

Do your digital plans match your licensing reality?

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As many organisations enhance their digital strategies, and embrace new agile ways of interacting with customers and supply chains it is vital they ensure that the ‘drive for digital’ does not breach existing (sometimes long-running) technology licensing arrangements. In this briefing we look at some of the ways your organisation can evolve its licensing strategies to embrace new technologies while avoiding costly clashes and disputes.

Developments in technology services, both in the technology available and the way services are delivered, are generally good news for organisations who are looking to increase their digital interactions. However, some of these changes result in quite drastic changes in customers’ use requirements and business models which are not always consistent with traditional technology licensing models.

New technologies: examples of changing use

While many ‘new’ technologies - big data, Robotic Process Automation (or ‘RPA’) and, to some extent, machine learning / artificial intelligence - have been around for a few years now, they have only recently been commoditised in a way which makes them accessible (and ensures they offer tangible business benefits) to a wide range of organisations. RPA, for example, is increasingly being deployed in middle and back-office functions. It enables organisations to replace personnel with ‘robots’ (or software solutions) - examples include mobile operators automating back-office processes such as SIM swaps, credit checks and customer data

updates. In licence terms, if employees previously accessed licensed (rather than owned) software/systems to carry out these processes, RPA would replace multiple ‘licensed users’ with one ‘robot’.

Alternatively, businesses may adopt new systems or applications which allow their customers to manage directly their own business accounts (for example placing their own orders for goods). This often replaces a traditional call centre model (where the customer would have contacted a call centre employee who would place the customer’s order on the business’ ERP system). Again, where the underlying system is licensed, that licence may be impacted. In some circumstances, the business may reduce the number of licensed users it requires (as it no longer needs as many call centre staff to deal with orders). In others, depending on the licence terms, it could result in the business increasing its number of licensed users (as customers and other staff may be classified as users with indirect access to the system - as seen in the recent SAP v Diageo case).¹ This could, in turn, increase licensing costs (and in the SAP case, SAP claimed an additional £55 million in under-licensed fees, although the judgment did not address quantum - the judgement was being appealed by both parties, but we understand that the parties have recently withdrawn their respective appeals).

Steps you can take to avoid disputes

There are a number of things your organisation can do when designing and deploying its digital strategy to avoid costly clashes with technology suppliers and licensors:

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- **Audit your supply chain:** it is important that those designing your digital strategy understand how it could be impacted by existing licences and contracts. This includes having a clear picture, at the start of the process, of which technology is licensed (either to you or your outsourcing, or other key, suppliers), and whether any of those licence terms may detrimentally affect proposed plans. For example, a minimum revenue/royalty commitment may reduce cost savings that would otherwise have been made by cutting FTEs (who are licensed users). Perhaps more worryingly, plans to enable customers or employees to directly manage their accounts by interacting with systems could be costly if a widely drafted technology licence would classify those customers as ‘users’, with indirect access to the underlying systems, and require licence fees in respect of them.
- **Choose your suppliers and licence terms carefully and monitor the market:** unsurprisingly, technology suppliers and licensors are aware that some digital advancements, particularly where they lead to a cut in required FTEs, could reduce licence fees (and their resulting profit margins). Different suppliers are reacting differently to this challenge to traditional licensing models. Some are promoting a flexible approach when it comes to ‘licensed users’, while some are choosing to litigate or audit customers aggressively.

Where possible, always select a supplier/licensor that offers flexibility and, while it can be notoriously difficult to negotiate some technology ‘standard terms’, ensure that any licence terms you agree reflect your plans. For example:

- consider whether you need to define references to concepts such as ‘use’ or ‘direct/indirect access’ in your licences;
- where licence fees are calculated by reference to categories of named users, future proof these wherever possible, and ensure that the supplier/licensor is not free to add to this list arbitrarily applying whatever their standard rates are at that time; and
- ensure that any interface licence expressly provides you with the access you require to the underlying systems, however this is accessed (particularly as developments in RPA and AI mean automated use is likely to increase).

