

Keep calm and manage your IT risk

There is a joke currently doing the rounds: "Who was responsible for initiating your digital transformation? The CEO, CIO, CTO or Covid-19?"



Guy Krige, director of Escrow Europe

It has no doubt raised more than a few wry smiles, but the reality is that suppliers of outsourced information technology solutions – be they developers or value-added resellers – represent significant risk to commercial continuity and current revenue streams; no more so than now as the effects of the #2020coronaviruslockdownSA bite.

According to Escrow Europe Director, Guy Krige, the good news is these risks can, and should, be managed and, as stated by Gartner, the practice of source code escrow is "... a smart and effective component of a business continuity strategy that software licensees can use to protect their mission-critical applications in an ever-changing environment."

Krige's suggestion is not to wait until Covid-19 triggers a disaster, when disaster may be entirely avoidable by software escrow.

“A software escrow arrangement is the only practical way whereby access to maintainable information systems, by the software end-user, can be assured irrespective of the stability or commercial status of the software owner/supplier and/or where certain predefined commitments such as warranty, support and maintenance are discontinued and/or not honoured,” he said.

At the heart of the matter is that, simply put, when a company licenses software, it more often than not gets a licence to use the machine-readable ‘object code’ but not access to the ‘source code’, which programmers read and work in. The difference between the two codes is vast: only machines read object code, any changes that need to be made to a system must be done using the source code, which is the only computer code humans can read.

“If the developer goes bankrupt or refuses to support the software, the only way the licensee company can hire its own programmer to fix any glitches and make any changes or enhancements needed, is if it has access to the source code,” explained Krige.

“But,” he highlighted, “developers don’t easily part with their source codes because they perceive it akin to giving Robin Hood the keys to the Tower of London. There is, however, a way across this impasse – source code or software escrow.

“Under an escrow agreement, the supplier and end-user of the software product agree that the source codes of the vital software product and related documentation are deposited with a neutral third party – the escrow agent – who is authorised to release the materials to the end-user under conditions as agreed by the supplier and the end-user in a written agreement.

“Such conditions may relate to operational risk, technical malfunction or even failure of the supplier who tailored and contextualised the software to the end-user’s business requirements,” he said.

The key objectives of software escrow for users and/or licensees are therefore:

- Continuity of use of the software by the end-user under circumstances where that would be impossible without escrow.
- Safeguarding the underlying business process.
- Protection of the end-user’s investment in the software, related hardware and staff training.
- Limiting the end-user’s total dependency on supplier for support and maintenance of the software.

For suppliers and developers, active software escrow also presents many advantages:

- **Winning deals:**

In a positive and structured way, you are able to meet a growing need among clients and, by excluding unnecessary discussion, shortening the sales cycle substantially. Having an active escrow arrangement in place for your clients gives you a tangible advantage over competitors of any size. Active escrow arrangements effectively eliminate business continuity risks for your clients and encourages them to use your licensed products in preference to those of even the largest software suppliers/developers.

- **Single deposit advantage:**

Escrow Europe makes it easy if you have multiple licensees based on one deposit into escrow of your source code (per product). You make a single deposit on behalf of all your licensees and Escrow Europe takes care of the administration/prompting for updates as well as the logistics involved with deposit release should this be applicable.

- **Patent, trade secret and copyright preservation:**

Active escrow arrangements provide you with documentation when securing a patent claim, significant assistance in an infringement suit and robust proof to support an intellectual property copyright claim.

- **Disaster recovery:**

Permanent loss of critical information is not an option. Having your most valued asset in escrow with a neutral third party provides you with an alternative to disaster in the event of an emergency. The active escrow agent will maintain a copy of your intellectual property stored off-site in a professional vaulting facility and available for restoration.

- **Collateral provision:**

Putting up your technology as collateral may secure your company much-needed funds and, in fact, many lending institutions, such as venture capitalists, angel investors, and banks are requiring technology escrow for asset-backed loans where the borrower is using its technology as collateral.

- **Reduced dependency on key employees who tend to 'hoard' instead of 'share' information:**

30-day escrow deposit cycles can ensure proper delivery according to functional specification and agreed deliverables (including documentation) when independent technical verification is performed on each deposit as a matter of course.

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