

Agenda

Why do I need to escrow software anyway?

How to identify your risk

How to expertly negotiate an escrow agreement

Key terms of any software escrow agreement

Define the right stuff that should be placed in escrow

You've got the right stuff, now how do you know it's good?

Release conditions – what happens?

Release process

Canadian v. US software licensing

You've got the code, do you have all the use rights you need?

How to easily explain all of this to your constituents

Managing the agreement and all the parties over the term of the licenses

What Is Technology Escrow?

The practice of securing conditional access to Intellectual Property or other proprietary materials for the benefit of the parties engaged in a business agreement.

Technology Escrow Parties

- Depositor: The seller, also referred to in contracts as the developer, licensor, grantor and in SaaS the provider, etc.
- Beneficiary: The buyer, also referred to in contracts as the licensee, user, grantee and in SaaS the subscriber, etc.
- Escrow Agent: The neutral trusted third party, also referred to as the custodian, holder, agent, etc.

Why Do I Need to Escrow Software Anyway?

Obsolescence

Vendor Insolvency, etc.

Vendor failure to support

Business interruption

Customer satisfaction & repercussions

Lost customers, revenues, profits

Lost (or inaccessible) data

How to Identify Your Risk

Operational Dependencies

- Number of users
- Customer impact
- Lost productivity
- Lost revenue
- Public Safety

Investment of Time

- Availability of substitute products
- Time to recode
- Time to identify new product
- Time to negotiate new license

Risk Factor
Determine what level of software escrow protection is needed and how seriously you should consider your escrow agreement

Costs

- Initial investment
- License fee
- Installation
- Retraining
- Customization
- Reprogramming
- Hardware

Vendor Assessment

- Vendor stability
- Management track record
- Subcontractor partnerships
- Breadth of product lines
- Commitment of staff

How to Expertly Negotiate an Escrow Agreement

Know your stuff

Know what you need

- Analyze your level of exposure

Dependence + replacement cost
x replacement time = risk factor

Be realistic

- If you need the escrow, budget for its cost

Choose the right agreement type

Three party vs. master three party:
which is best to protect your
organization?

- Size of vendors
- Negotiation positions that you can take
- How frequently you use escrow

When is a two party agreement
recommended?

- Hardly ever ...

Key Terms of Any Software Escrow Agreement

Deposit contents, update process and frequency

Comprehensive listing of all elements

- Including 3rd party components necessary to use, update, reproduce, support, maintain, etc.

Verification rights

Regular updates

Release conditions

- Release mechanism, objection period, contrary instructions, etc.

Rights to use following release

Payment of fees and dispute resolution

Define the Right Stuff That Should be Placed in Escrow

- Source code and documentation
- Maintenance tools
- Proprietary or third-party system utilities
- Instructions on “where to get third party utilities” and “how to deploy”
- Descriptions of the system/program generation
- Compilation and execution procedures
- Names and home addresses of key technical employees of the developer
- A list of any encryption keys or passwords used in the creation or backup of the escrow deposit
- A copy of the executable with data in SaaS/ASP licensing arrangements – the data is as important as the code!

You've Got the Right Stuff, Now How Do You Know It's Good?

Perform an appropriate level of verification:

- Catalogue the files in escrow and confirm the ability to read the media
- Identify the tools needed to maintain the deposit
- Compile the product and build the executable code
- Test the functionality of the compiled deposit
- Confirm the usability of the files built when installed

77% of all deposits sent in for analysis did not contain the necessary software to build the media

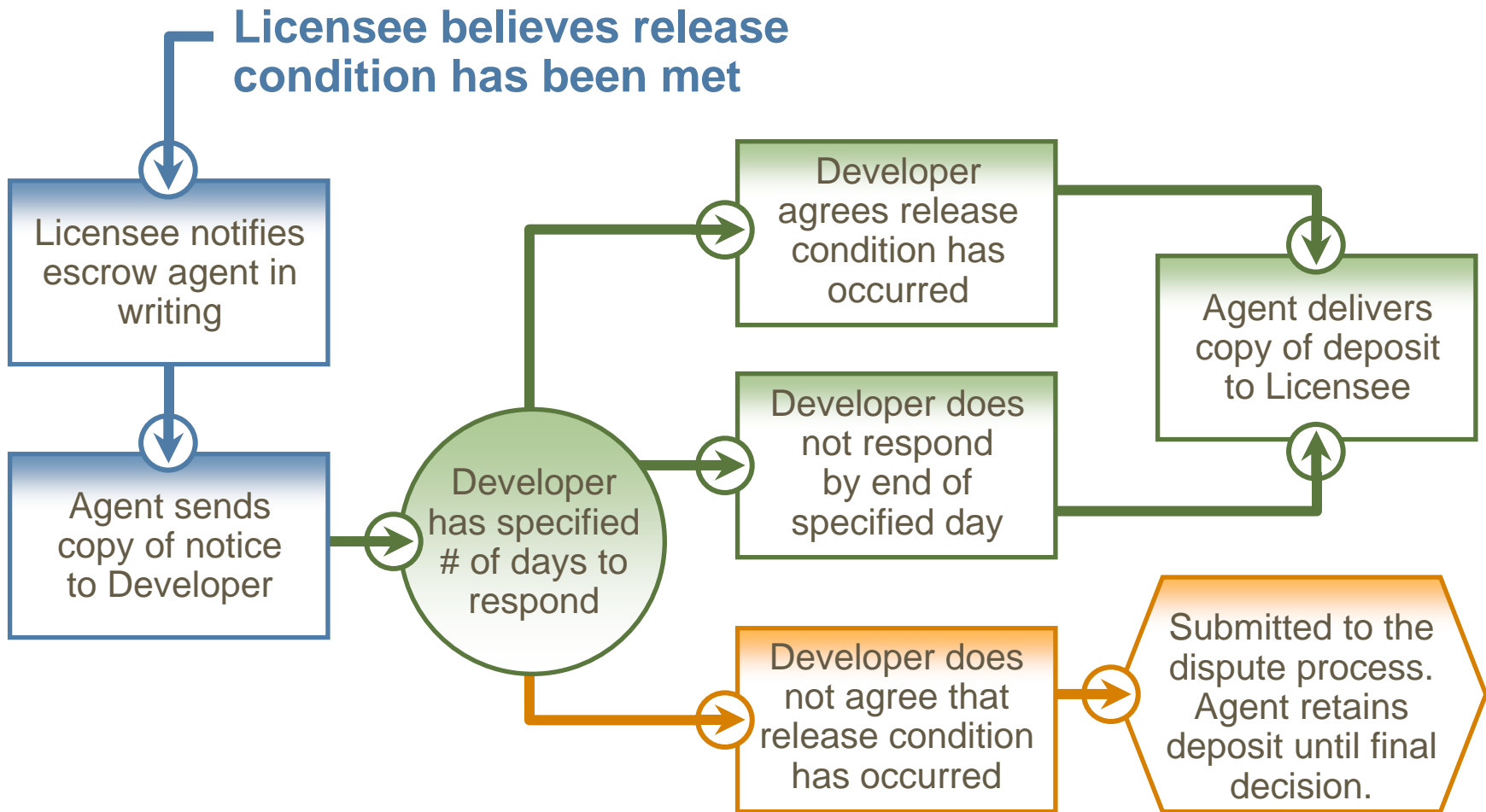
88% of deposits reviewed required depositor contact for completion and confirmation