It is also helpful to monitor market intelligence to see what (if any) action prospective suppliers are taking in this area and how the market is reacting. For example, SAP has gone on record stating that it “is committed to modernising its pricing approach” following discussions with its user groups who were

It may be that by reviewing your licensing matrix as a whole, you can gain comfort that you have sufficient licensing cover in place. For example, you may have a ‘gateway licence’ which allows third party systems to interface with your underlying system in such a way that your intended use is permitted. However, it is not currently safe to assume that licensing integrator tools will always provide a gateway licence (and this argument was not supported in *SAP v Diageo*, although the judgment has been criticised on this point, amongst others, and it will be interesting to see if this is open to challenge). In addition, warranties and maintenance arrangements may be affected if existing systems are combined with a new digital enabling layer, which could add cost and/or risk to the business case. In our experience, these are often issues which are spotted (where they are spotted) near the end of the process - however, time and money could be saved if they were considered up-front.

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concerned about the issue of ‘indirect access’ mentioned above,ⁱⁱ and Cisco has launched a new, flexible Enterprise Licence Agreement which includes a 20% ‘growth allowance’ which may be helpful for those expecting digital growth. Knowing what suppliers, and their competitors, are saying to the market may help when trying to negotiate the best deal with them (particularly if their proposed terms do not match the market rhetoric).

- **Engage with your supplier:** while it is important to bear digital plans in mind when selecting new suppliers, many of the issues you may face will be with existing, often long-running arrangements. And many of these arrangements, agreed in a ‘pre-digital’ era, will fail to cater for the new technologies and services which are now relevant to them. As a general point, good vendor management, whether for a software licence (where possible) or full outsourcing arrangement, will always help reduce potential disputes. It may, depending on your relationship with the supplier, be beneficial to clarify that proposed plans which are not expressly covered by the agreement will not breach its terms, or amend the agreement to cover new plans. You should also consider whether, or when, it may be appropriate to discuss potential issues with your supplier. Depending on your circumstances it may be beneficial to proactively raise concerns with your supplier, rather than wait to see if the supplier picks up on them. Some suppliers are actively encouraging such engagement. SAP, for example, has assured customers that it “will not collect back maintenance payments for [any] under-licensing” where customers suspecting they may be under-licensed proactively engage with them.ⁱⁱⁱ While this may just be a supplier reacting to negative press and lobbying about its pricing strategy (or, some may argue, capitalising on current customer concerns in this area), it is something for customers to consider. In reality, how you

choose to engage with existing suppliers/licensors may depend on whether you have the ability (contractually and practically) to seek out alternate suppliers with pricing models more attuned to your digital plans if discussions do not go well.

- **Check if you can sell old software you no longer need:** If your digital strategy has resulted in changes which mean you have software you no longer need, the business may consider selling this on through the lucrative re-sale market. However, it is important to check that you have the right to do so. While sale or assignment may be restricted in the licence terms, the case of *UsedSoft v Oracle* held that in certain circumstances (for example where the licence was effectively a ‘sale’ and where you make your copy unusable) the licensor’s rights had been exhausted and so the software could be sold regardless of restrictions in the licence.^{iv} The case does not, however, apply in all cases (and, for example, services including SaaS terms will not normally be relevant).

Comment

There is an increasing conflict between the way businesses use licensed software in their digital operations, and the now out-dated pricing modes adopted by some IT suppliers which have failed to keep pace with these new opportunities.

As a consequence, we are seeing some suppliers actively pursuing additional licence fees when their customers enact digital advancements, and are currently advising clients on strategies to resist claims they have received.

That said, we have seen some suppliers publically stating that they are trying to adapt their licensing models to acknowledge the current pace of change around automation and digitisation, although only time will tell whether this makes a practical difference to their customers.

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While lobbying suppliers may help bring about change in the longer-term, and case law may develop in this area, it is vital that organisations factor existing licence and supply chain issues into

their digital plans and business cases now to avoid any expensive surprises.

This article was written by Rob Sumroy (Partner) and Natalie Donovan (PSL) from Slaughter and May's Technology team.

Our Technology team advises on the full range of technology issues, from the procurement and implementation of complex technology solutions to advising clients on new risks and opportunities generated by developing technologies such as IoT, AI and RPA. If you would like to discuss any technology issues with us, please contact Rob, Natalie or your usual Slaughter and May contact.



Rob Sumroy
T +44 (0)20 7090 4032
E rob.sumroy@slaughterandmay.com



Natalie Donovan
T +44 (0)20 7090 4058
E natalie.donovan@slaughterandmay.com

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ⁱ SAP UK Limited v Diageo Great Britain Limited [2017] EWHC 189 (TCC)

ⁱⁱ <http://news.sap.com/sappire-now-modern-pricing-modern-times/>

ⁱⁱⁱ As above

^{iv} UsedSoft GmbH v Oracle International Corp (C-128/11)