

FINAL TRANSCRIPT

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****ACC - Protecting Intellectual Property through a Best Practice
Technology Escrow Program**

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PRESENTATION

Lisa Sotir Ozkan - *Blackboard Inc. - Vice President Legal & Deputy General Counsel*

This is Lisa Sotir Ozkan from Blackboard, and this is a presentation on Protecting Intellectual Property through a Best Practice Technology Escrow Program. I'm the moderator, and this program is being sponsored and helped with by Iron Mountain and Frank Bruno, a Senior Business Strategist from Iron Mountain is assisting me. Frank, how are you today?

Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

Doing great Lisa, thanks.

Lisa Sotir Ozkan - *Blackboard Inc. - Vice President Legal & Deputy General Counsel*

And we are going to be going over a lot of issues relating to technology escrow issues, and wanted to get started as quickly as possible, so.

Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

Great. Well one of the--

Lisa Sotir Ozkan - *Blackboard Inc. - Vice President Legal & Deputy General Counsel*

...At the end of the presentation we'll take questions so you can email them to me at lsotir@blackboard.com, and I will look forward to--at the end of the presentation we'll look at those. Go ahead, Frank.

Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

Terrific. Thanks Lisa, and thanks folks for joining us today. And what we're going to do is just take you through 30 some odd slides about protecting your intellectual property through best practice technology escrow program. I'm on slide two and just reviewing the learning objectives. What we want to do is essentially create a standardized approach for establishing an escrow process within your organization.

We'll talk a little bit about leveraging contract language to maximize that protection. And then we'll take a look at escrow in action, shall we? All right, so on the next slide, yes, the grim reality is that companies do disappear and more than 30 formerly independent software companies disappeared last year, in a flurry of over 13 billion in merger and acquisition transactions.

And at least 30, I'm sorry at least 100 venture-funded software companies closed their doors in 2003 never to be heard of from again. That's a pretty staggering statistic when you think about the money that's spent on the technologies these companies provide. And what happens to these companies when they just simply shut their doors.

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So on to learning objective number one, creating a standardized approach to the escrow process using best practices. Technology escrow defined, I'm on the next slide, and that is the practice of securing access to the source code, maintenance and other proprietary materials for the benefit of all parties to a technology transfer, typically a license agreement.

Now, this may extend well beyond software. It may include things like process documentation, trade secrets, some things used in the supply chain, the creation of things like pharmaceuticals, that sort of thing. Parties include the developer also referred to in our contracts as the depositor, could be the licensor. The next party is the user party or the licensee referred to in our agreements as the beneficiary. And then of course there is the escrow agent which is the neutral, trusted third-party.

Lisa Sotir Ozkan - Blackboard Inc. - Vice President Legal & Deputy General Counsel

Just so you know, my company Blackboard is a software provider to the education community. And our software includes -- we both license our software to universities and colleges and colleges and schools around the world and around the country, as well as we incorporate third-party software into ours. So, from my perspective we're both a developer and a licensee. And we've been using the services of an escrow agent on behalf of our licensees, as well as ourselves, for a number of years.

Frank Bruno - Iron Mountain Intellectual Property Management - Senior Business Strategist

And onto the next slide software programming 101. And essentially what you have is the intellectual property in and of itself is the human readable source code. And this is the, what the programmers develop in different languages like C++, Visual Basic, 4GL, compilers translate this code into what we refer to as an executable or object code. And this is the ones and zeros that you're computer reads to run the application.

And onto the next slide, why is the source code so critical? Well, most vendors don't provide the source code for a good reason. Number one, it is their intellectual property, secondly it is a source to maintain the revenue streams and provides the maintenance to support the application, update the license to you. Since the compilers can't convert object code back into source code, in other words, it's very, very difficult to reverse engineer the one's and zeros back into the human readable code. Essentially the licensee is unable to support the program without the help of the software company.

Lisa Sotir Ozkan - Blackboard Inc. - Vice President Legal & Deputy General Counsel

All right. And that is actually one of the reasons why often companies provide just the object code, is that once customers start modifying the source code it becomes very difficult for them to support the licensee. And one of the reasons you have source code escrow or technology escrow, is in the event that that company goes out of business or stops providing support for the product.

Frank Bruno - Iron Mountain Intellectual Property Management - Senior Business Strategist

And I will also add one other thing too Lisa, and that is if in the event you needed to get access to the source code it's very, very important realizing that this is not your core competency, to have some expert available to assist in maintaining that mapped source code.

I will also make another observation in some industries where they will just turn over the source code to their licensees. And unless you're a large, very computer savvy organization I would be very careful of getting access to the source code, because typically what happens is there are a lot of problems that result from licensees playing around with source code requiring the software company to come back in, and benefit from those consulting dollars to fix the problems that exist. So, you do actually want companies whose expertise lie in maintaining source code, to maintain it.

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So on to the next slide. This one's an interesting slide because what you have here are the forces at work, which kind of lead the parties to the solution of escrow. And on the left-hand side of the slide you see what the developer desires. They want to establish credibility in the market place. Obviously they want to shorten the sales cycle whenever they can and satisfy their clients. The outcomes that they're looking for is to close more deals for the products to gain market traction, and also to protect their rights to the intellectual property.

