

## **Guidelines for Fair Use & Best Practice For Licensors and Licensees**

### **Introduction**

Over the last few years in particular, greater sophistication of software products enabling increased scope and flexibility of use, coupled with the more elaborate needs of licensees has stretched the boundaries of software use beyond the parameters envisaged by the terms of many software licences. Where this is the case and where the parties to a software licence cannot mutually agree what (if any) additional charges should apply in such unforeseen circumstances, then there is clearly a need for independent guidelines to help determine what would be deemed to be '*fair and reasonable*' for all parties in the changed circumstances

### **How should these guidelines be used?**

The guidelines present a fair and reasonable position, acceptable both to the licensor and licensee, that can be used to resolve disputes in circumstances not provided for by a software licence, or where contractual statements have been rendered obsolete by changes in business practice (i.e. where the contract is silent).

It is not proposed that these Guidelines be used to vary existing terms of a software licence that already covers the issue and has already been entered into by the parties.

In brief, the guidelines are designed to:-

- give a general idea of what is perceived as fair within the industry
- resolve disagreement between supplier and user as to whether charges are justifiable
- provide a preliminary quick-reference stage before moving to other forms of dispute resolution.

## **Guidelines for Fair Use**

### **BASIC FAIR USE PROVISIONS**

If changes cost the supplier nothing and deliver no benefit to the customer, no additional charge should arise. Changes in charges after entering into a licence should be:

### **REASONABLE, PREDICTABLE and JUSTIFIABLE**

### **1. Circumstances in which a Licensor may Justifiably Charge Additional Fees**

The following are examples of justifiable reasons to charge additional fees:

- a) Any Licensee change which would result in the Licensor incurring any additional expense (eg. The cost of sending support staff to a new, more remote location).
- b) Licensor changes/improvements to software facilities or performance (eg software enhancement, improved functionality) which (if used by the licensee) would confer additional business benefit to the licensee.

- c) Any licensee change which would result in the Licensor suffering **actual** loss of revenue (eg. loss of a potential new licensee resulting from the change in use of the software by an existing licensee becoming a *bureau-type* service and running the software for the benefit of others who would themselves have been licensees of the software)
- d) Where the software owner incurs additional risks (eg as to credit, breach of confidence, loss of control, etc).

## 2. Where a Licensee makes a change to its System

It would be acceptable practice for no additional charges to apply to a licensee if it changed or upgraded its system **PROVIDED** such change

- runs the **same** software for the equivalent use<sup>1</sup> to that it was used prior to such change or upgrade,
- the licensee **uninstalls** the software from the old system (subject to parallel running and disaster recovery/back-up as specified below).
- does not extend the **networking** use beyond that which it was used prior to such change (if that is relevant to the licence)
- does not increase the **number of users** (as defined in the relevant licence eg named users, log-on ids or concurrent users) (if that is relevant to the licence)
- does not change the **location** (if that is relevant to the licence)
- does not change the **processing capacity** (if that is relevant to the licence)

### However:-

- A system change may justify an additional charge in circumstances where the Licensor incurs any additional expense (eg in support) or would suffer actual loss of revenue directly resulting from such change, or where the user derives additional value.
- A software owner may properly resist a migration to another manufacturer's equipment:-
  - if there are commercial reasons for not permitting use of that software on that equipment
  - if allowing the licensee to become a lawful user of the software on other equipment would give the licensee lawful user rights under Article 5(c) or Article 6 of the Software Directive.\*

### 2.1 Parallel running

During a system changeover, there is often a period of time during which software is installed on both the old and on the new system. This should not be chargeable **PROVIDED** the software only remains on the two systems for a *reasonable period of time for the purposes of testing only* and the Licensor does not have to **support** both systems.

### 2.3 Location of Software Use

In most cases, the **location** of software use should be irrelevant for **licensing** purposes therefore there should be no charge applied when the licensee changes the location of the software.

Location **is relevant** to **support** of software, therefore it would be reasonable for the Licensor to charge more for support if the software has been moved outside its usual area of operation or if change of location compromised the software owner's ability to control its use. Such increase in support charges should be **proportionate** to the extra cost which the licensor will actually incur in providing such support outside its area (eg. the extra cost of time and travel for its support staff to make an on-site visit or sending upgrades etc).

### 2.2 Permitted Copies

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<sup>1</sup> This may require a definition

There should be no additional charges imposed for **back-up** copies of software since current UK and EU law already permits copies of software to be made for such purpose. This should also extend to copies kept at/for **disaster recovery**.

In addition, since the use of **laptop** computers is now commonplace, in addition to other modes of mobile and portable computing devices there should not be a restriction on an authorised licensee (ie who has a current valid licence) also installing a copy on his/her laptop or other device. Such a provision in fact is becoming more common in software licences.

