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A Cautionary Tale - EULA's Hidden Dangers

Chuck Bartel – Vice President for IT & CIO
Bob Goffeney – Director, Administrative Applications
Sheryl Reinhard – Director, IT Infrastructure
Computing & Technology Services
Duquesne University of the Holy Spirit
The Presenters

Chuck Bartel is the VP for IT and CIO and is responsible for the overall management and strategic planning for all University IT services and oversees CTS, which provides computing and technology services to the Duquesne University community.

Bob Goffeney provides leadership to the Administrative Applications group, responsible for development, maintenance and support of a comprehensive system and services portfolio, including the Banner ERP suite, CRM, housing support, data analytics and reporting, document management, the university portal and website, business process improvement and project management.

Sheryl Reinhard is responsible for the implementation and operation of all technology infrastructures, which includes data center, service monitoring, network, telecommunications, servers, storage, backup, recovery and related software management.
Fast Facts about Duquesne University

- Founded in 1878, celebrating our 140th birthday
- Private, Catholic, Doctoral, Coeducational
- The only Spiritan institution of higher education in the US
- Located in Pittsburgh, Pennsylvania
- Main Campus: 44 buildings, 49.5 Acres
- Nine Academic Schools
- 186 Academic Programs
- Total University Enrollment: 9,256
- FY17 Degrees Conferred: 2,805
- Living Alumni of Record: 95,367
- Athletics: 6 Men's and 11 Women’s Varsity Sports
- Carnegie Classification – High Research
- Operating Budget: $295 million
What is a EULA?

End User License Agreement (EULA) is a legal contract between a software application author or publisher and the user of that application. In the EULA, often referred to as the "software license", the user agrees to pay for the privilege of using the software, and promises the software author or publisher to comply with all restrictions stated in the EULA.

Commonly referred to as “click-through” agreements.
If they are “click through”

Q) Why should we care?

Q) Should you care about your institution being hit with a potential $1M in fines and compliance costs for a $4K piece of software?
How realistic is that scenario?

Let’s discuss a hypothetical situation . . .
Welcome to Whatsamatta University

• Founded in 1959
• Main Campus: Frostbite Falls, Minnesota
• Satellite Campuses:
  – Pottsylvania
  – Moosylvania
• Total University Enrollment: 9,256
  (plus Moose and Squirrel)
• Notable Alumni:
  – Mr. Peabody, inventor of the Wavelength Acceleration Bidirectional Asynchronous Controller (WABAC machine)
  – Rocket J. Squirrel, aviator
  – B. Badenov, entrepreneur
The case of “Whatsmatta U” (cont.)

- In 2005, “Whatsamatta U” purchased a new ERP system, and at the recommendation of the ERP vendor, separately licensed a COBOL compiler for the ERP at around $4K. This came with EULA version 4.0.

- WU has been paying annual maintenance on the COBOL compiler (around $1,600 per year).
The case of “Whatsmatta U” (cont.)

• In 2010, at the recommendation of the COBOL license company, “ACME”, WU upgraded to the new version of COBOL as part of the annual maintenance contract (and clicked through EULA v 5.1.04 as part of the install process)…

• Between 2010 and 2016 WU paid the $1,600 annual maintenance on COBOL v5.1.04 and on occasion sought maintenance support on the product.
The case of “Whatsmatta U” (cont.)

• In April 2016, during a maintenance support call, ACME questioned if the right licenses were in use for the ERP. WU provided the original purchase info from 2005, received the support needed with the understanding of compliance.

• The annual maintenance contract was renewed by ACME in June 2016 and June 2017 (again with the understanding of compliance).
The case of “Whatsmatta U” (cont.)

• In August 2017, WU received (what was thought to be) a routine COBOL license audit request.

• WU provided the requested documentation on server configs, user counts . . . WU provided add’l info as requested over a 12 week period.
On Dec 21st 2017 (the day that WU was closing for their Holiday break), ACME stated that WU was out of compliance, and provided the following offer for license compliance resolution . . .

“The required remedy is for WU to purchase the correct license type for Server for COBOL which is Sever License for CPUs for all three environments due to the automated scheduled activity that is being tested and run, as well as compensate ACME for the period of time that WU exceeded its license grant”
ACME provided two options based on the type of server environment:

- “One is the maximum value ACME could seek for resolution based on installation on physical servers ($913,395.00)”
- “The second is based on the size of your virtual environments ($331,044.00).”

The breakdown of the $331K:

- $132,144.00 in additional license purchases and upgrades
- $62,886.00 in back support (from 1/2015)
- $14,335.00 in go-forward support
- $121,678.00 in settlement fees

Note: the go-forward (annual) support increased from $1,600 to $14,335.00

Note: the 30 day resolution window started on 12/21/18!
The case of “Whatsmatta U” (cont.)

• WU can pay $913K, or $331K, now
• Annual support increases from $1,600 to $14,000
• For software that cost, originally, $4K
• And the clock is ticking . . .
The case of “Whatsmatta U” (cont.)
So, if you were the CIO of WU…
What did the CIO of Whatsamatta U do?

NEGOTIATE!
Negotiation Tips and Tricks

Before going into a negotiation:

• Know your position
  – What is your financial position?
  – What is your legal exposure?
  – Develop a negotiating team w/ a lead and defined team roles

• Understand the vendor’s position
  – What might (or have) they settled for?
  – What might drive them to a favorable settlement?
    • Financial Quarter timing?
    • “Bird in the hand...” approach? (Settle vs. Trial)
Negotiation Tips and Tricks (cont.)

