

**Notes from the Computer Weekly Meeting  
Tackling Software Licence Abuse in the age of e-Business  
1 November 2000, IoD, Pall Mall**

### **Introduction**

John Riley, the chairman, outlined the purpose of the meeting and sketched the history. "Stiffing", or abuse of SW contracts, had been raised two years ago by IBM at the UKCMG meeting. Computer Weekly had picked up on this and had publicised the kind of abuses that were going on. In conjunction with Hammond Suddards they had drawn up a rudimentary code of practice, to which a number of software suppliers had signed up.

The meeting would take the form of formal presentations followed by informal discussion. Lord Randall had kindly agreed to be present to try and assess the scope and scale of the problem and decide whether parliamentary action was needed and, if so, how to go about raising the issue.

John Riley urged everyone to assist Lord Randall to scope the issue by giving him as much information as they could.

### **I Geoff Petherick**

Objectives for the evening

- To gather examples of licence abuse (whether by user or supplier)
- To establish some idea of the scale of the abuse and the money involved
- To identify the opportunities for putting this issue on to the political agenda.

Why stiffing is bad

Money that users were spending on change of ownership could have been better spent in improving services to customers, lowering prices

It affects the competitiveness of those companies.

It gives the software industry a bad name

It makes buyers antagonistic and aggressive in negotiating contracts

It stifles innovation because resource is limited and companies are unwilling to invest more in IT when their previous experiences have been negative.

Geoff outlined the way they were going about it, through a joint initiative between CW and EURIM. CW had publicised the issues, launched the campaign and generously funded a number of meetings. EURIM gave the group political focus and access to the decision making process.

Geoff gave a quick overview of EURIM explaining that it was self funded by subscription and relied on more members to finance a big activity stream in this area.

He explained the function of EURIM and the organisational structure, and described the 6 Themes that EURIM was currently focusing on – UK competitiveness as a place to do e-business, Modernising Government, e-Crime, Fair Dealing, Education – learning for employment, and Regulating the information Society.

Geoff then summarised the situation:- Stiffing was a two-way thing – as a small SW company he had suffered "reverse stiffing". It was important to promote fair dealing rather than just to try and attack SW companies for sharp practice. In fact, stiffing was almost always legal and occurred because legacy licences no longer reflected the way business operates.

EURIM and CW were trying to reach a middle ground where people could do business confidently instead of antagonistically.

### How stiffing became an issue

It first emerged at the 1998 UK CMG meeting, when one of the presentations highlighted the cost and negative impact of stiffing. This coincided with a discovery by EURIM that suppliers were taking advantage of the Y2K situation to force users to buy a new "compliant" licence.

EURIM and CW joined forces on this. They produced a draft Code of Conduct with the help of Michele Rennie of Computalaw and set up a working party.

This initiative was supported by software vendors such as IBM, Beta Systems, Landmark and Compuware.

The big licence abusers were very few and were known – Computer Associates, BMC, Software AG and Compuware plus 2 others (ask Geoff??). However, smaller SW suppliers were jumping on the bandwagon.

The Working Party created 5 sub-groups –

- 1) Issues, chaired by KS of CW, to extract and communicate the main issues.
- 2) Code of fair use and best practice – chaired by MR of Computalaw. This sub-group had produced a draft code and were seeking more input from suppliers to ensure the Code was balanced.
- 3) Alternative Dispute Resolution - chaired by Robin Laidlaw. Among other things there was scope for reduced insurance for companies opting for ADR rather than law.
- 4) Model contracts, chaired by Peter Monk (formerly chaired by CIPS). The group was producing case studies of stiffing and use these as an illustrative basis from which good practice principles could be drawn, and also a series of model clauses for insertion into contracts could be derived. The group did not intend to re-invent wheels by writing model contracts, but instead direct people to the information that already existed.
- 5) Lobbying – GP and PV were identifying whether political intervention was necessary and the best route for achieving it.
- 6) UCETA – GP identified a 6<sup>th</sup> area that the WP needed to look at. UCETA (Uniform Computer Information Transactions Act) was developed by the NCCUSL (National Conference Commissioners for Uniform State Laws - a central body in the US who assess where legislation is needed and try to implement it across the States). This started as an amendment to a US equivalent of Sale of Goods act but it dramatically affects shrink-wrapped licences and some conditions are very onerous and have major implications – Software developers are given the right to switch off the software without redress, legally disclaim their warranty and prevent its movement. Just by opening the wrapping you have accepted the conditions, however onerous, even if you had not read or signed them. GP referred to a document from the IEEE in the US which looked at its implementation and gave advice on how to prevent it affecting your organisation:-

[IEEEUSA.org/grassroots/ucita/ucetakick/pdf](http://IEEEUSA.org/grassroots/ucita/ucetakick/pdf)

He also referred to the 4site website which represented US bodies fighting the implementation of this legislation. The bill was getting mixed response and although it had been adopted in Virginia and Maryland a number of other states had thrown it out.

