



*"The Perfect Fit for
Your Business"™*

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 [®] **Apple Says "Uncle"**

The "Pirates" have been after Apple[®] – at least in Europe – where they and their Pirate Party political surrogates have demanded data portability for music purchased from Apple's iTunes Music Store[®] and exclusively destined for the iPod[®] to all music players.¹ Now, Apple has blinked, sort of.

On February 6, Steve Jobs announced:

. . . abolish [digital rights management] entirely. Imagine a world where every online store sells DRM-free music encoded in open licensable formats. In such a world, any player can play music purchased from any store, and any store can sell music which is playable on all players. This is clearly the best alternative for consumers, and Apple would embrace it in a heartbeat. If the big four music companies would license Apple their music without the requirement that it be protected with a DRM, we would switch to selling only DRM-free music on our iTunes store. Every iPod ever made will play this DRM-free music.²

Jobs is shifting the focus from Apple to music companies. But, he is onboard with the pirates, and they are rallying around the skull and cross-bones.

Vendor Lock-In

Liquidated damages clauses and long-term contracts are two of just many weapons

¹ For a brief discussion of the European Apple controversy and the Pirate Party movement, see *The Ultimate Pirate Party* (sidebar) in *Taking Notice of Arbitration*, CARPENTER LAW OFFICE CLIENT NEWSLETTER 4 (Robert H. Carpenter, Jr., Plano, Tex.), Nov. – Dec. 2006, http://www.carpenterlaw.net/images/Taking_Notice_of_Arbitration_Nov.-_Dec._2006_2007.pdf.

² Steve Jobs, Thoughts on Music (Feb. 6, 2007), <http://www.apple.com/hotnews/thoughtsonmusic/>.

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fielded by vendors to capture and hold customers.³ Marketers also advocate a “wrap” strategy to bind customers to vendors. The customer is wrapped by overlapping contracts (*i.e.*, contracts that are not co-terminus) and multiple, interdependent and interoperable products.

Based on the total cost of ownership, many major users are now considering open source information technology solutions. And, when they do, they encounter more subtle vendor lock-ins that include non-transferable OEM licenses tied to hardware and volume licensing, which includes financial incentives tied to multi-year commitments. What else can they come up with?

Data – A New Tool

Whether one licenses technology for in-house use or outsources to an information technology services vendor, data is the critical component.

Outsourcing

In protecting the customer, a contract that provides only for data ownership, the flip-side of the data confidentiality coin,⁴ is not sufficient. Financial services companies that change technology services providers and platforms know this. Consider some typical contract language that addresses the point:

All of Customer’s data and output (“Customer Proprietary Information”) disclosed by Customer in connection with this Agreement is and shall remain the sole property of Customer. At the request of Customer, and upon payment to Company of all monies due under the terms of this Agreement, Company shall return any Customer Proprietary Information held by Company to Customer.

But, when customer gets its data, will it be able to read it or to use it on a different platform? Of course, most vendors provide de-conversion services to departing customers, but neither these customers nor these services are likely to be their highest priority. And, in an environment of increasing technology complexity, the acquiring vendor cannot guarantee a smooth transition.

Licensed Technology

The situation may not be much better for those processing their data in-house. Yes, they physically have their data in hand; but reading and mapping it to a new platform may be a “horse of a different color.” Even if the user is not converting from its current platform to a different one, it will certainly face the issue of systems interoperability, perhaps based upon database design and structure.

International Standards

The international community, in order to accelerate economic growth, efficiency and innovation, is promoting open information technology standards, standards pursuant to which the

³ *Data Processors, Forced to Reevaluate Pricing Strategies?*, CARPENTER LAW OFFICE CLIENT NEWSLETTER (Robert H. Carpenter, Jr., Plano, Tex.), Dec. 2004, http://www.carpenterlaw.net/images/Data_Processors,_Forced_to_Reevaluate_Pricing_Strategies_Dec.2004_2007.pdf, addresses the length of contract terms and liquidated damages upon a termination for convenience.

⁴ *See Ouch!*, CARPENTER LAW OFFICE CLIENT NEWSLETTER (Robert H. Carpenter, Jr., Plano, Tex.), Jul. – Aug. 2004, http://www.carpenterlaw.net/images/Ouch!_Jul._-Aug.2005_2007.pdf.

owner can fully control its data. These open standards are gaining acceptance.

Within the last year the International Organization for Standardization (ISO) adopted the open document format (ODF) to promote these goals with respect to office applications.

... **ISO/IEC 26300, *Open Document Format for Office Applications (OpenDocument) v1.0***, ... will allow users to save and exchange editable office documents such as text documents (including memos, reports, and books), spreadsheets, databases, charts, and presentations – regardless of application or platform in which the files were created.

Organizations and individuals that store their data in the open format avoid being locked in to a single software vendor, leaving them free to switch software if their current vendor goes out-of-business, raises its prices, changes its software, or alters its licensing terms.⁵

Governments and industry around the world are jumping on this bandwagon, but the push towards open standards for commercial platforms/applications will be more difficult. And, they will likely focus on database design and structure.

Ownership of data, realistic ownership, must include reasonable portability. Most outsourcing agreements provide for the return of an owner's data at any time in a "machine-readable" form. This contract term addresses both the file format and the media by which the file is delivered (*e.g.*, tape). Mainframe applications often deliver file extracts to data owners in an EBCDIC (Extended Binary Coded Decimal Interchange Code) format. PCs typically use ASCII (American Standard Code for Information Interchange).

These standards are widely recognized and prevalent in commercial applications, but record definitions within these formats may vary widely. Thus, portability depends upon the recipient's ability to map data from the records in one application to another. How can one be better prepared?

"The Best Defense is a Good Offense"

TIP Before contracting for information technology, understand thoroughly the data output capabilities of the technology and its vendor, your ability to receive and translate that data, and the portability of that data to another platform.

TIP Make sure that the contract provides for data ownership and delivery upon demand and without condition.

TIP In the contract, prescribe the file format and media by which the vendor is to deliver requested data. (This should be a format and media that the customer can currently handle, recognizing that as technology changes and new hardware and software are acquired the parties can always agree on something different.)

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⁵ Press Release, Int'l Org. for Standardization, ISO and IEC approve OpenDocument OASIS standard for data interoperability of office applications (May 8, 2006), <http://www.iso.org/iso/pressrelease.htm?refid=Ref1004>.