On the other side of the slide, if the licensees are looking to avoid any kind of risk possible, as well as to avoid litigation if there should be any kind of dispute. And it typically satisfies a legal requirement as part of their contract negotiations. Their desired outcomes, obviously they want to be able to control their budget.

What we mean by that is that if in the event a developer chooses to discontinue support for a particular software version and force the licensees to move on to a current version. If that licensee isn't ready to move or they don't have the budgets allotted for it, a well written escrow will protect them in that event. And it will enable them to leverage the relationship and potentially get access to the source code if they're not ready to upgrade.

Lisa Sotir Ozkan - Blackboard Inc. - Vice President Legal & Deputy General Counsel

For example, with Blackboard with our licensees, what we --we have the source code escrow and we've had it for a number of years, because we are only about 8 years old, and early on in our business many customers wanted to make sure they had the source code to make sure that if we're not around they could be able to support their product.

We also wanted to be able to close those deals quickly, because that's how you keep a company alive. But we didn't want to give anybody source code and that intellectual property protection was very important to us. We also find that for us it allows us to provide a very standard pricing model for our customers, for them to have a controllable budget on the licensing side, as well as in the event that if we were gone that they would be able to control their budget in terms of protecting themselves.

Frank Bruno - Iron Mountain Intellectual Property Management - Senior Business Strategist

So let's look at the next slide, the inconsistent use of escrow. You know, it's interesting what happens and the dynamic within an organization. Most times companies with the best intentions have a program in place, but there's just -- they're just so large and decentralized, that sometimes the left arm doesn't always know what the right arm is doing. And as you look at this slide you can see that if Tom in contracts, always does this due diligence, John in IT uses escrow 100% of the time or thinks that it's getting done 100% of the time, when Sarah in procurement only periodically does it.

Then finally, when a software company goes out of business, Sam in finance finds out that an escrow agreement had not been executed as part of that licensing agreement. So, these are the pitfalls and if you don't have a program in place, a consistent program in place across the enterprise, it could result in some serious pain.

Lisa Sotir Ozkan - Blackboard Inc. - Vice President Legal & Deputy General Counsel

So how do you identify your risk Frank?

Frank Bruno - Iron Mountain Intellectual Property Management - Senior Business Strategist

How do you identify your risk? Well, what we've done, and we do work with a lot of companies, to help them do a basic risk assessment. And essentially, if you're talking about a shrunk wrap, off the shelf, software package that can be replaced, typically you don't need to have that code escrowed.

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However, if you're looking at an application that has certain operational dependencies, it affects a great percentage of the employees within the company it may touch your customer in some sort of way. It could affect productivity or potentially revenue, and most important public safety, then certainly you want to consider getting it into escrow.

Then of course you also want to add in any type of costs that are going to be associated with replacing that solution, the investment, the licensing fees, reprogramming existing applications, any kind of customization or investments in new hardware. And then, what kind of investment of time are we talking about? How long is it going to take to get all of this done and what is it going to cost my business?

That coupled with, you know, what is the current state-of-affairs for your vendor, will provide you with a risk factor. And of course, depending on your acceptable level of risk or what your threshold for pain is, you want to consider getting that code into escrow and doing some sort of verification of the deposit materials.

Lisa Sotir Ozkan - Blackboard Inc. - Vice President Legal & Deputy General Counsel

Now we've interestingly as a company whose product has moved from being just where customers were more concerned about whether we would be around for a while, as to now it's becoming more of a mission critical product. We've seen that the people who request source code escrow and how they request, when they request source code escrow have changed over time.

As well as, we've become much more consistent in requesting source code escrow particularly, for example, with our accounting package or our -- the CRM programs that we use. Because those are things, for example, PeopleSoft, people are concerned about what happened when Oracle takes over PeopleSoft. Those are things you really do need to consider, as to how you will implement it later.

Frank Bruno - Iron Mountain Intellectual Property Management - Senior Business Strategist

Okay, so let's move on here. On the next slide, slide 11, creating a software asset management team. One of the things that we advocate within enterprise organizations, licensee organizations that are managing their license agreements is to, not only have their expertise in getting the T's crossed and the I's dotted, but also to focus on the materials in escrow, the deposit materials. And making sure that you do have something that is going to be usable.

And essentially as part of the guidance that we provide, if you are a licensee responsible for let's say validating a vendor's invoice, a vendor's maintenance invoice. One of the things that you're going to do is you're going to number one, make sure that you're in compliance with the software licensing agreement. Make sure that you still use the software that you are maintaining the appropriate number of seats and that the current version of software is in escrow. Many times than not, what you'll find is that the current version of software may not always be what's in escrow. So making sure of that is very, very important and verification plays a big part of that.

Lisa Sotir Ozkan - Blackboard Inc. - Vice President Legal & Deputy General Counsel

Right. One of the things that we've done internally is to make sure that we have a standard process from both on our legal side, in terms of when the contracts are signed, and making sure that we set up the property beneficiaries to making sure as software is developed and released that we are properly depositing it in a timely manner in accordance with our agreement. And that's something that you want to check for with your licensor. Or if you're a licensor you want to make sure that you too -- that you actually are doing something similar to that.

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Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

So let's take a look at what we're talking about when we say making deposits. On the next slide you'll see deposit contents and practices. Creating deposit requirement guidelines basically involves determining, what is it going to take for us to recreate the application development environment if we ever need to get the code out of escrow.

