

AP: Hello and welcome to Addleshaw Goddard's *Technol-AG's* podcast series. I'm Anouj Patel, a member of Addleshaw Goddard's commercial disputes team. Throughout these episodes, my wonderful colleague Nadia and I will discuss common legal issues faced by businesses relating to technology. And this series will sit alongside the articles we produce on similar topics.

NS: Thanks Anouj, hi everyone. I'm Nadia Stephenson, and I am a member of Addleshaw Goddard's Payments team. Anouj, myself and the wider tech team at AG help to manage tonnes of issues experienced by clients in the world of tech, whether that's contract negotiations, disputes and really anything that falls in between.

AP: So we thought why not talk about them in this podcast series...

NS: Exactly! So today we're going to have a conversation about software licensing. It's really an area where we commonly see issues arise, with some businesses being asked to pay hundreds of thousands or even millions of pounds in additional licence fees. Anouj, I know you've helped to manage a lot of these sorts of disputes, which has often saved clients a lot of money in unexpected licence fees. What are the basics of software licensing that we should know about?

AP: Thanks Nadia. That's right. It's fair to say almost all businesses rely on software, to some degree. And for a business to use a piece of software without infringing a software supplier's intellectual property rights, the supplier will grant the business a licence to use the software. The terms of that licence are usually found in some fairly complex software licence agreements.

The licence agreement specifies how the business can use the software, how many users or interactions with the software there can be, for what term, what cost, etc. And it gives both the business and the supplier a number of rights. Those rights tend to include the right for the supplier to audit the business' use of the software and compliance with the licence agreement.

NS: That makes sense. And the audits seem reasonable too so I suppose the IT suppliers will want to make sure customers aren't using more licences than they're actually paying for - and that they're complying with the contract terms too. So where does the issue lie?

AP: Yeah so that sounds fine in principle. Though around 75% of audits reveal non-compliance with licence terms, like over-usage, or users of 3rd party software indirectly accessing the licensed software. The reality is often unclear, for example, due to ambiguity in contract terms, increasing automation or different systems having some degree of non-licensed inter-connectivity.

NS: And what do you mean by inter-connectivity or indirect access?

AP: Yes – good question. I will give an example here: say you've got a business. We will call it Nadia Plc. Nadia Plc has a licence arrangement with Supplier A, for Nadia's sales team and customers to use Supplier A's sales software and online portal. Nadia Plc also has a software licence arrangement with Supplier B, for Nadia's HR and Procurement teams to use Supplier B's Customer and Inventory Database software.

Supplier A's software might interact with Supplier B's software in a limited way. For example, employees accessing Software A, the sales portal, might be able to view inventory information from Software B. In that instance, Supplier B might say that the users who are licensed to use software A should also be licensed to use Software B, because they have access to it. That can result in a claim for millions of pounds of additional licence fees across all those extra users.

If Nadia Plc doesn't pay, the software provider might threaten to remove the business' access to the software or pursue a legal remedy.

NS: Okay, so it sounds like things can get out of hand pretty quickly then. So presumably the supplier has the upper hand, if it's their software, and the licence agreements are complex and supplier-focused. So what can businesses do in those sorts of situations?

AP: There are steps businesses ought to take to handle these issues and protect themselves from unexpected costs. It's worth mentioning, before we go on, that we acted for Diageo, opposite SAP on the biggest software under-licensing case in the UK, which is worth around £60m. However, most of these cases settle early, and based on my experience, we help to reduce and in some cases entirely eliminate any additional licence fee liability for businesses. I've got 3 broad guidance suggestions here, which are first:

- 1 Know your IT estate and understand how that fits in with the contract. That'll involve joining the dots between technical, commercial and legal teams, to ensure the business is compliant. The position may not be black and white, for example where there's indirect access, interactivity or automation involved. Get a legal view on this and understand your commercial leverage and contract rights.
- 2 second, where an audit might show non-compliance, a legal-led review helps to connect technical assessment, legal analysis and commercial negotiation, engage sensibly with the supplier, minimise, or eliminate alleged additional licence fees and help negotiate more business-favourable terms, while protecting communications from becoming disclosable, should any dispute arise, with the benefit of legal privilege.
- 3 and third engage as early as you can with technical, commercial and legal teams prior to any contractual negotiations, licence renewals or audits, to maximise the prospect of a successful outcome. Make sure the right stakeholders are involved, maintain a central channel of communications, ideally routed through the legal team, and do not make unnecessary concessions to the supplier.

NS: Thanks Anouj some great insight there. I'm sure it's easier said than done though, especially where you have large businesses with expansive operational, commercial and technical teams. We've obviously got a lot of experience in this area, and it sounds like there are some common themes to watch out for from suppliers.

AP: That's right, yes so where these issues escalate, suppliers may threaten to turn off software (and we have actually obtained successful court injunctions to prevent that). We've also experienced suppliers raising calls all the way to board level within their customers' organisations and seeking to push unpaid invoices through different channels within the customers' business, in the hope that they are processed and paid.

NS: That's very interesting. Do we think that the increasing use of cloud computing will affect this area?

AP: Yes, so just like with greater automation, this can increase ambiguity around the customer's level of access and the potential for dispute. Where software is hosted on the cloud, it also often gives the supplier greater access to usage information, so it can cause suppliers to be more bullish in their under-licensing allegations.

NS: Well, now our listeners know that AG can help them to keep a lid on these matters and also potentially save a lot of money, prevent business disruption and possibly even existential issues where licensing issues arise. Thanks very much for your time and insights, Anouj. We'll catch up in the next podcast, where we'll be talking about cloud contracts.

AP: Thanks Nadia – absolutely and glad I could share my experience. See you next time, and thanks everyone for listening.