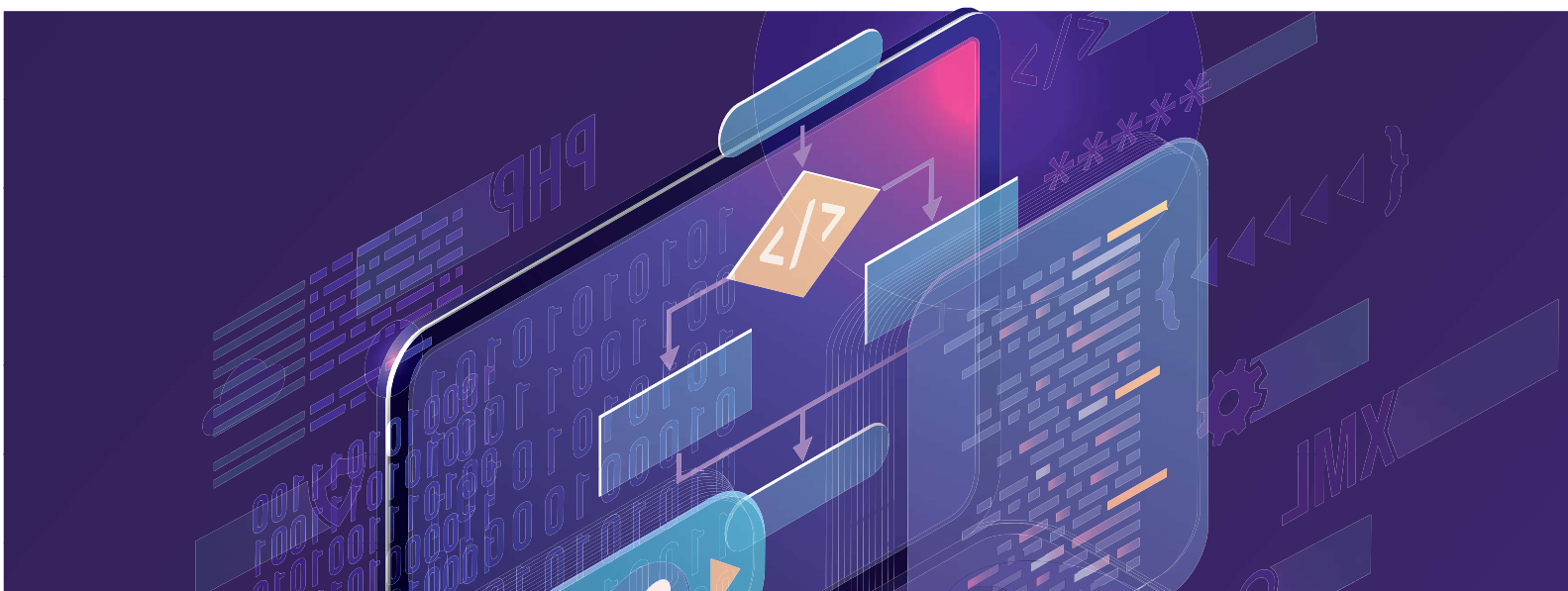





*An Article*

# ESCROW AGREEMENTS IN SOFTWARE TECHNOLOGY LICENSING ARRANGEMENTS





Many global corporate arrangements and rearrangements today are technologically concentrated. Start-ups and corporates alike are being purchased and sold solely for their tech substance. In the tech sector, particularly software, the bulk of proprietary rights are intangible, thereby making them Intellectual Property assets. Just like tangibles, Intellectual Property rights in software can be let via licensing.

Software licensing allows a Licensee to legally use software, the usage of which would otherwise have been a copyright breach. A software license grants usage rights to an end-user and defines the scope and extent to which an end-user can deploy the software of an owner subject to consideration. At the back end of a software is what is known as source codes. Source codes are the original, unfiltered versions of the software as originally written. It is the primary programming language of a computer programme. Writing source codes is the most time consuming and brain taxing aspect of software development.