And some of the traditional contents include things like beyond (ph) the source of maintenance tools, proprietary or third-party system utilities, instructions on where to get third-party utilities and how to deploy them. Descriptions of the system program generation, compilation and execution procedures. Here's what I think is fairly important, is to have the names and information, contact information, for some key programmers who can assist if there are any questions as you attempt to recreate the application development environment. So a lot of things to consider, it's not just source code folks.

Lisa Sotir Ozkan - *Blackboard Inc. - Vice President Legal & Deputy General Counsel*

And Frank and I had an interesting discussion relating to home addresses, in that we were concerned somewhat about providing such private information. But you can also note that in patent applications and other public filings that a lot of developers of software's name and at least where their homes are located are listed in public records. So it's not as unusual as you might expect, and the fact that within source code escrows the information is protected, which I know Frank will talk about later.

Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

Right. And if you think about, if you're trying -- if you're getting code out of escrow because a software company has just gone out of business, you've got to think these guys are looking for work anyway. So having the information available on the magnetic media which is being stored in a media vault anyway, is a little bit more secure than having it published on the web somewhere.

Anyway moving on, we're going to talk a little bit about the levels of verification. Now, again levels of verification or verification in general is just making sure that what is in escrow, what is in the deposit materials is something that you can use if you ever need to exercise a release request. And the three levels of verification that we perform include level one, which is a basic inventory of the files. We run a virus scan to make sure that the files are usable and that they're not corrupt, and then we're just basically taking an inventory to see if they appear to be present.

Then of course, a level two is where we begin to recompile the source code into object code or the executable. And then of course once we have an executable then it's a matter of making sure that it contains all of the same functionality as the application that you're currently supporting in production today. So, as you look at that diagram you can see source code plus the compilers equal the object code -- with the third-party object code gives you an executable.

And verification is a best practice. I am on the next slide by the way. If you look at some of these stats, it will show that 15% of the level-two verifications that we've performed could not be successfully built for whatever reason, and 40% of the time the level-one verifications were determined to be incomplete. In other words, there were certain materials that were missing.

Now, when you think about performing verification you have to keep in mind that that companies, the developers that are creating these things are people who are going -- many of them, are going through it for the first time. Some may make a simple mistake and have just omitted a couple of files that would prevent you from recreating the application development environment in a timely basis.

So, verification is really going to strengthen the leverage value of the escrow. It's going to enable a quick and successful deployment of the deposit if you ever need to use it, and it's going to protect your software investment. It's going to protect your ROI on that application.

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Lisa Sotir Ozkan - Blackboard Inc. - Vice President Legal & Deputy General Counsel

Now Frank, I know we haven't talked about who pays for escrow arrangements, but one question is, who pays for the verification?

Frank Bruno - Iron Mountain Intellectual Property Management - Senior Business Strategist

That's a great question Lisa and typically the costs are assumed by the licensees. They're the ones who need to verify that the code is usable. So, 90% of the time we're finding that the licensees are picking up the tab for performing verification testing.

I'll also say that in certain cases and what we're finding to be a growing trend, are developers who are seeking to get on a higher competitive playing ground. Most vendors today have their code in escrow, but those who have their code in escrow and verified, where they can share the report results with prospective clients, are now starting to gain some additional traction. Certainly they're gaining credibility amongst their prospect base and hopefully it's helping them to shorten their sales cycle.

Lisa Sotir Ozkan - Blackboard Inc. - Vice President Legal & Deputy General Counsel

Whereas most escrow arrangements, the base escrow arrangement is often who pays for that is usually handled in the contract itself for the escrow, between the licensor and the licensee.

Frank Bruno - Iron Mountain Intellectual Property Management - Senior Business Strategist

That's correct. So let's take a look at the next slide. Verifying the escrow deposit isn't necessary. Well the numbers get greater. I know that on the previous slide I've said that about 15% of level-two verification could not be built. Well if you look at those numbers, 73% of incomplete level ones didn't contain any build instructions.

The only thing that was in there was the source code, but what you do with it is another question. And unfortunately, without build instructions you're not going to be able to get very far. Sixty percent of those level one had corrupted media or other missing files. And then 80% of the level-two verification tests that we performed required direct input from the depositor. In other words, having the personal contact information for the key programmers was necessary for us because we had to contact those folks to get their assistance in creating the executable.

At the bottom of the slide what you will see is just a basic timeline of how verification testing kind of unfolds and really it's not a complex process to do. All that we're asking is that if the licensee is requesting a test, that the depositor complete a questionnaire that's going to help us create a statement of work. And that's basically -- a statement of work is going to tell the requesting party what kind of resources and time and investment is going to be necessary to recreate the application development environment. And then of course, once we get approval from the parties we'll go ahead and conduct the test, and then we issue a report just to let the parties know what the findings were.

More times than not, verification testing typically takes a few weeks to complete. But again, at the end you're going to strengthen the leverage value of the escrow, and knowing that if you ever needed to get the code out of escrow that you're going to be able to recreate the application development quickly, therefore protecting your ROI. So Lisa, how do we normalize this to some other industries?

Lisa Sotir Ozkan - Blackboard Inc. - Vice President Legal & Deputy General Counsel

Well it looks -- if you think about it in a legal context, if you are doing any type of lending, a lender has to examine the collateral. If you are purchasing real estate you do surveys and appraisals. And if you're getting life insurance of any sort think about the number of times you've been pricked to give blood on every policy, on every life-insurance policy or any disability policy you've

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ever purchased. And this isn't uncommon within the business market. And so verification is just another -- essentially another way of ensuring that what you've paid for is actually there.

Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

And I will say that, it's the life insurance company's verification process that causes me to go for the very largest policy that I can possibly find, because I'm not big on getting blood taken.

Lisa Sotir Ozkan - *Blackboard Inc. - Vice President Legal & Deputy General Counsel*

Well that's why you hang around with lawyers, right?

Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

Yes, and there you have it. Another occupational joke from Miss Lisa, thank you very much. Okay, well let's take a look at selecting a reputable agent shall we? On the one side you've got some qualitative conditions and on the right side are the quantities conditions. Obviously having a proven reputation is very, very important. Having a strong background in providing verification testing and also to administering to releases and administering to the processes written into the agreement is very, very important.

Back on slide 11 when we talked a little bit about having the software asset management team with legal and technical expertise, well the same applies here folks to escrow agents. You want to make sure that you've got a trusted third party who can do both. On the right-hand side, obviously the quantities conditions include carrying professional liability insurance operating your own IP media vault, having redundancies for operations in your IT infrastructure. Do you have a disaster recovery plan? And obviously having in-house legal advisors to assist with things like determining whether something is enforceable, and whether or not you need guidance as it relates to certain situations that might come about.

Lisa Sotir Ozkan - *Blackboard Inc. - Vice President Legal & Deputy General Counsel*

All right.

Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

Now I will also say, in terms of selecting a reputable escrow agent, if you were to do a Google search on software escrow you would probably get between 10 and a dozen hits. And the guidance here would be, if you're selecting an escrow agent and you're entrusting that agent to secure or safeguard your corporate crown jewels, your intellectual property, the guidance would be go and visit them, and make sure that they have all of these things that we listed on this slide. This is a great checklist because many, many agents do look alike on the web because they have a website. But many are not the same and again, the guidance would be go check them out.

So on to the next slide. What makes an ideal storage environment? Well, if you look at this picture here this is somebody that I know, her name is Paula Smith and she is standing at the doorway of one of our media vaults. And as you can see, her hand is placed firmly in a biometric clearance pad. She is standing at a cinderblock wall, which is a four-hour fire rated wall. And she is one of a very, very few bonded, vault administrators who have access to our media vaults. And one of the reasons is because she is one of the people who knows how to use our bar-coding inventory, which tracks deposit materials located within the vault, within a Gemtrack storage system.

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The media vault is limited to technology-related materials only, and we maintain constant room temperature and humidity. And typically the optimal environment for magnetic media is around 72% and 40% relative humidity. In case of a fire we have a non-water based fire extinguishing system using FM-200 gas. Many companies will also use 1301 Halon, which is another way to extinguish fires without using water.

And then the most important thing that you want to consider is what happens if a disaster strikes, whatever that may be. And the most important thing on this list folks is a disaster recovery plan. Having a documented process for handling deposits, problem resolution and disasters, is so important.

Lisa Sotir Ozkan - *Blackboard Inc. - Vice President Legal & Deputy General Counsel*

And actually thinking about an ideal storage environment as well as it being a disaster recovery, a number of licensed sources of software actually just store their source code with this type of -- somebody like Iron Mountain or somebody -- or another escrow agent in order to protect their own source code. Because if they happen --if they don't have redundant facilities in their own area, they need to be able to protect their source code and make sure they don't lose it. And this is one way that a licensor can protect their own materials for themselves without necessarily having to even provide access to any of its licensees.

Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

You know that's an interesting point Lisa, and I know that we talked about this briefly. And I'll just share this quick story with the group. And that is on more than --well I should say probably at least a half a dozen times a year we'll get a call from some of our clients requesting a copy of their source code. If you can picture a large enterprise software company that has many, many programmers, some of which who leave the company.

Often times these machines where source code is stored will be redeployed with the hard drive scrubbed and cleansed, and now the source code is missing or at least the person taking over has no idea of where to locate these things. Well that's one of the reasons why having this source code on deposit is so important, because you never know when you're going to need a copy of it. So, we do store a lot of intellectual property without even having an escrow to administer to it. So, thanks for bringing that up.

Lisa Sotir Ozkan - *Blackboard Inc. - Vice President Legal & Deputy General Counsel*

So, I guess we're actually now at our second learning objective, which is the leverage contract language and maximized protection to the release conditions, the release process and the right to use. And as a lawyer who actually handles both sides of this transaction from license -- both as a licensor and a licensee, this is something that I'm fairly familiar with. So, one of the things -- that you want to definitively know what is within your source code escrow agreement. And it's the contract language that is the most important.

You want to make sure you have the release conditions very clearly stated in terms of, and we'll be going through what types of release conditions in terms of when does the escrow agent release the source code, or the technology to your licensee? What is the objection period in terms of when does the licensor have to be able to -- how long does a licensor have the right to say, no, you can't release the software.

What are the verification rights of both -- of the licensee? Who pays the fees? How often are--is the technology updated and deposited? What are the rights to use once the software or the technology has been released? And what's the dispute resolution process? And you want to think about how to protect your organization in its best possible way, and know what to expect from the other party. Remember the licensor has a number of risks that it's going to consider, as well as its internal business practices, as well as what the licensee needs in terms of protecting itself.

