

# Realising the value of software licences

Noel Unwin explains why software licensing is now recognised as an intangible asset that can yield real financial returns for creditors with little policing from IP's.

Software what?...the response echoed throughout the industry when the theory behind this new licensing asset reared its invisible head back in the winter of 2004 – an understandable first reaction to an asset where the hidden heterogeneity between the software and the licence itself had gone hitherto unnoticed by insolvency members, private sector businesses and even the software vendors themselves.

Tracing a Microsoft software licence and understanding the legalities that this new intangible asset gives rise to requires a combination of IT and IP knowledge in order that clients may be able to realise its full value. To this end, the main focus of this article is to:

- recap on our understanding of what a software licence is;
- look at the cost of policing against the financial benefits that this new asset offers;
- elaborate on the legalities of Microsoft software licensing and, more importantly, how this works within the UK insolvency arena.

## What is a software licence?

A Microsoft software licence is simply a permit to use a piece of software on a desktop PC, laptop or any IT device – the licence may come in paper format or else the vendor's agreement breakdown and ownership details may be accessed through a central database. While there are numerous software vendors within the UK and each will have different types of licensing programs (fully packaged 'boxed' product, OEM product, proprietary product etc), we are solely concerned here with Microsoft's 'open volume' licensing. Volume licensing allows businesses to purchase multiple software licences for their business through either subscription use (where businesses pay for the legal right to use the software for a limited period of time) or perpetual use (businesses purchase the legal right to use the software forever).

For instance, a company may require multiple 'permits' to use Microsoft Office or Server software due to expansion, licence compliance or business driven necessities. That company could purchase a perpetual or subscription licensing agreement from Microsoft. If that same company decides to stop using the software and then decides to transfer the licences to another company or individual, no copyright infringement will have taken place as long as UK law and/or Microsoft's transfer procedures are adhered to. In the same way, if an insolvent

company that you are dealing with purchased (in full) a perpetual Microsoft licence during its solvent life, that company owns an intangible asset that may have a resalable value attached to it.

## Does the policing outweigh the financial returns for your clients?

UK insolvency practitioners are leading the way for UK creditors. Being the first to trace and realise the financial returns of this previously unrealised software licence asset, UK IP's are opening the envelope of asset traceability by simply adhering to Microsoft's own licensing transfer terms and conditions; a 'user friendly' clause that permits disused or unwanted software licence agreements to be transferred from insolvent (and also downsizing solvent companies) back into private sector businesses.

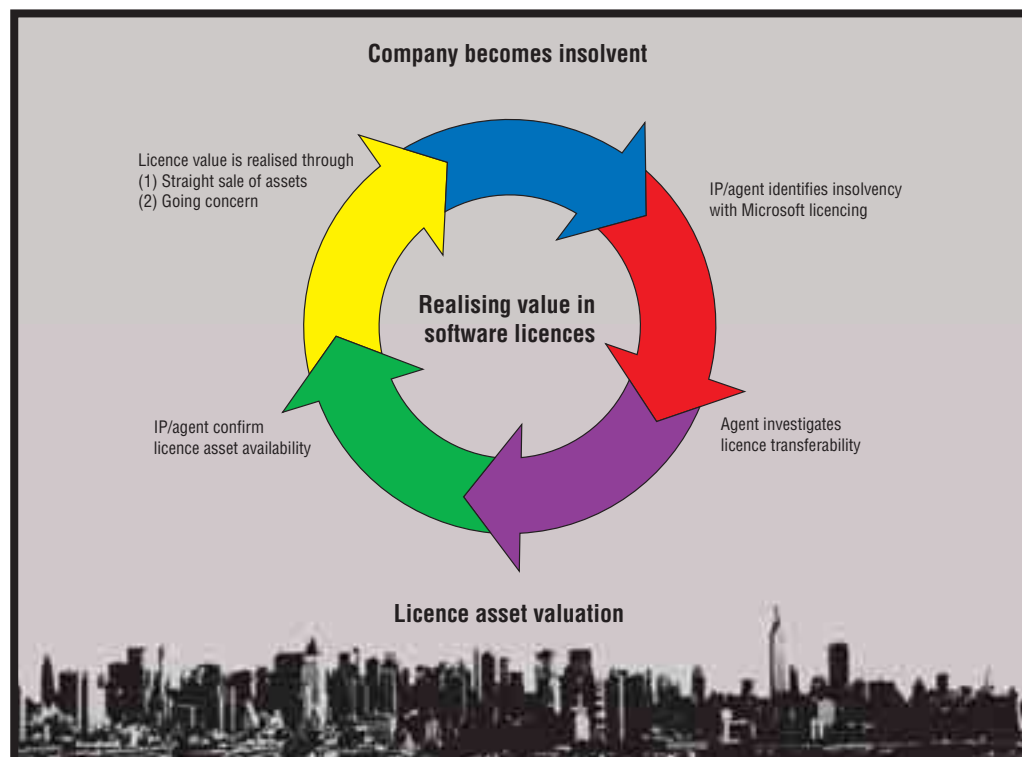
An on-going audit of software licensing assets has led to numerous Microsoft software licence assets being realised for a host of organisations such as Tenon, Ernst & Young, Grant Thornton etc. Tracing this asset through to realising the financial returns for clients demonstrates that the financial rewards outweigh the policing required on your part. In many cases, the value of the transferable

Microsoft software licences runs into five figures and can amount to as much as 10-15 percent of the overall insolvent company asset value. As such, perceptions are changing and intangibility does not have to mean that the financial returns of the Microsoft licensing assets will be negligible to your clients or impose unnecessary policing upon its members. Indeed, recent cases such as *Bousfield Ltd*, a receivership being managed by Ernst & Young, has already seen its creditors realise tens of thousands of pounds from its Microsoft licence assets. In order to cement the sale between the insolvent company and new private sector transferee, the IP/appointment manager is solely required to:

- approve the sale of the Microsoft licence asset;
- confirm the payment/client account details.