Release Conditions – What Happens?

REASON FOR RELEASE	% OF TOTAL RELEASES
Loss of support	30%
Cease business operations	22%
Insolvency/Bankruptcy	20%
Depositor's request	9%
Demand release	6%
Payment	2%
Court order	1%
Breach of obligation	<1%
Merger	<1%
Transfer of assets	<1%

- Be specific and cover all possible circumstances
- Think beyond insolvency/bankruptcy

Release Process



Canadian v. US Software Licensing

In Canada:

Recent changes to CCAA and BIA acts give more rights

Licenses may be disclaimed in bankruptcy

Recent amendments provide some protection to Licensees, but limited and not entirely clear

Restructurings and proposals, not standard bankruptcy

Clearly define the IP that is licensed

Compliance issues: separate the license payments from other payments

Location of data storage may also be an issue

In the US:

Section 365(n) allows the Licensee to retain its right to use licensed technology in the event of a Licensor bankruptcy

Structure license to fall within 365(n)

- Recommend a US escrow agent and have US law control
- Include continuing obligations so as to deem it an executory contract
- Avoid contingent license grants
- Include IP rights which fall within definition of the Code

Be careful of automatic stays and bankruptcy judges

You've Got the Code, Do You Have All the Use Rights You Need?

Make sure you have the right to modify and otherwise maintain the technology upon release

Include in BOTH license agreement and escrow agreement

License agreement should include the right to:

- Use source code (not just object code)
- Make a backup copy
- Provide access to source code to an outsourcer or sister company, subject to appropriate controls
- Move software to another location or computer
- Increase your number of licensed users post-release
- Create derivative works in order to meet business needs, within scope of original license

How to Easily Explain All of This to Your Constituents

Outline the risk assessment exercise

- Including costs of failure

Review the options

Explain your risk management strategy

Make it their decision

- Give the decision-maker the tools s/he needs to make the decision you support

Engenders trust between two parties partnering in business!

An “insurance policy” to protect investments in mission-critical technology

Contingency that extends beyond the seller’s DR plan.

Solution by which the sellers address the buyer’s reasonable concerns

Intellectual property protection from infringement claims (irrefutable proof!)

Managing the Agreement and All The Parties Over The Term of The Licenses

Legal Expertise

Focus on escrow contract

Ensures a release occurs when it should

Technical Expertise

Focus on escrow deposit

Ensures the deposit contents are usable



Form a cross-functional internal team comprised of risk management, IT, legal and business professionals

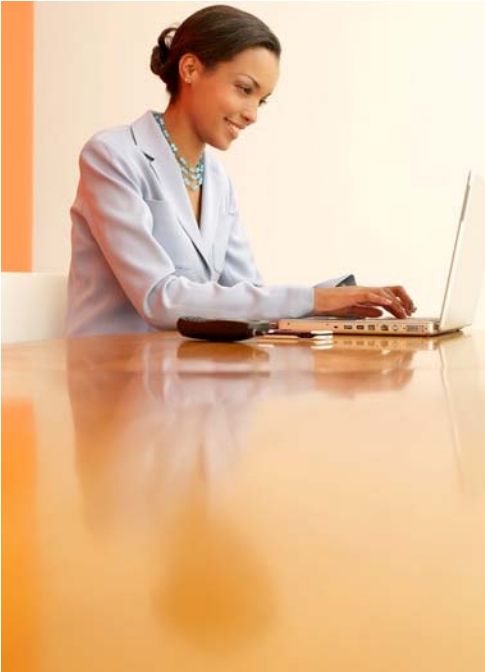
- Get corporate commitment

- Identify the level of risk with which your company is comfortable

- Include escrow in your RFP's and money in your budget to protect your investment

- Incorporate escrow practice into your asset management program

- Pass baton, educate users and audit compliance



Thank You!

Questions?

Software Escrow for Dummies® is available at the conclusion of this session. A copy of the presentation can be emailed to attendees with a link to a Gartner Report and sample software escrow agreements for download. Please provide your card to one of the speakers if you are interested.