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Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

Right, well --

Lisa Sotir Ozkan - *Blackboard Inc. - Vice President Legal & Deputy General Counsel*

...And this slide has always amazed me Frank. On this -- what are the release conditions?

Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

The release conditions, you know, as you look at the different items on the left-hand side, the reasons for release, interestingly enough bankruptcy ranks third at 20%, behind lack of support and ceasing business operations. We've seen a tremendous number -- a tremendous uptick in the number of releases over the past couple of years. Probably, just to give you an idea, back in the 90's we were releasing somewhere between maybe one and 2 per month. And over the last, probably three to four years, that has jumped to between 10 and 20 per month, which is just absolutely dramatic.

And when you talk about how the escrow agreement has evolved, in many companies realizing that there is leverage in the escrow agreement, have written certain release conditions into their agreements speaking to lack of support which represents 30% of the total releases that we've processed. Ceasing business operations, which is 22%. Now remember folks, it costs money to file for bankruptcy. So sometimes you don't always see that happening, companies do just simply shut their doors and disappear.

Now, as you move down the list the numbers become a little bit more nominal, but one that is kind of telling is the depositor's request. That is true when companies are winding down we'll get letters from them saying, go ahead release the code to our beneficiaries. So, 9 (ph) % of the time that does happen.

Lisa Sotir Ozkan - *Blackboard Inc. - Vice President Legal & Deputy General Counsel*

Now most of you are probably -- obviously, as we talked about in the previous slide, familiar with several release times. When you're negotiating your contract do you want to try to look at -- you want failure of the developer to maintain or support the product to be a condition for release? A failure of the developer to continue to do business in the ordinary course, and as you saw those were the top-two reasons that people request -- that companies request release of the software or of anything of the technology escrow.

Then you have if the developer materially breaches its support or maintenance obligations, if they assign their maintenance obligations to someone who is unacceptable. And then one is very rare, but sometimes -- if it's a smaller company and you have very important key developers, the voluntary termination of employment by one or more of their key persons which might -- which would mean that their source code won't be supported any longer. Frank, how often have you seen that last condition come up?

Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

Well that does tend to come up pretty frequently. And we'll say that probably 10% of the time and the reasons are, obviously because you've got people who are coming and going left and right. And so, when you lose your number-one programmer that will inevitably affect the level of support that you're getting for that product.

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Lisa Sotir Ozkan - Blackboard Inc. - Vice President Legal & Deputy General Counsel

So that's -- and as I said that's probably more important in a smaller company with a smaller number of developers. When you reach the critical mass of developers and you've divided the code it becomes less of an issue. But you still can ask your licensor, how many developers they have and how many people are actually working on the code on a regular basis. Now what is the standard release process that you all have seen?

Frank Bruno - Iron Mountain Intellectual Property Management - Senior Business Strategist

Well the release process, if you're looking at slide 23, if the licensee believes that a release condition has been met, this is going to trigger them to send us a release request. And essentially, we'll get a copy of that release request immediately over to the developer. And while the T's and C's spell it out as though it's going to be mailed. With the different many mediums of communication we are telephoning, faxing, emailing, making every effort to get notices back to the developer to let them know what is going on. And then, from the time that we do this the developer has a specified number of days to respond.

And if the developer agrees to the release, again, 9% of the time that does happen we'll go ahead and deliver a copy of the code to the licensee. If they don't respond by the end of that specified time, we'll go ahead and release. And then of course, the last box is if the developer does not agree that the release condition has occurred that's typically submitted through a dispute process. And we'll retain that deposit until the final determination has been made. If you look at the next slide, or I'm sorry Lisa, did you have anything to say about that?

Lisa Sotir Ozkan - Blackboard Inc. - Vice President Legal & Deputy General Counsel

No, no go ahead please, no, go ahead.

Frank Bruno - Iron Mountain Intellectual Property Management - Senior Business Strategist

If you look at the next slide, these two slides go hand-in-hand which is the reason why I'm just kind of flowing one into the other. Typically, the reason which causes the licensee to file for a release request is because there's a problem. And if this problem is a triggering event in their escrow agreement, then they're going to likely contact their developer first. And if the developer rectifies the problem the desired outcome is that we have a happy licensee.

However, if the problem has not been rectified then the licensee will normally seek a release. And hopefully the developer is still operating, they take heed of the release request and they take care of the problem and of course the licensee is satisfied. However, if the problem goes unresolved or, if perhaps the developer is no longer operating, we go ahead and release the code. So, that's the leverage process or the leverage of the escrow process.

Lisa Sotir Ozkan - Blackboard Inc. - Vice President Legal & Deputy General Counsel

Now as a software developer, on slide 25, this is something that is near and dear to my heart. You want to make sure that -- from the developer's perspective, and licensees should understand this, you always want to provide a timeframe for the developer to cure before the software -- the escrow is released.

So now -- and you all think from -- in a lot of these agreements if there is -- the reason for the release is a loss of support or some other condition that isn't the company going out of business typically the agreements provide for that licensee to return the deposit along with all the copies, to the escrow agent. If the licensor is able to cure the issue, that originally required the release of the product. So this is -- so think of it as there being a time to cure to before it's release and possibly a time to cure after -- after the code has been released.