The Act had serious implications, for instance when a chip was used in surgery, it could be switched off, as could the software that runs a car.

### Conclusion

We need to fight this code like mad! Geoff asked those present to consider whether they had been stiffed, and if so, the effect it had had on the organisation – whether financial or a limiting effect on innovation or investment. He asked people to contact Lord Randall so that he could get an idea of the scale of the problem.

## **II John Lister Presentation**

Whilst working for major retailers JL had experienced a number of cases of stiffing, both within his own organisations and others. He felt it would be helpful to give tangible examples with real sums involved, which would give an idea of the scale. Stiffing practices he had encountered tended to fall into one of four areas.

- 1) The “Version Release” stiff – This arose from a lack of clear definition about what constitutes a version and what constitutes a release. If you buy a car, e.g. a Ford Prefect – the car is a version. If it stops working and a garage repairs it, this maintenance is a release. It is therefore reasonable that if you want to buy a new car that is a new version and you should

pay for it. What sometimes happens is that suppliers make the continued function of software you have bought subject to a new version rather than a new release – releases are usually free and versions are typically things you have to pay for. There should be no possible circumstances where misunderstanding could arise, but this is not the case – the biggest example was Y2K – users were obliged to upgrade to new versions to guarantee Y2K compliance. Going back to the car analogy, software suppliers deemed that the car that would run beyond midnight on 31 December 1999 was a new car and not the old car. Big organisations are not nearly so much at risk as SMEs – they have more clout and vendors have a vested interest in maintaining a good relationship. Having said that, the Y2K stiff cost ASDA £1Million. This was a simple case – they used a piece of software for online authorisation of credit card payment. The SW supplier decided in May 1999 that the replacement, Y2K compliant, authorisation SW would be a version not a release, and in order to process CC transactions after midnight on 31 December 1999, retailers would have to buy a new version of the software. Even though the SW was free the cost of implementation, (the only people able to implement it were, of course, employees of the SW company) would be £1 million. This was a business-critical area and the lack of notice meant that the retailers were between a rock and a hard place. The SW company had covered themselves legally by offering “additional benefits” in the new “version” and although none of these benefits were needed or wanted by the retailer, the vendor could demonstrate they were offering better “value”, and in any case the user would have been unable to mount a legal challenge in the time available – 7 months. In the event, the retailer threw out the vendor, de-installed the software and used a different vendor. This operation still cost £1 million but the retailer had the satisfaction of knowing that the money did not go to the stiffer. The problem was, it was money that did not need to be spent at all and could better have been invested or passed down to the customer in lower prices or better services. The Y2K compliance fixing should have been neither difficult nor expensive.

- 2) The “Upgrade” stiff, which is a “wolves dressed up as sheep” stiff and includes the “usage-based charge” stiff, the “number of users” stiff, the “machine it runs on” stiff, and the software salesman’s ultimate “there must be some way we can charge you for your extra usage” stiff. Here users pay for “extra usage” in circumstances where they are not using it at all. E.g. Oracle finance is licensed on a per-user basis. It doesn’t matter whether that user is the Chief Executive’s secretary who types an expenses claim in once a month or a department where it is being used all the time. This means that that to licence Oracle finance at its list price to include all the occasional users would cost £600,000 extra where in fact only a few clerical people are using it on a daily basis. The company is paying for more SW than it is using. This pricing is the equivalent of everyone paying for a Rolls Royce even though some only need a bike, but bikes are not available. They have defined a definition of usage that is not relevant to the real usage. \*A subtle variation of this is charging per machine it is on. A domestic equivalent of this is buying a computer at home to write 3 letters a month. As kids want to go on the internet you keep upgrading the PC, even though the usage is still only 3 letters a month. Each time the computer – or platform – gets bigger you have to pay a huge software upgrade although all you are doing is writing the same 3 letters. This looks reasonable in terms of the legal contract at the outset, but people do not realise the exponential increase in platform size and the impact of upgrade costs 7 years ahead, even if the use hasn’t changed. The solution is to be able to choose a pricing model that is appropriate for your business. For instance a retailer and CA agreed a licence price based on turnover, but allowed a certain amount of organic growth (15%) and acquisitive growth (5%). The cost of the licence increased if growth exceeded this.

