

How to Sweat Software Assets

Preparing for a major contract negotiation

While individual users purchase a license or two from a supplier or perhaps from the Internet, large corporations obtain their software in a process that can and should take many months of preparation and negotiation.

This is true with specialized software required for your industry or business, and this is true of all the Microsoft, IBM, Oracle and SAP products used throughout your enterprise. Literally, millions of dollars can be saved or lost, based on the amount of preparation, how much strategizing and planning you do, and finally how you conduct the negotiations with software vendors.

Ultimately, your company and the software vendor have at least one major thing in common: a need to conclude an agreement. But how good that agreement will be for your company depends first and foremost on you, not the vendor. Here are a few pointers before you get to the negotiation stages.

Prepare Thoroughly

One of the most basic mistakes you can make when negotiating is to come to the negotiations without adequate preparations. It is important to understand that the process of negotiating does not begin at the moment your team first meets the vendor team across the negotiation table, but many months before. In most cases, you will find that the efforts you make prior to beginning the negotiation process are easily as important and play as significant a role in achieving a successful outcome as the actual time you are meeting and discussing terms with the vendor's agents.

Organizations (actually individuals, because every negotiation is conducted by people) do not spend enough time on these important pre-negotiation steps:

- Gathering the required internal data.
- Analyzing that data.
- Looking at future plans.
- Defining the desired outcome of the negotiations.

- Understanding the goals of the other side.

The inevitable outcome of neglecting these issues is poor negotiation results. Similarly, the inevitable outcome of proper preparation, research, strategizing, and negotiation is a software licensing agreement that saves your company money and/or includes more or better software licenses.

Set Clear Goals

Setting realistic and achievable goals is essential to a successful negotiation. Well defined goals will determine your strategy and tactics, enable you to determine when you have reached a successful outcome, and establish your “red lines” or reservation points (what is unacceptable).

Failure to identify these limits up-front can lead you or your company to accept terms that are lower than what you expected and likely will be regretted in the future.

Define your BATNA

This is an acronym for ‘Best Alternative to a Negotiated Agreement’:

http://en.wikipedia.org/wiki/Best_alternative_to_a_negotiated_agreement” (Fisher, Ury and Patton, 1991). In simple terms, the strategy is to prepare at least two or three alternate options to your planned outcome. This means determining the point at which you are prepared to leave the negotiation table, or at which you will accept terms that are better than your original goal.

These are not the goals you set out to achieve in the negotiation process; rather they are potential alternatives to consider.

Understand how the software vendor works

Just as you need to determine your own goals, reservation points and BATNA, you need to do the same for the software vendor. By understanding the software vendor’s interests and goals, you are better able to understand the obstacles you are likely to face at the negotiation table.

Such information can be gleaned from a variety of sources, including unofficial discussions with your software vendor’s Account Manager. The vendor sets very high goals for Account Managers – typically, they are expected to increase the licensing revenue from your previous

or current agreement by between 15-20%. Part of your preparation should include making a list of the decision makers on the vendor side and understanding who has the ability to agree to concessions. Each vendor has a structured approach to negotiating agreements that involves setting out rules at different levels of the organizational pyramid that determine when and by whom concessions can be made.

Choose When to Negotiate

The accepted ideal is at the end of the calendar year, when companies are looking to close their sales objectives. In some cases, the end of the fiscal year does not coincide with the end of the calendar year. For instance, at Microsoft, the fiscal year ends June 30. As a result, a set of promotions come out around April or May in order to increase sales. In the past, there was a thirty day grace period for renewing an enterprise agreement but this has been removed and therefore you must factor the lack of this time when calculating when you need to approach Microsoft. Discounts that are currently defined in your licensing agreement will not be honored beyond the agreement renewal date.

Because Account Managers know that they will be penalized if their account agreements are not renewed in time, they will increase the pressure to close the negotiation cycle as the date draws near. As you begin considering your options, check whether a given promotion is relevant to your geographical location; often promotions are limited to specific countries (this information can be obtained from your Reseller). Once you know when you want to begin negotiating, you must schedule additional time for your pre- negotiation preparation and research. If you wait until the software vendor approaches you, the opportunity to choose when to negotiate may be lost. The closer you get to the renewal date, the less time you have and the more pressure you will experience – both from the vendor and from within your organization.