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Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

That's right and typically the right to use the code, and by the way I'm just moving on to the next slide, because it does go hand-in-hand with this one. If there is not a provision written into the escrow agreement, many times a licensee would be infringing on that IP should they use it. So it's very, very important to make sure that this provision is included. And of course, what you want it to state is basically to allow the licensee to continue to support the code, to support their application that they've licensed from the developer.

One of the things that we want to kind of point out is that this not being a core competency of the licensee, you really don't want to create derivative works and start your own software company, that's not the intent. The intent is to simply continue to support the application that's been licensed.

Lisa Sotir Ozkan - *Blackboard Inc. - Vice President Legal & Deputy General Counsel*

So, one of the other core requirements of any source-backed technology escrow agreement is that you want it to have a specific right to use. If you don't have a specific right to use this deposit once it's released to you, in a particular manner, you have no right -- you can have the escrow software or whatever in your hands, but you can't use it. All you have is you have -- you have the right to receive it. So, you need to ask for the right to modify or otherwise maintain the technology upon release in order for the purposes of -- that the source code escrow was set up for you. Whether it's to maintain your product in the -- maintain your use of it as you were using it before the cause for the release.

You want to include this in the license agreement between the licensor and licensee as well as in the escrow agreement which we haven't talked about. But can be either a three-party agreement between the licensee, licensor and the escrow agent. Or a two-party agreement where there's the -- between the licensor and the escrow agent and to which the licensee is a beneficiary.

Now the license agreement between licensor and licensee, you want to make sure that it includes the right to use the source code not just the object code which they already should have. That they have the right to make a backup copy and that they provide access to the source code to an out source or a sister company, for purposes of helping maintain the code, but also subject to very appropriate controls. And that they have the right to move the software to another location or computer for those same purposes.

Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

Well put. I think we're in the final -- the home stretch here. We're nearing on learning objective number three, and that's to take a look at the escrows in action. And what we want to cover in this section is basic technology licensing and the U.S. Bankruptcy Code. Different types of escrow arrangements, who pays the fees or what kind of fees are associated with escrow, and then we'll finish up with some deposit update process and a final recount.

On technology licensing, typically this is an executory agreement and--that is subject to 365(n), or one which allows the licensee to retain its right to use the license technology in the event that a licensor goes bankrupt. The structure for the license to fall within 365(n) obviously we're recommending that you use a U.S. escrow agent and have the governing law be U.S. governing law. That, as part of the agreement, that you include continuing obligations so as to deem it an executory contract. And to avoid any kind of contingent licensed grants and include IP rights which fall within the definition of the code. And Lisa, I'll pass it along to you just to further comment on that.

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Lisa Sotir Ozkan - Blackboard Inc. - Vice President Legal & Deputy General Counsel

Right. I've negotiated several source code escrow provisions that include language having to do with 365(n). One of the things that you may want to be aware of is that, from a licensor's perspective, the contingent license grant issue can cause them a little bit of heartburn, because it can have some effect on revenue recognition on --as the SEC requires revenue recognition be handled by software companies.

And that's something that requires some creative drafting and can be drafted around to make sure that both parties are satisfied, and that you satisfy 365(n) as well as not making your -- the licensor's finance department go wacky on you and put the kibosh on an entire deal for just that provision. Now I think, now there are various types of escrow relationships. There are two main ones which most parties go through. Frank do you want to -- since you're more familiar with them?

Frank Bruno - Iron Mountain Intellectual Property Management - Senior Business Strategist

Sure, yes, the types of escrow arrangements that exist today -- obviously you've got a three-party arrangement and a two-party arrangement. The three-party arrangement involves the developer, the licensor. Right? You have licensee or in our case the beneficiary, and then the neutral third-party which is the escrow agent and all three parties must agree on the terms and conditions. Typically you want to review, make modifications to represent your best interests, and to be able to sign on as a contract party and terms are generally customized.

Historically, the industry was driven mainly by the developers and the reason was because beneficiaries or licensees who were acquiring mission critical technology, and not necessarily as familiar with the escrow process would often say to the developers, hey do you have your code in escrow? And so the developers went out, and in trying to put in place an agreement that represented the least amount of burden to the beneficiaries, set up a two-party agreements between themselves and the escrow agents, and then they simply named licensees.

So what you have in a two-party arrangement is an agreement signed by the developer and the escrow agent. The terms are standardized for all licensees, and historically they've been restricted to things like depositor instruction and or bankruptcy. And then of course, under this agreement it is very, very flexible in that you can manage multiple products governed by a single agreement.

Lisa Sotir Ozkan - Blackboard Inc. - Vice President Legal & Deputy General Counsel

And two things, one is an administrative tool? I want to tell everyone that slide 21, 23 and 24 are not showing up. You can access them from the PDF slide deck on the same site. And then -- but, now back to what we were talking about. Blackboard has typically had a two-party arrangement with it -- between a developer and our escrow agent to facilitate it for licensees because most of them don't -- they really want to have the software and have it in a particularly short period of time and that often three-party agreements take a little bit longer to negotiate.

But it's negotiating an additional contract, and so we find it simpler for us to have a two-party relationship and we just negotiate what that source code escrow release provisions are, in our license agreement, and provide everybody with a copy of our standard two-party agreement that we've already signed. Often -- we have questions of later -- if licensees can participate either just to call our escrow agent and ask if they can become a beneficiary. And that typically has to go through the -- the developer themselves, the developer has to add that party, that licensee to the beneficiary list. I don't know if there is some other way to do it. Frank do you have any -- do you know of anything like that?