Early in a negotiation:

• Recon if you can
  – Send an “emissary” to gain intel on how the process goes from the vendor perspective

• Play the “committee” card
  – “The final offer needs to be approved by…”
  – “I am only authorized to approve funding at …” or
  – “If we can agree to $X, I can approve that at my level and it won’t need to go to the CFO/President..”
Negotiation Tips and Tricks (cont.)

In the negotiation:

• Throw them off of their standard approach
  – They may have a standard “playbook”, try to make the first salvo (in a nice way).
    • One approach is to introduce them to the mission and values of your institution, the population you serve…
  – Try to negotiate favorable deadlines

• Try to get them to “write off” the back charges:
  – “We can only pay for charges in the current FY”
  – “We can’t re-open past fiscal years due to audit/state requirements.”
Negotiation Tips and Tricks (cont.)

During the negotiations:

• You will likely not complete this in one call/meeting
  – They may also play the committee card.
  – If you have (or created) a deadline, keep that in mind as you work the process.

• Ask to apply EDU/Academic/GOV… pricing

• Inform them budgets are closed and spent as of …

• If you are getting close to your number, offer to “split the difference” to close the deal. You may not get your number, but you may get close
How these tips may help

Add’l Licenses   $132,144.00
Back Support      $ 62,886.00
Go-Forward        $ 14,335.00
Settlement Fees   $121,678.00

$331,044.00
How these tips may help

Add’l Licenses $ 58,662 - Academic Pricing
Back Support $ 62,886 – Waived – current FY only
Go-Forward $ 12,348 - Academic Pricing
Settlement Fees $121,678 - Waived - current FY only

$71,010 vs. $331,044

WU also scaled back the use of the COBOL software to a subset of the virtual server environment to stay in compliance with the revised licenses and EULA

DISCLAIMER: YOUR MILEAGE MAY VARY!
Beware-Predatory Business Practices

The goal of the vendor is to monetize their assets!

- Some use software audits as sales opportunities
  - Increase license counts and/or annual maintenance
- Some vendors are embedding links to EULAs as part of the order form or invoice (if you send a check, you accepted the EULA)
- Some vendors are buying antiquated software packages (Novell, Borland…) and forcing upgrades or EULA updates to create new revenue streams via audits and EULA compliance…
The case of “Whatsmatta U” – Part II

Having “successfully” settled the COBOL licensing issue, the CIO asked WU Procurement to see if there were any other software packages from ACME in use at WU.

Lo and behold, there was a legacy network software package that was recently acquired by ACME, and used by the IT department.

Now the CIO’s stance shifted from reactive to proactive to avoid a replay of the compliance issues with ACME.
The case of “Whatsmatta U” – Part II

WU IT’s Approach:

• Reviewed the EULA of record to determine their current state of compliance.
• Discussed software renewal options with the vendor months ahead of the annual due date.
• Guided the renewal negotiation with an eye towards EULA compliance (retaining the current favorable EULA).
• Documented all correspondence and understandings…
“Whatsmatta U” – Part II (cont.)

- When there were delays in the negotiation (lack of vendor response with the clock ticking), used this technique to drive to a conclusion:
  - State your understanding of the matter
  - Provide a reasonable timeframe for response
  - Use the default of “opt-out” to the solution
  - “Unless I hear otherwise by you by the COB on X/X/XX, my understanding as stated above will be considered as our agreed upon solution to the matter.”
Lessons learned:

• Begin with the end in mind- exit strategy
• Determine and confirm the EULA of record
• Any upgrade can/will bring a new EULA
• Vendors shifts to bundled models - more product you may not need, at a higher cost.
• They will get to you eventually, big fish first, little fish next.
• Don’t assume license renewals are coming from the sales team.
  – Sales Managers can make deals, license renewal teams can’t make deals
How can you protect your institution?

1. Check (read the EULA) before you click through
2. Develop in-house expertise in reviewing EULAs and software licensing procurements. Avoid silos in the review of EULAs
3. Build EULA review into your institution’s procurement process.
4. Build software compliance into your software budget.
5. In the age of “consumerized IT”, raise awareness across your campus on the hidden dangers of clicking through EULAs.
6. Use resources like the Higher Education Information Security Council’s HECVAT (Higher Education Cloud Vendor Assessment Tool).

https://library.educause.edu/resources/2016/10/higher-education-cloud-vendor-assessment-tool
Conclusion

• Check before you click
• You can negotiate a favorable settlement (think win-win)
  – Know your position and theirs
  – Ask for the discounts & split the difference
  – Remember, it’s just business, not personal
• It is better to be proactive than reactive:
  – Develop in-house EULA expertise
  – Raise awareness on your campus
  – Build EULA review into your procurement process
Q&A
Please take a moment to evaluate this session

There are two ways to access the session and presenter evaluations

1. In the online agenda, click on the “Evaluate Session” link.

2. From the mobile app, click on the session you want from the schedule > then click the associated resources > and the evaluation will pop up in the list.
Resources

Higher Education Information Security Council (HEISC)’s

• HECVAT (Higher Education Cloud Vendor Assessment Tool)
  https://library.educause.edu/resources/2016/10/higher-education-cloud-vendor-assessment-tool

• Data Protection Contractual Language:
  https://spaces.at.internet2.edu/display/2014infosecurityguide/Data+Protection+Contractual+Language

• Vendor and Third Party Management:
  https://spaces.at.internet2.edu/display/2014infosecurityguide/Vendor+and+Third-Party+Management

Contact info:

Chuck Bartel – cio@duq.edu
Bob Goffeney – goffeneyr@duq.edu
Sheryl Reinhard – reinhard@duq.edu
Thank You!