain
 - Key Commercial Drivers

- **Business Side of Software Licensing**
 - Getting What You Paid For v. Getting Paid
 - Money Matters
 - My Stuff v. Your Stuff
 - Life and Death of a Software Program
 - Insurance by Any Other Name

[Leverage: A Matter of Perspective]



[Two sides to every bargain...]

- Balancing the needs of the parties
 - Software licensing is not a zero sum game
 - “win-win” is *required*, not optional
- “Vendor” myths that create obstacles
 - Myth #1: Any deal is better than no deal
 - Myth #2: End of year fire sales
 - Myth #3: You WILL do what I say because I am the CUSTOMER!
- Understanding the other perspective is key to success for BOTH parties



Key commercial (and other) drivers...



- Licensee
 - Value for my money (company)
 - Use it or lose it (company – budget)
 - I want a promotion (individual)
 - I feeeeeeel GOOD! (personal ego)

■ Licensor

- Hitting revenue targets (company)
- Minimizing risk (company)
- Making sales targets – my paycheck (individual)
- Gotta gotta gotta close the deal... (individual obsession)

Getting what you paid for v. getting paid...

Software functionality and performance

- Trial period pros and cons
 - Resources, effort, expense on both sides – each party bears
 - Best way to know for sure prior to any commitment
- Acceptance pros and cons
 - Same as trial, except commitment tied to specified parameters
 - Better for licensor (qualified commitment)
 - Wash for licensee (only remedy is walk-away)

[Getting what you paid for v. getting paid...]

Software functionality and performance

- Warranty pros and cons
 - Commitment with safety net
 - Same remedies but maybe harder to untangle
 - Best for licensor (immediate revenue)
 - Best for alert licensee (remedy commitment from licensor)
 - Read documentation – get the engineers and business users together
 - Negotiate adequate remedies – better than a walk-away

[Getting what you paid for v. getting paid...]

- License term - really perpetual?
 - Support required?
 - Practical reality – Can you really use the product/ obtain any value if you drop support?
 - Legal terms - Any license “gotchas” that require licensee to continue paying “support” fees?
 - Survival under what circumstances?
 - If licensee terminates for breach?
 - If agreement “expires”?

[How much is enough?]

- License scope: When is enough **enough**?
 - Avoid paying for excess capacity (the “enterprise” elephant gun)
 - Pay-as-you-go at a specified rate
 - Future payments caps – the value of CPI
 - Balance with discounts for upfront commitments



Who invited the in-laws?]

- Corporate Family: Welcome or unwelcome guests?
 - Licensors protecting future revenue by limiting corporate family
 - Find out who really needs it
 - Don't pay extra now for “what ifs” (M/A) – anticipate and structure options in advance



Money matters...



- Who cares about your revenue?
 - Licensors will walk away when revenue is unattractive
 - Company CFO and auditors rule
 - Sales person will not waste time on no commission deal



Money matters...



- Capital v. Expense
 - Perpetual = capital
 - Term = expense
- Death and Taxes
 - Understand the taxes up front – surprise taxes could kill value
 - Check state jurisdiction for sales tax applicability

[My stuff, your stuff...]

- Configuration:
 - Configuration requires no touching source code
 - Allowed by the functionality of the unaltered program
 - Rearrangement of pre-existing elements
 - Ownership is completely irrelevant – not anything new being created
- Customization:
 - Re-programming at source code level
 - Creation of a derivative work
 - Prohibited by © law except with permission of owner (licensor)

[My stuff, your stuff...]

- Modification
 - Direct alteration/ repair/ addition made to source code
 - Creation of a derivative work
 - Prohibited by © law except with permission of owner (licensor)
- Separate program / works
 - Entirely separate but compatible / related
 - New code that runs with, on, in pre-existing program but could have independent value
 - Non-code works (templates, training manuals)

[My stuff, your stuff...]

Ownership – the big hang-up

- Change the issue: Who wants to do what with which parts?
- Sort out rights using licenses and restrictions:
 - Licensee can expect broad royalty-free license, but...
 - Licensor must protect derivative works to avoid creating a competitor – no third party distribution by licensee;
 - Licensor's distribution of derivative works can be restricted if they contain licensee IP / confidential material.

[Life and death of a software program...]

- Prodigal Son
 - Support termination and reinstatement
 - Giving up the cap
 - Back fees – justified or not?
 - Missed upgrades
 - Lost support cannot be recaptured
- Upgrade AGAIN??
 - Costs and business disruption with too many upgrades
 - Support that is limited to current or one-prior release
 - Read the roadmap

[Life and death of a software program...]



Sorry – No Longer Supported

- Read the roadmap!
- Negotiate in replacement products
 - Fair compensation for new functionality
 - No compensation / fair restriction for useless new functionality

[Life and death of a software program...]

■ The Great Escrow Myth

- Good protection, or security blanket?
- Ask your engineers – could you really support us?
- Cost/ benefit analysis – Easier to replace or support?
 - Level of customization
 - Difficulty of implementation
 - Critical/ non-critical to business operations
 - Availability of replacement products
 - Learning curve for engineers – this is NOT for Help Desk staff or faint of heart



[Insurance by any name...]

Call it what you will, it all adds up to insurance:

Risk reduction measures that make the other guy pay if something goes wrong.

- Audits – insurance for licensor
- Indemnity – insurance for licensee (or both?)
- Material change in circumstances – insurance for licensee
- Warranty – insurance for licensee....AND licensor!
- Liability limits – insurance for both parties
- Assignment clauses – insurance for change
- Escrow – sometimes insurance, sometimes a Linus blanket

[Risk balancing...]

Consider as a whole the risks on both sides and mitigating factors

- Look at liability limits together with:
 - Warranties
 - Indemnities
 - Insurance
- Weigh together:
 - Magnitude of risk
 - Likelihood of risk
 - Available remedies/ mitigating factors
 - Involve the business
 - Walk through real-life scenarios

[Questions?]