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Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

Well I mean in terms of getting a licensee enrolled to a developer's escrow agreement, the two-party arrangement is the developer's proactive response to it's helping to shorten the sales cycle. And typically what we've seen is, any licensee who has reviewed the agreement and found that the terms and conditions were not suitable for their particular needs, just went and defaulted to the three-party arrangement.

Lisa Sotir Ozkan - *Blackboard Inc. - Vice President Legal & Deputy General Counsel*

Okay.

Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

Which is all together possible so now, and just as a segue into the next slide, on escrow fees, typically when this happened the arrangements were slightly more expensive. As you can see on the two-party agreements, to add a licensee to a deposit account, link them to a deposit account as a beneficiary, the cost is right around \$200 per licensee, per year.

And of course, the release conditions are standardized for all of the licensees. For those who needed different provisions for escrow the costs can be a little bit more expensive. Typically the cost to link a beneficiary to a deposit account using more subjective release conditions, customized release conditions, run anywhere from \$650 per year, upwards of \$2,000 per year. So, not all agreements are created equal.

Lisa Sotir Ozkan - *Blackboard Inc. - Vice President Legal & Deputy General Counsel*

But it also can then depend on the customer's, the licensees budget, as well, for that type of protection?

Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

Certainly.

Lisa Sotir Ozkan - *Blackboard Inc. - Vice President Legal & Deputy General Counsel*

And so the -- now the other aspect of this is that there is the require --how a licensor actually deposits, updates their deposit. It's very simple for a licensor to do the initial deposit they just say, oh yeah, we have to get the source code we have to get these and just send them over to their escrow agent.

But having them remember to do it every time they have a new upgrade or update, is often more of the issue. And so, the key to the validity of the escrow process is updating the source codes on a regular basis. And you want to make sure that your license agreement has provisions for depositing updates and upgrades within a certain period of time after they're generally available.

You want the licensor to develop a process between the manager of the escrow relationship and the product development or the developers themselves, to facilitate the regular deposits. And make sure that that source code, for each product in escrow, is separated and regularly updated. That's particularly important for licensors of multiple products. You don't want to be getting -- it's great if the multiple -- if you happen to have the--an escrow arrangement for product "X", but the only thing they've really been updating, in terms of deposits, is product "Y". You have no access to product "Y" and you may be stuck with a product "X" that is multiple years old, and so --.

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Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

Yes, that can be problematic and a good way, and again, this is a validation point for those companies, those best practice companies that are performing software asset management appropriately. When they get -- and this is usually prompted by them getting a maintenance invoice or something to that effect.

And so what they want to do is make sure that they are supporting the application, that they are in compliance with the license agreement, and that the code that they are currently supporting is in escrow. So, one of the things that we have and what clients refer to as kind of a deposit receipt, we also refer to it as an Exhibit "B", is to make sure that if you receive a copy of the Exhibit "B" that it does list the version of the software that you're supporting.

And if the Exhibit "B" that you have, looks to be a little old, and looks to be an earlier version of the software, that would typically prompt you to pick up the phone and place a phone call, just to ensure that they do have the most current version of code in escrow.

Lisa Sotir Ozkan - *Blackboard Inc. - Vice President Legal & Deputy General Counsel*

So, I guess we're at our recap which is slide 32.

Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

Yes, the recap. So, what's your protection strategy? Number one is have one, and gain the appropriate corporate buy in and if this is something that needs to be memorialized in the form of a process document that resides on your corporate intranet, we would fully recommend doing something like that.

Many, many best practice companies also have a boiler plate agreement with enforceable processes that they use. They also specify what components are necessary for their developers to put in escrow. So, ensuring a usable deposit that's updated regularly, and then periodic verification of the escrows. If you're unsure as to the viability of the vendor that you're working with or if there is something that leads you to believe that perhaps the deposits would not be useable in the event of a release, then we would suggest budgeting for the appropriate verification testing just to protect your investment.

And finally, work with a reliable agent to administer the service and stay involve. This is, again, if we could guide -- if we can counsel you to do one thing that would be to include, to think about, what is in escrow, as part of your annual validation process. When you're maintaining, when you're doing software asset management and you're validating a vendor's invoice, check the escrow make sure that the current version is on deposit.

Lisa Sotir Ozkan - *Blackboard Inc. - Vice President Legal & Deputy General Counsel*

And then obviously always work with that reliable agent, is very important.

Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

Now, in appreciation for your attending our webcast today ,we'd like to offer you a book on Protecting Your #1 Asset by Michael Lechter, who is an internationally known intellectual property attorney, and that URL, www.ironmountain.com/ipm is where you can fill out the web form to get your book. And we -- I guess we're at that point where we can take questions?

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QUESTIONS AND ANSWERS

Lisa Sotir Ozkan - *Blackboard Inc. - Vice President Legal & Deputy General Counsel*

Right, we are. And actually just a reminder, I know that there slides 21, 23, and 24 have shown up blank. There is a PDA -- the PDF slide deck is available on the web site. If you are not getting it email me and we'll make sure you receive a copy of the slide deck and see it PDF. And we have advised ACA that there was an issue with the slide deck.