### **3. Where a Licensor makes a change to the Software**

3.1 It would unacceptable practice for a Licensor to try and **impose** a change or upgrade on a licensee (whether at an additional charge or not), other than for safety reasons or when a Licensor is obliged to make changes to software as a result of changes forced on him by modifications to the hardware, operating system or other hosting software.

3.2 Furthermore, it would unacceptable practice for a Licensor to try and **impose** a change or upgrade on a licensee at an additional charge if such change or upgrade is for the purposes of

- rationalising its own support
- introducing a new functionality or enhancement which the licensee chooses not to take.
- *[add any other reasons & clarify difference between Versions and Releases]*

### **4. Where a Licensor wants to cease supporting Software**

Where a Licensor wants to cease supporting software under perpetual or renewable licences (whether that relates to earlier versions which licensees wish to continue to use or to the software in general) then the Licensor will give to the Licensee reasonable notice of such proposed cessation and either

- arrange for a third party organisation to take over its support obligations or
- make the source code available to the Licensee solely for the purposes of continuing to support the software and subject to strict confidentiality and non-exploitation provisions

*[a problem here - many pieces of software contain copyrighted algorithms that no SW company would agree to part with, however protected, so this clause may have to be removed]*

### **5. User Restrictions**

The most common clause relating to **who** can use software, generally restricts use to the licensee employees. It would be unreasonable for additional charges to apply to an independent contractor or consultant on contract to the licensee to assist the licensee, (or to agents or brokers who are using the software under a delegated authority scheme exactly as an employee would) **PROVIDED** that consultant is bound (in his consultancy agreement with the licensee) to observe the terms of the software licence, undertakes not to take any copies of the same nor use the same other than for the purposes of the licensee's requirements with whom he is contracted. This should also apply to Disaster Recovery sites (see above).

Where **identified named employee users** are specified in the licence, then there should be no charge for the licensee changing those names in the ordinary course of staff turnover and during leave, sickness etc.(including cover being provided by an independent contractor subject to the above conditions).

### **6. Outsourcing**

Where the licensee decides to outsource the work hitherto performed by its own employees, to a third party, it would be unreasonable for additional charges to apply to a licensee by virtue of that outsourcing arrangement **PROVIDED**

- the software is used by the out-sourced service provider solely for the purposes of performing the same work on behalf of the licensee and
- the out-sourced service provider is expressly prohibited (in the outsourcing agreement between the licensee and the out-sourced service provider) from using the software for any other client or for any other work of its own or any third party and undertakes to comply strictly with the terms and conditions of the software licence and
- the licensee uninstalls the software from the licensee's own system where the out-sourced service provider is using its system.
- The licensee does not make any increase to the licensed capacity (however so determined)

Where the out-sourced service provider is in the same geographical location and where the system used by the out-sourced service provider is the same or equivalent to that of the licensee, then no additional support charges should be levied.

**However**, when a software owners is willing to allow outsourced use of software outside the previous terms of a user's licence, he may properly wish to retain effective control and may wish to impose additional constraints on the assignee. Negotiating these terms will take management time and may incur legal costs, for which charges may be appropriate.

## 7. Facilities Management

Where the licensee decides to appoint a facilities manager to perform the work hitherto performed by its own employees, it would be unreasonable for additional charges to apply to the licensee by virtue of that facilities management arrangement **PROVIDED**

- the software is used by the facilities manager solely for the purposes of performing the same work on behalf of the licensee and
- the facilities manager is expressly prohibited (in the facilities management agreement between the licensee and the facilities manager) from using the software for any other client or for any other work of its own or any third party and undertakes to comply strictly with the terms and conditions of the software licence.

*[If outsourcing and facilities management are to be distinct, the differences need to be explained]*

## 8. Changes in Licensee

It would be acceptable practice for no additional charges to apply to a licensee in the following circumstances:

- (i) Where the licensee changes its **name** (with no other change to the licence terms)
- (ii) Where the licensee **merges** with or is taken over by another company and there is no change to the licence terms (eg. number of users or location (if relevant)).
- (iii) Where the licensee **transfers that part of its business** which uses the software to another company or subsidiary within the group, the licensee should be permitted to assign the licence to that company or subsidiary free of charge.
- (iv) Where the licensee **sells that part of its business** which uses the software, the licensee should be permitted to assign the licence to the purchaser free of charge **PROVIDED**
  - the licensee uninstalls and ceases to use any copy of the software after the sale and the purchaser undertakes to comply with all the licence terms and
  - the purchaser has not previously been in breach or otherwise infringed any right of the licensor.
  - The value derived from use has not increased
  - There is no increased credit risk associated with the change
  - *[add other circumstances]*