Know what to negotiate

Knowing where not to spend your time and effort is sometimes more important than where you do choose to focus. There are certain concessions that are pre-determined by the software vendor and others that are easier to negotiate than others. Smart negotiators will focus on issues of pricing, product mix, agreement duration, payment terms and other negotiable topics.

Get Everything in Writing

Have all agreements regarding concessions, special terms and conditions drafted into a formal document that is part of the overall set of official statements set out in the software licensing agreement.

Do not accept local subsidiary letters, mailed notes or verbal promises, as none of these have any legal status. Document all offerings made during the discussions and make sure they appear in the final agreement before it is signed. Too often, negotiators offer additional benefits during the negotiation process that do not appear in the final agreement. Only later does the company discover the discrepancy, and by then, it is too late. If it is not in the agreement, as far as the law and the vendor consider it, it does not exist.

This advice has been contributed by Daryl Ullman: <http://www.linkedin.com/in/darylullman> from Emerset: <http://emerset.com/>. And is an extract from Daryl's book 'Negotiating with Microsoft'.

Microsoft Product Use Rights (PUR)

Microsoft Product Use Rights Document – the hidden font of Microsoft licensing knowledge!

As any Software Asset Manager should know, a license is actually the right to use a piece of software, and the ways in which a license can be used are governed by the terms and conditions of the contract which creates the license.

The terms and conditions of Microsoft licenses are found in a variety of different documents, including documents such as Master Business and Services Agreements, Enterprise or Select Plus Agreements, and Enterprise or Select Plus Enrolments.

However most of these documents are designed to govern the relationship between Microsoft and the company or organisation that is using the licenses. They don't actually contain most of the detailed provisions that dictate how licenses can actually be used. They do, however, reference another document, Microsoft's Product Use Rights (PUR) document, which can be downloaded from the Microsoft's Product Licensing web page (<http://www.microsoft.com/en-us/licensing/product-licensing/products.aspx>) and it is possible to download both the current PUR and past PURs.

The PUR document contains the detailed terms and conditions for every Microsoft application and product sold through Microsoft Volume Licensing. It is updated regularly by Microsoft, and in conjunction with your Master Agreement, Select Plus and / or Enterprise Agreements and the Enrolments, it is one of the key documents governing your relationship with Microsoft.

Despite its importance, many Software Asset Managers have barely heard of the PUR, let alone read it or ever used it to understand how to license particular products and applications. It is also helpful when validating information received from the SAM support network, eg resellers, licensing consultants and Microsoft themselves!

Given that accountability for correctly interpreting the terms and conditions of licenses always rests with the end user organisation, all Software Asset Managers should be able to use the PUR to at least satisfy themselves that advice they have received from licensing consultants is correct.

Using the PUR

The PUR contains three sets of license terms – Universal License Terms, which apply to all volume licenses, General License Terms, which apply to all products licensed under a particular licensing model, and Product-Specific License Terms, which apply only to a specific application or product.

There are also appendices, which is where you will find the license terms applying to Software Assurance

The PUR is updated on a monthly basis, and always includes the terms and conditions of the current version of software. Older versions of the PUR are also available for download, and it is vital that Software Asset Managers are always referring to the correct version of the PUR for the product that you are licensing.

But bear in mind if you are taking advantage of downgrades rights that it is the T&Cs of the actual license you purchase that apply, not the version actually installed. So for instance if you purchase SQL 2012 to cover a SQL 2008 installation, the T&Cs of the 2012 version will be the ones you need to refer to.

Universal License Terms

The Universal License Terms are where you will find key licensing principles such as ‘Rights to use other versions’ (which includes downgrade rights) and ‘No Commercial Hosting’ which prohibits use of the products for commercial hosted services, which might happen if your IT department provides services to a 3rd party as part of a commercial contract eg a facilities management contract.

It is also in this section that Microsoft details its ‘License Reassignment’ terms – Microsoft specifically specifies that licenses may not be reassigned on a short term basis (less than 90 days) and that if a license is reassigned the software must be uninstalled or blocked from use. Microsoft also lists some exceptions to this rule eg CALs and license mobility (more on that later).

General License Terms

Microsoft defines 10 license models, each of which has a set of General License Terms associated with it. The document is structured so that the Product Specific Terms for each individual application are listed in a section devoted to each License Model. This can make finding Product Specific Terms challenging to locate – the find function (Ctrl + F) is particularly helpful, as is the product index at the end of the document (if you are crazy enough to read past the appendices and realise it’s there!).