On the other hand users should have to show much greater due diligence since there are also many abuses of software – for example where they have lots of usage that they don’t pay for. It is a two-way street.

- 3) The “Outsource” stiff and the “Changing company name or address” stiff. Otherwise known the “if your contract doesn’t say you can use the SW when it is raining then you can’t” stiff. Many big firms outsource – BR and CA had a major litigation on outsourcing. ASDA outsource on 170 software contracts and have to get assignments so have their work cut out to avoid being stiffed. A classic example was ASDA’s outsourcing to IBM which attracted a £3.8 million assignment charge. In fact the software did not leave ASDA’s computers and never went on to IBM’s systems, they simply ran them for ASDA. The assignment charge was

settled at £1,300. However, in many circumstances outsourcing can justifiably be charged for if the software is going to a different user organisation which might otherwise have bought it in their own right.

- 4) The “Change of use” stiff – This is a catch-all and occurs when you want to move a piece of software from one platform to another. Organisations have their business processes based on one type of software, which operates on a certain platform. They may want to move it from, say, UNIX to Windows NT. This move will have a charge attached because you are asking the supplier to provide a new function and you must recognise it has to be paid for. The problem is that you are in a monopolistic set of circumstances – your company’s business processes have evolved around that software so you are not free to change it, and therefore the SW company can charge what it likes. Where this cost was unfair JL had refused to pay, and if necessary de-installed the software. Even when it cost more in screenclipping, de-installation and re-installation costs in the long term this approach paid off. Firstly he had more control over contract terms and saved money. Secondly he developed a reputation for being unstiffable. Whenever you do platform changes you are at the mercy of the supplier, although you can insert clauses in a contract to protect you to some extent over later changes of use, by, for instance, relating the percentage charge to first purchase price i.e if you get 40% discount on the list price, any “change of use” charge should also have a 40% discount off the list price. This works unless your piece of software is being used by suppliers as a cash cow. In this instance the supplier has based maintenance contracts on a percentage of list price, so keeps raising the list price artificially to get money out of maintenance contracts.

Those are the four categories. If this was the insurance or banking industry we would be accused of mis-selling, sharp practice, theft, on the front of every newspaper. Stiffing is under-recognised but none the less is extremely damaging – Firstly in cost to business, where the money extracted could be better spent in investment or passed back to the customer. Secondly there is a more invidious effect – it causes companies to start applying different cost-benefit criteria to their IT investment than they would for other physical aspects of expenditure. A manufacturing company who does not understand IT and gets stiffed will not trust IT contracts to be worth the paper they are written on. This can only be bad. Out of all things this psychological impact on the way companies assess IT investment is the biggest issue because it affects future investment in our industry.

### III Peter Monk, CGNU

Peter noted that although he worked for a large insurer he was speaking from his own perspective and not necessarily that of his employer. He sought fair dealing and saw it firstly as parity between supplier and customer and secondly as transparency – the financial implications of a contract should be clear. Money should change hands only when benefit is accrued to the user or cost is suffered by the supplier. He proposed to look at the subject under a series of six headings.

- 1 What is the problem?
  - a) Unreasonable costs - associated with changes to long-term licences. Software licences are usually exclusive, which means you can only use the software under the conditions laid out. If it doesn’t say you can use it when it is raining outside then you must expect the supplier to come in and say “its raining, you can’t use this software at the moment”. Many contracts were drawn up in the 70’s and 80’s and could not have foreseen the changes in business practice and markets that have taken place. These changes make the original contracts invalid, place the user in default and give the supplier the opportunity to charge extortionately for the changes required to make the contract appropriate again.
  - b) Inhibiting the implementation of the right solution:- if you have a problem the costs involved in changing the software licence to apply the best solution may force you to solve it an alternative but less good way.
  - c) Risks to your business – from foreign jurisdictions. Licences are often not under UK law and businesses are left open to alien regimes.
- 2 Why is it with us?