## Understanding the legalities of software licensing

Understanding the legalities of software licensing within the UK insolvency market is clearly paramount for you and your agent(s). This can be split into two areas: transferring a Microsoft software licence agreement and asset availability of a Microsoft software licence agreement.



### 1) **Transferring a Microsoft software**

**licence.** Microsoft clearly states within its own 'open' licence agreement/product use rights that '...you may transfer the licences identified on the cover page to a single individual or legal entity only if: (i) the transferee accepts in writing the applicable product use rights, use restrictions and limitations on liability, and (ii) we receive written notice of such transfer within 30 days of the date of transfer...'. Further underlying restrictions do exist within the product use rights that are not so easily defined, and these complicate the boundaries of licence transferability. However, the basic legal concept can clearly be understood from this clause, which eliminates the legal ambiguities leading to different interpretations of the law.

In any case, your agent(s) should have specific fail safe processes and relevant insurances in place – a necessary set of protections given the legal complexities and underlying restrictions associated with both the insolvency market and transferring licence agreements back into the open market.

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### 2) **Asset availability of a Microsoft software**

**licence.** This topic needs clarifying from a legal perspective in order to avoid any confusion when ascertaining whether the Microsoft licence asset is available for sale. IP feedback has been combined with legal advice to establish when the Microsoft software licence is and is not available for sale. Our findings to date have demonstrated that the Microsoft software licences:

- have not been included in the sale of assets or when the business has been sold on as a going concern, unless they have been contained or specifically mentioned within the sales contract;
- do not come under the heading of 'intellectual property';
- should not be mistaken as proprietary software/licensing that the insolvency may have purchased throughout its solvent life.

A spokesman for Geldards LLP has commented that in a straightforward sale of assets scenario, as opposed to the sale of a business as a going concern, for a transfer to be effected the sale agreement must make specific reference to the licence. Following completion of the agreement, it is the responsibility of the purchaser to register the transfer. If this is not

done, ownership of the licence will remain with the insolvent company meaning the purchaser will be using the software illegally and putting it at risk of action for the use of software that is unlicensed.

In the case of the sale of a business as a going concern, again the best practice is to specifically refer to the licence in the sale agreement. Some may argue that a licence would fall within the ordinary definition of 'intellectual property', but this does not reflect the fact that a software licence is a separate entity to the software itself. The law protects the copyright of the software, whereas a licensee is free to transfer the licence provided that certain criteria are met. A software licence is merely a 'licence to use' that would not ordinarily terminate upon a company becoming insolvent. A licence could therefore, for example, be included under the definition of 'supply contracts'. Alternatively, there is no reason why a licence could not be excluded from the sale of a business as a going concern, and sold separately, in the event that the purchaser already had sufficient capacity with its existing licence.

So, it should be clear that unless the Microsoft licence(s) were included within the 'heads' or specifically mentioned within the sales contract, an unrealised asset may still exist and could be realised for your clients.

Note that the asset valuation supplied to you by your agent(s) for the Microsoft licence agreements can be realised in one of two ways; either by omitting the licensing from the sales contract and then sold on separately, or otherwise, by including the value of the asset in the sale of

#### CHECKLIST

In order to continue tracing Microsoft software licence assets communication is clearly essential and relies upon the flow of information to and from your agent(s) in order to yield greater returns for your clients. For ongoing insolvencies, bear the following in mind.

- 1) a software licence is an asset in its own right and separate from the software or other IT hardware;
- 2) the contractual legalities of being able to transfer a Microsoft 'open' licence agreement are clearly laid out in Microsoft's own transfer terms and conditions;
- 3) Microsoft licensing does not come under the heading of proprietary software or licensing;
- 4) intellectual property does not include Microsoft software licensing;
- 5) Microsoft software licences can potentially be realised through every type of insolvency including MVLs;
- 6) valuable licence information can be obtained either directly from source or extracted externally, on a periodic basis, by your agent(s);
- 7) either clearly list the licence as an asset within the sales contract or omit it, so that the assets can be realised without any future complications which may arise with regards to confirming asset availability.

the company as a going concern. In either case, your clients can gain increased value from an asset that had not previously been recognised.

Even if the insolvency has been dissolved, the company can be restored; however, the merits of this will need to be decided upon on a case-by-case basis and will be reliant on the financial benefits outweighing the cost of doing so.

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#### Realising the value of software licensing

The value of software licensing can also be realised in voluntary liquidations. It was widely believed that it would not be possible to realise a Microsoft software licence for a liquidation that was still under shareholder control. However, despite only being accessible for solvent companies, the law still requires an IP to act as the liquidator in cases of MVLs. As the majority of solvent companies have not known about the residual value attached to their Microsoft licence agreements, MVL shareholders can be informed of this asset in exactly the same way that a creditor would. This was first proved with Ascend Communications Ltd, an MVL controlled by Tenon. Shareholders can sell an asset in much the same way as a creditor seeks to maximise its returns from assets within an insolvent company – neither party is concerned about the source as long as the asset is not required for future use, plus the sale is legal and does not infringe upon any corporate social responsibilities.

Remember that with no physical asset to deal with here, an agent(s) can electronically trace the licence agreement information remotely; otherwise, the licence details can be sourced directly from the company directors themselves once insolvency proceedings begin. Currently, a no win/no fee basis applies, with the agent(s) responsible for creating the indirect and/or direct sales channels that will enable your clients to realise the maximum value for this asset. □