The 10 license models are:

1. Desktop Applications
2. Desktop Operating Systems
3. Servers: Processor/CAL
4. Servers: Server/CAL

5. Servers: Per Processor
6. Servers: Per Core
7. Management Servers
8. Specialty Servers
9. Developer Tools
10. Online Services

It is in the General License Terms for Desktop Applications that you will find the reason why publishing Microsoft products on a Citrix server can lead to nasty surprises (see Citrix Licensing Quick Guide (<http://www.itassetmanagement.net/2012/09/25/citrix-licensing-quick-guide/>)). It is a combination of the following two terms:

1. *You must assign each license to a single device; and*
9. *Remote use of the software running a network Servicer is permitted for any user from a licensed device.*

Product Specific License Terms

After the General License Terms for each License Model, the PUR lists the Product Specific License Terms for each application that uses that particular license model. So for instance, the Product Specific License Terms for MS Office Pro Plus, MS Visio Std and MS MapPoint are all listed in the 'Desktop Applications' Section, while SQL Standard 2012 is listed twice, both in the 'Servers: Server / CAL' section and also in the 'Server: Per Core' section.

The Product Specific License Terms are the ones which change the most frequently, being updated with every new version of software that is released. Sometimes the changes can be quite dramatic. For instance in the Oct 09 version of the PUR there is a specific term which allows certain Server / CAL licenses, including SQL Enterprise 2008, to be reallocated to servers within a server farm as needed (license mobility):

SOFTWARE AND EXTERNAL CONNECTOR LICENSE REASSIGNMENT: Within a server farm. You may reassign software and external connector licenses to any of your servers located within the same server farm as often as needed. The prohibition against short-term reassignment does not apply to software and external connector licenses assigned to servers located within the same server farm.

However the Product Specific Terms for SQL Std 2012 are quite different – although License Mobility within server farms is allowed, the Product Specific Term specifies that this right only applies to licenses with active Software Assurance.

LICENSE MOBILITY — ASSIGNING SERVER LICENSES AND USING SOFTWARE WITHIN AND ACROSS SERVER FARMS: You have the right to reassign server licenses as described in "License Mobility – Assigning Server and External Connector Licenses and Using Software within and across Server Farms" only for licenses with active Software Assurance.

Appendices

There are also 3 Appendices, Notices, Software Assurance and Additional Software. Of the three, it is the Software Assurance Appendix that will be most useful to Software Asset Managers. In particular, the 'Roaming Rights', 'Servers – 'Cold' Disaster Recovery Rights'

and 'SQL Server Enterprise 2012 Unlimited Virtualisation' sections provide significant additional benefits for some applications over and above those outlined in the rest of the document.

This is also where the T&Cs for Windows 8 Enterprise are provided, including rules around Windows Virtual Desktop (VDA) and Companion Device Licenses (CDL) as strictly speaking Windows 8 Enterprise is a Software Assurance Benefit.

As you can see, the PUR document contains the terms and conditions which underpin some of the most basic principles of Microsoft licenses, for instance that desktop applications are licensed per device, as well as some of the newest and most complex license terms, for instance those governing desktop virtualisation and how to license user owned devices accessing a corporate network.

Software Licensing consultants working for Microsoft Accredited organisations eg a LAR, receive intensive training on each new licensing model as well as how to interpret the PUR. Unfortunately this isn't available for Software Asset Managers working at the coal face of software licensing, however familiarity with the PUR at least gives Software Asset Managers a way of 'sanity checking' the advice they receive from external sources such as their LAR.

This advice was contributed by **Sean Robinson** of **License Dashboard**
(<https://www.licensedashboard.com/>)

Avoiding the audit-deal-cloud rinse cycle

Squeezing out ambiguity in contracts

An interesting trend that is emerging is that of customers explicitly detailing license measurement metrics in contracts, especially related to audits.

In layman's terms: if you insist on auditing us, how will we measure consumption for that audit?

This is a really positive trend; customers detailing exactly how consumption is measured for license metrics, even going as far as detailing the exact executable or files that need to be measured.