One question I had which is from one participant, and please email your questions to me. I know that there is a link for you to email them, directly on the site. What can software companies do to ensure that their proprietary rights and trade secrets are not revealed, violated or otherwise disclosed in connection with a software escrow? And what -- and then also what can we do -- can software companies do to reduce the costs associated with the software escrow? Do you want to take the first one, Frank?

Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

Well obviously the best thing that you can do to protect your intellectual property rights is to have a deposit account established so that you can date and timestamp developed works. And this enables us to evolve the product genealogy so that if there ever is an instance where somebody is infringing upon your intellectual property you can use that irrefutable proof of ownership because the development work has been date and time stamped.

And by the way, filing for a patent is another good way to protect your intellectual right, however it takes anywhere from six to eight months to process an application and a lot can happen in that time. Plus consider that the TTO only requires the first 20 pages and the last 20 pages of the patent to be kept on file. So, there is a lot of stuff in the middle that could be missing. So, I think that's probably the best way that you can protect your intellectual property rights.

Lisa Sotir Ozkan - *Blackboard Inc. - Vice President Legal & Deputy General Counsel*

Well also for example, trade secrets you don't want to file with the Patent or the Copyright Office, obviously, because then they're suddenly revealed to the world and they're no longer trade secrets. And also in terms of when you're using, as we talked about using a technology escrow of any sort, you want to make sure you've protected yourself in terms of when it can be released, and also under what conditions can the technology that's released be used. And what -- how does it have to be returned to the escrow agent, at what point in time, if ever.

Also, you can make sure that if you do have a -- if a company is going to use the product after it's been released, that they're continuing to pay you some type of a royalty ongoing, relating to that use. It also makes them very cognizant of how much they're actually -- that they're actually paying for something, and it has value to them it's not just something to be thrown away. And then as to the software companies reducing the costs associated with software escrow, Frank would you recommend they use the two-party arrangements more than using the three-party arrangements?

Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

Certainly. What we find happening a lot of the times are software companies that are putting out an offering, an escrow offering, which enables their beneficiaries to be named to their -- or named as a beneficiary to their deposit account and then of course the cost can be kept to around \$200 per year. Of course in those limited events where the licensee is requiring something different, then obviously you're flexible enough to negotiate with them. However, perhaps the burden of cost needs to be assumed by them. So, it really depends on how you negotiate the deal.

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Lisa Sotir Ozkan - Blackboard Inc. - Vice President Legal & Deputy General Counsel

That's always the issue, is how you negotiate it. One of the other questions we received is what kind of leverage does a small to medium-sized business have with a larger software vendors in using escrow?

Frank Bruno - Iron Mountain Intellectual Property Management - Senior Business Strategist

Right, you know typically larger vendors will tell you that they're not going to go bankrupt. Therefore there's really no need for escrow there. That they're going to provide support for the product, and you don't really need to worry about it. But if you remember the chart that we looked at, support was the number-one reason for release. So while these companies may be in a strong financial condition, they still may decide that they're no longer going to support the product at some point in the future and that's a major concern.

And you -- your need to use the software is certainly going to outlast the vendor's decision to keep it. So in today's economy a lot of large companies have filed for bankruptcy, look at the Enrons and the MCI's of the world. While Chapter 11 may not require you to trigger a release request, it may be a precursor to support failure.

Lisa Sotir Ozkan - Blackboard Inc. - Vice President Legal & Deputy General Counsel

That's something, even though we make sure we do, when customers ask we do provide the source code escrow arrangements for them. Because it's easier for all of us to know that yes, the source code is somewhere that they can get to in the event that we decide not to support something. Not that we ever have.

Well let's see, and then one of the things -- I noticed that bankruptcy isn't as important as it used to be and actually we're at the end of our time, but we'll get one more question in. That the end of -- bankruptcy isn't the number-one reason for release, but what have you all seen as -- has been your experience with the legal enforceability of a release triggered by bankruptcy?

Frank Bruno - Iron Mountain Intellectual Property Management - Senior Business Strategist

Well, over the last decade we've been tracking releases for quite a while, and like I said earlier in the presentation we used to do between two and three per month and in instances where we've seen bankruptcy as the release or the reason for the release. Which is basically 20% of the total releases, we've not been stopped by a court or a trustee in bankruptcy. And from a legal enforceability stand point, the bankruptcy claim has really not been a factor in precluding us from releasing those materials.

One caveat though, that I will mention is sometimes we're asked to stop a release process by a Trustee while they're searching for a suitable party to assume the obligations of the licensor. Or perhaps to entertain buyers who are interested in that intellectual property who are willing to step up and provide future support for those licensees. And typically in those cases, and again keeping in mind that licensees don't have a core competency in maintaining software, we've actually seen licensees who are very cooperative and participating in those discussions.

Lisa Sotir Ozkan - Blackboard Inc. - Vice President Legal & Deputy General Counsel

Well thank you, so much Frank. It's been a real pleasure to learn a lot about source code escrows, a lot more than I knew before we started this process. And I hope that all of you have found this useful as well. If you have any questions you can please continue to post them and we'll try to answer some of them. But we thank you, so much. We will be posting a new set of slides to replace the ones that are defective, after the webcast. And thank you, so much and have a good day.

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Frank Bruno - *Iron Mountain Intellectual Property Management - Senior Business Strategist*

Thank you.

Lisa Sotir Ozkan - *Blackboard Inc. - Vice President Legal & Deputy General Counsel*

Thank you.

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