

How to Effectively Mitigate Risk When Licensing Software



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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

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

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

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
- A list of any encryption keys or passwords used in the creation or backup of the escrow deposit

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

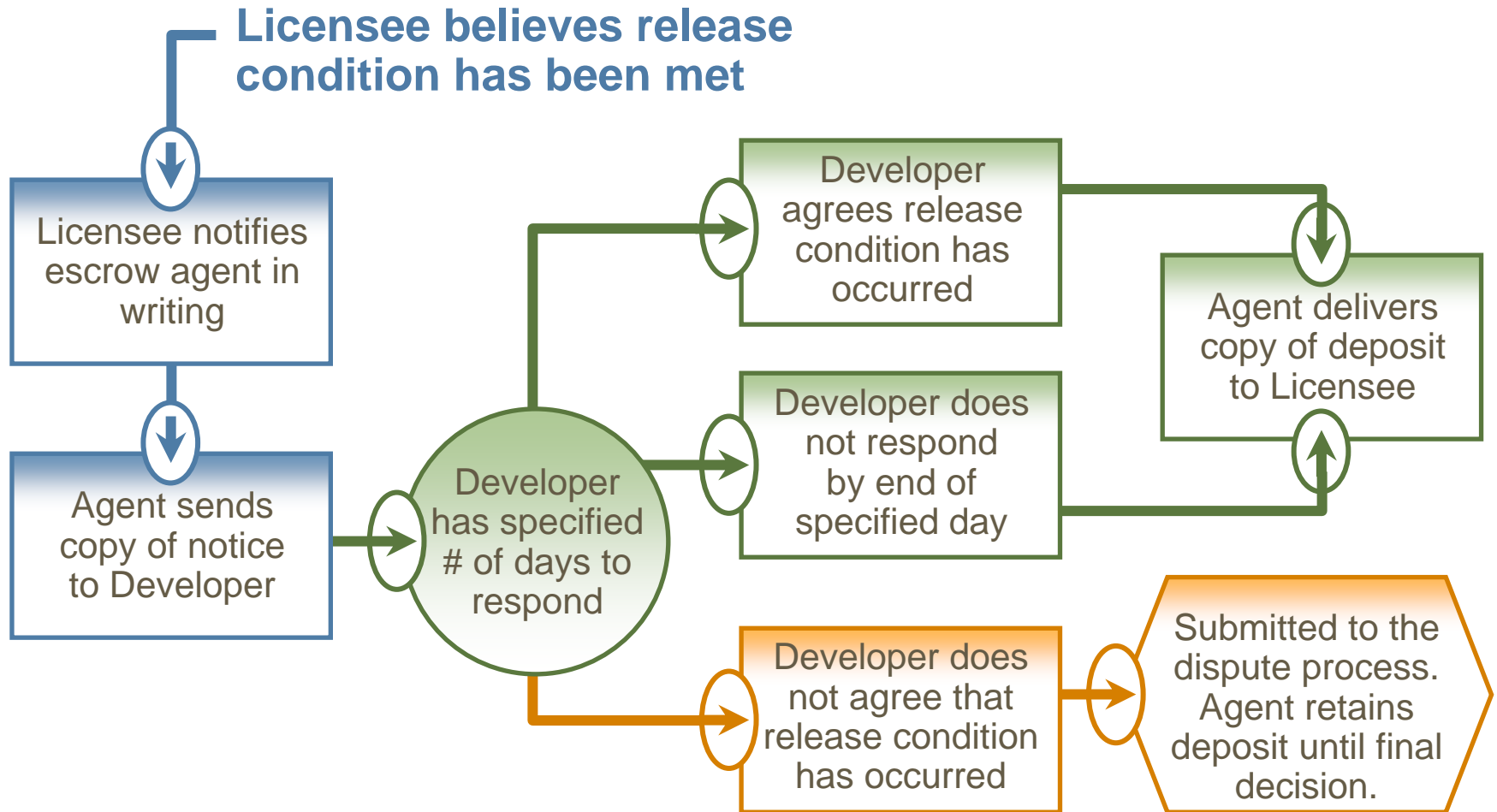
88% of deposits reviewed required depositor contact for completion and confirmation

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



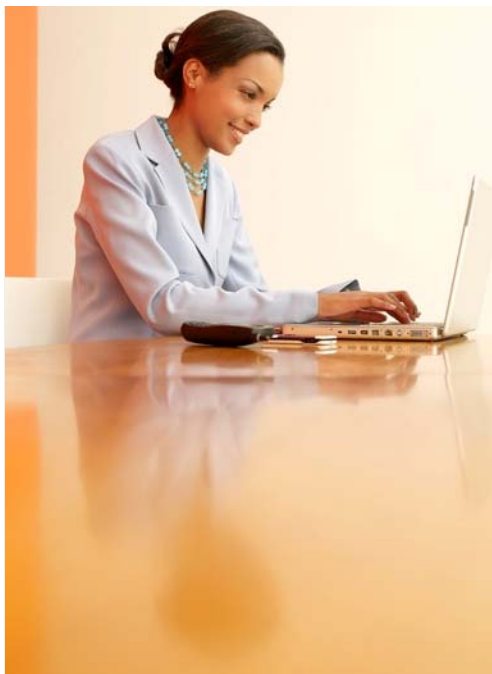
You've Got the Code, Do You Have All the Use Rights You Need?

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



Thank You!



Questions?