Under the Nigerian intellectual property regime, source codes are majorly protected under copyright laws. Section 39 of the Copyright Act<sup>1</sup> defines literary works to include computer programmes, it also further defines computer programmes as ‘statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result’. This is exactly what source codes are.

Software Licensing Agreements (SLA) are the conditioned transfer of a finished software product, or that of the source codes, depending on the circumstance and needs of the parties involved. Many a times, Licensees obtain a license for a software programme, and during the pendency of such license, the Licensor, for some reason, fails to satisfy their end of the agreement by their inability or unwillingness to continue to sustain the programme. Such action may prove fatal to the business of the Licensor, especially if the programme is vital to their operation. This is where an Escrow Agreement, involving a third party depositor proves vital.

A technology escrow, also called a software escrow, protects all parties in a software licensing arrangement by depositing the source code, data and all accessories attached to the software with a third party neutral, pending the occurrence of a stated event.

Software escrows are beneficial to both parties in an SLA arrangement. For the Licensors, it protects them from any potential misuse or disclosure and duplication of the codes by the Licensee. It also allows them to license the software to as many Licensees as possible, as the control of the codes vest with a third party and not a single Licensee. It, therefore, protects their business and allows them to profit from it. For the Licensees, it allows them access to the code which is vital

to their business in the event that the Licensor goes out of business, by reasons either of bankruptcy, rearrangement, death (for non-corporates), obsolescence, and other unforeseen circumstances covered in the agreement. In essence, it allows the Licensor to retain their IP rights, while the Licensee gets assurances that the source codes and other related accessories are within their reach.

A software escrow typically involves four steps. The coming together of the relevant parties to the SLA, the escrow agent to design the agreement and identify the release conditions. Release conditions are those events that trigger the delivery of the codes and related accessories to either of the parties. The owners and other sub-contractors, if any, deposit the materials and all others related to the IP. The escrow agent collects, tests, verifies and stores the deposited materials in a high level storage space. On the occurrence of any specified release event, the escrow agent releases the materials to the designated party, usually the Licensee.

What happens when the SLA expires? The escrow agent either releases the materials to the Intellectual Property owner or destroys them, the terms of which are largely spelt out in the SLA. It is important that the materials are updated timeously whilst at the possession of the escrow agent, as new versions of the software develop. Most modern escrow agents have this system automated and the updates run concurrently.

It is important to ask some preliminary questions before effecting a software escrow arrangement. Is the escrow even necessary? Some of the preliminary assessments necessary before engaging in the money-consuming arrangement include:

- i. The likelihood of the vendor breaching or discontinuing its maintenance and support obligations,
- ii. The financial stability of the vendor,
- iii. The size of the vendor's operation,
- iv. The structure of the vendor's operation (whether a corporate with succession or a sole proprietorship/business name),
- v. The importance of the software to the integral operation of your business.

In the event where the software crashes or begins to malfunction, or where it needs to be updated due to the needs of the day, is it essential to have the source code and other related materials like build instructions, system integration design, user interface components, and so on deposited with a third party? If affirmative, then you need an escrow.

Iron Mountain Inc<sup>2</sup>, one of the world's leading escrow agents, identified some qualitative assessments to help

determine your business's risk level in identifying whether your business requires an escrow<sup>3</sup>. Some of it include; the number of users, customer impact, initial investment, subcontractor partnerships, vendor stability, license fees, installation, retsaining inter alia.

In conclusion, an escrow agreement is a smart tool for mitigating risks associated with the acquisition of technology, precisely software technologies. By accompanying your SLA with an Escrow Agreement and your data package, you are very well poised to diminish the attendant loss that

#### END NOTES

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1. *Cap C28, Laws of the Federation of Nigeria 2004*
2. <https://www.ironmountain.com/services/software-escrow>
3. <https://d2dzik4ji1e1u6.cloudfront.net/images/lexology/static/9ac3326d-4fab-46b6-84c9-31ae0443fb5a.PNG>

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