- a) It is mainly the result of old legacy contracts. A contract signed in 1976 had recently come back to roost:- the supplier (probably in the interest of client relations) had not enforced the many small changes that had been required over the years to keep the contract in line with business practice, so when it was eventually reviewed it was completely inappropriate.
- b) the user approach to managing suppliers and negotiating contracts – this is hit and miss, few really look carefully and really know whether they are building what they really want for the future. Companies feel they are there to sell whatever they sell, not to spend resource poring over IT contracts.
- c) The nature of the agreements, which are complex and renewable, and now subject to cycling into increasingly large and complex arrangements.
- d) The way company infrastructure and processes gradually wrap around software, it cannot be plucked out because most organisation have a portfolio of licences.
- e) New style agreements – “shrink-wrapped” and “click-wrapped” where onerous terms and conditions apply as soon as they are opened.
- f) Non-conformity in the industry, which has created ad hoc contradictory solutions that work in the short term but do not help to create sensible precedents or frameworks.

#### 4 How big is this problem?

There is no specific answer but a number of areas. This meeting comprised those most aware of the problems, and some good suppliers, and even then, the floor could account for hundreds of millions in cost. This bodes badly for the rest of industry which less aware.

How much effort does the industry have to make? Ideally a new framework is needed. to Companies also need to changes practi ces – the need to assess the cost of revisiting contracts in the event of change of circumstances before they commit to change, whether it be outsourcing, merging or employing more staff. The impact on the licensing regime should be a factor in whether that change is implemented or not. This is wrong – companies should not be spending time watching their backs, and licence conditions should not be dictating company policy. This results in companies implementing wrong or inefficient solutions from fear of exposure. The other problem within companies is that corporate culture means that people may have to put their jobs on the line to alert senior management to disadvantageous licensing. Licensing terms are very important to the future of a company.

#### 5 Who would benefit by improving the situation?

The customer would benefit in the future from more transparent contract terms and more predictable costs. However, suppliers would also benefit because users would feel able to take a less antagonistic negotiation stance and they would waste much less time and resource in negotiation. Both pay even when the contract is thrown out – the supplier loses the contract and the customer still has to pay elsewhere. Top management don't want this confrontation – salesmen with a quota to reach will try and do anything to get a deal but management would prefer him to work on more productive business. Enforcement of contracts – injunctions and lawyers fees- cost suppliers dearly. Bad publicity is also a major cost.

UK plc gains as well. We pay far too much for IT solutions for all the reason we are talking about, and much of this money goes overseas. Are we in the UK too much at the beck and call of overseas suppliers. Most software IPR are held in the US and was designed for a different business community than that of Europe but the different business. Software in the UK is driven by the US market in pricing structure, sales technique and operation, which is not ideal.

#### 6 How can we improve things?

One solution is ADR (Alternative Dispute Resolution). This can be done on several levels-firstly an informal level – sharing information with others to see if licence conditions seem unreasonable (known as amateur dispute resolution). “This is what happened to us and this is how we got out of it...” This can be succeeded by the more formalised process of ADR.

Whatever we do in future, we are still stuck with existing licensing whether we like it or not and this is where ADR will be vital.

We need to improve the contracting situation and our understanding of these areas. The WP has professionally produced three case studies, which are illustrative guides to the pitfalls and solutions to licensing. Now we need to use the case studies to extract guidelines in this area of licensing. From

this data we then need to produce optional conditions and standard or “kite marked” clauses that have been discussed and approved by both the user and supplier communities.

Teach best practice in IT procurement – we don’t do this very well. IT procurement should always involve a triumvirate of IT people, lawyers and procurement experts. Other organisations such as Buy IT and the IT Procurement Forum also offer best practice guidelines.

Involve lawyers, to help you examine the clauses and refine them to your own needs. Even large organisations often fail to involve lawyers since they are just not aware of the implications.

Ideally this resolution should be extended beyond the UK to the EU and US.

### **John Riley, Computer Weekly**

JR thanked the previous speakers for their informative and lucid overviews, in the traditional parliamentary manner, and opened the subject to the floor for questions and points.

## **IV QUESTIONS**

Q1 – Michele Rennie, Computalaw – How do you get enough muscle together to qualify imports, applying the condition that purchases would not be under UCITA? This could not be achieved individually but collectively there was potential.

Q2 – Colin Sills – At the moment much software purchase is on the vendors’ terms. But, even if companies were buying on their own terms there was no way to see into the future, and they may still be open to stiffing. Things can change that can’t be foreseen in the contract. Instead there should be a duty of care framework stating that “unless benefit is enjoyed by the user or cost incurred by the supplier no money should change hands”.