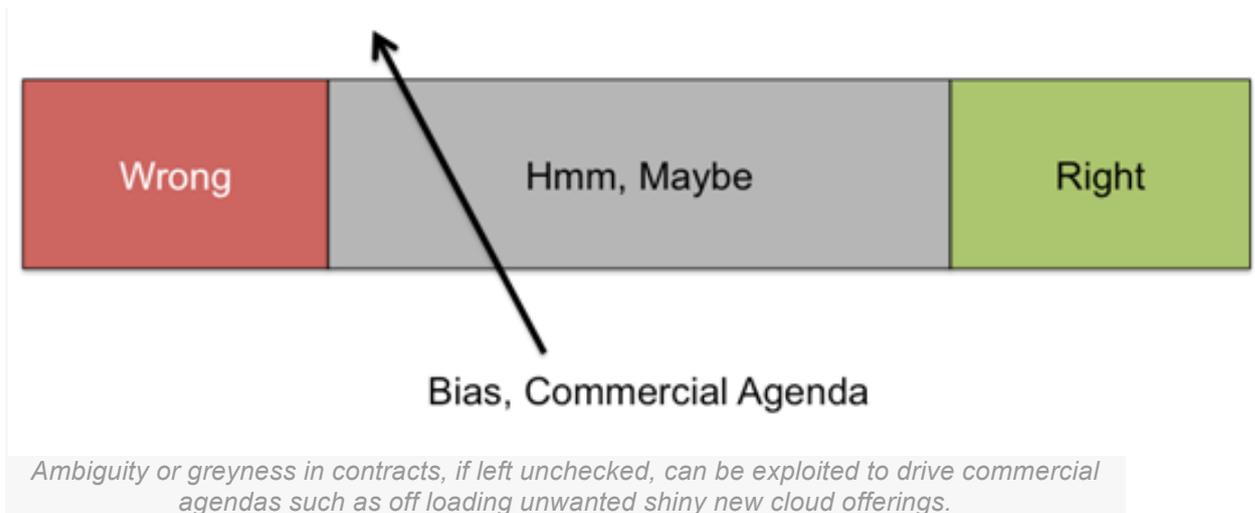
This approach might seem a little extreme, but frankly software licensing is an unregulated industry and it is often difficult to tell the difference between genuine infringements of intellectual property and over zealous sales reps and biased auditors.

License metrics, product use rights and how to measure consumption should either be public domain or detailed in the contract. The benefits of this approach are:

- It reduces the opportunity for commercial agendas exploiting greyness in contracts
- It also sends a message to the business that we've contractually committed to measure something and we need the capabilities to manage it in order to manage the risk of the contract

An observation from research with the Campaign for Clear Licensing <http://www.clearlicensing.org/> suggests that large software publishers, desperate for revenue, are exploiting the greyness in their (typically old and not fit for purpose) contracts.

If not scrutinized prior to purchase or reviewed regularly, contracts and license terms can become ambiguous and open to interpretation. When greyness exists and the customer is unprepared or unaware, software publishers can drive their own commercial agenda to exploit the greyness.



Don't fall for the 'Audit-Deal-Cloud' rinse cycle

Software publishers can't make money from stable, feature rich perpetual licensing products in the longer term. A successful product kills the long-term business model.

Microsoft, IBM, SAP, Oracle and Adobe are all desperately trying to transition their business models to cloud subscriptions of some form. This is nothing to do with cloud or technology and is everything to do with share price. Shareholders like ongoing, predictable recurring revenue.

A great case study of this is Adobe who has a dated, mature set of products, they've done a great job of convincing customers to continue paying every year for software they already own by calling it 'cloud'.

Greyness leaves you open to this cloud trick to cover up past mistakes, lack of knowledge or mismanagement of software.

The typical audit-deal-cloud rinse cycle:

1. Publisher finds an excuse for audit, review or some other sniffing exercise
2. Publisher finds sufficient weakness to make customer feel guilty, exploits holes in the customer defenses and builds a deal. Weaknesses might be ambiguous or misunderstood licensing terms, shortfalls or mismanagement by the customer.
3. Publisher pushes cloud as a resolution even though the customer doesn't need cloud
4. Publisher has recurring cloud revenue (good for share price) and is seen to be shifting new product and relevant in the market place (good for share price)

If you fail to sharpen your contracts and continue to mismanage software, you'll get lumbered with cloud product you don't need.

Key things to ask before signing an agreement

- How will we measure consumption of this contract?

- What mechanisms, processes, and tools will we use to measure that consumption?
- Do we have sufficient internal expertise, tools, and bandwidth to do this – is it an ongoing commitment or occasional reporting?
- How will we ensure accuracy and act upon the outcome?
- Are we dependent on vendor tools / scripts to measure consumption or can we make our own assessment?