Q3 Mike Berry, Landmark – As a small vendor he had been forced by a large user to use their terms and conditions, which protected them far less, and left them more open to stiffing, than the suppliers’ standard contract. He agreed it was more important to get a framework and a series of approved terms which both parties knew were fair. JL strongly agreed.

JL had a policy in place to prevent technicians trialling a piece of software before the terms and conditions are sorted out. Technicians get married to software and then feed the vendor the information they need to get the sale through the management.

Q4 Rolfe?? - Was it possible to shape terms and conditions for importing software which ensure that it conforms with characteristics – for instance it doesn’t bring unfair terms with the licence. It was impossible for corporations to prevent individuals clicking onto products on the web or to open shrink-wrapped goods which they might do without realising the consequences so maybe another means of control was needed.

Q5 Mike Dulieu noted that both sides got stiffed - big users often took advantage of small vendors who needed their business - and urged the group to ensure that a two-way view was maintained.

Q6 - LR expressed his surprise that with the extent of stiffing there was not more co-ordination between victims. If they could establish a reliable estimate of the size of the problem, then he could decide whether it needed immediate tough action or whether industry could set its own house in order by implementing best practice and ADR. For Ministerial attention it was essential to have a grip of the size of the problem, and whether it was one that would go away as legacy contracts died out or would continue to grow.

Q7 - JR asked those present whether they could indicate the extent to which stiffing had affected their organisation. 3 members indicated that stiffing had cost their organisation a 7 figure sum, and one individual could list £100 million of cases in the UK. A catch 22 of stiffing was that many companies had to sign non-disclosure clauses when they negotiated agreements with vendors.

Q8 - RH – IBM have brought out a new pricing strategy now that they are moving mainframes from 31 to 64 bit technology, and certain software vendors have used it as an opportunity to force users to renew their licences. IBM has urged users not to purchase processors without first ensuring that the software vendors guarantee that the existing contract will stand and will not oblige them to sign up to a new licence. Although this costs them money in the short term, IBM believes that by being fair and transparent they will keep the trust of their many clients and a reputation for fair dealing and this will grow their business in the long term.

It is evident from the very poor results being posted by some of the more notorious vendors that users are getting wise to stiffing – BMC reported a 37% reduction in revenue. They now had a choice – to clean up their act and grow their businesses or stiff themselves back into a short term profit. One of the big successes of the Computer Weekly campaign is the very strong view that Customers are no longer jumping into new 3, 5 or 7- year contracts and are much more wary. Also, accounting rules in US are changing which will cease to allow revenue to be taken in the same quarter as the deal is signed.

On the whole the stiffing situation seemed to be static, and was not rising exponentially

JR urged that any individuals with information or examples of stiffing pass it to Lord Randall, either privately, formally or informally, to help him assess the extent of the problem

Q9 – Bryan Cassidy – noted that a number of practices seem to be uses of dominant market position and are therefore contrary to competition laws in the UK. Had victims approached the DTI to take action? He also asked whether the new legislation emerging from the EC was likely to be of help - the Directive on Copyright and related rights in the information society and long awaited Commission Draft Directive on Patent rights.

GP replied that the biggest problem was getting evidence. Companies were unwilling to quote, either because of confidentiality agreements or because they did not want to be seen to have been ripped off. PV noted that EURIM had contacts at the OFT who were willing to take up cases but needed first to receive a formal complaint.

GP noted that there was plenty of work to be done but EURIM needed more members to fund activity

## **V Other points from the floor**

P1 AN noted that new areas for stiffing were arising, principally where people were dependent on data sets owned by dominant suppliers.

P2 JL noted that the software suppliers comprised a small, very narrow monopoly within a small segment and asked whether how that monopolistic position could be exposed. In terms of scale, they had an outsourcing charge of £2million that was reduced to £1700 without resorting to litigation. Another case was the well publicised British Rail vs. CA outsourcing case which is a classic piece of case-law on outsource stiffing.

P3 RH noted that IBM had chosen to fund outsourcing centrally and had made a central allocation, but outsource companies never used this because the supplier always negotiated a separate deal with them that was cheaper. Effectively the supplier had sold the software twice. Was this stiffing or clever business practice?

## **Conclusion**

JR summed up thanked everyone and asked them to support the campaign in any way they could. The discussion continued informally over drinks.