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23 JUNE 2020

Know Your Software Licence Limits: Liability for Indirect Use

With software development rapidly advancing and interaction between different systems progressively enabled by novel application programming interfaces, the possibility of software being indirectly accessed and used by third parties has never been greater. The issue poses acute problems for software licensing agreements, where conventional methodologies for determining the licence fees payable for software usage often do not account for indirect access or use.

The question then is, can indirect access or use result in a breach of licence terms, rendering a licensee liable to pay potentially exorbitant additional fees? This was precisely the issue before the English High Court in *SAP UK Limited v Diageo Great Britain Limited*.¹

Material facts

In 2004, Diageo, a beer and spirits producer, entered into a Software Licence and Maintenance Agreement (**Agreement**) with software development firm SAP. Pursuant to this Agreement, certain “Named Users” within Diageo were licensed to use SAP’s *mySAP Business Suite*, which included the software known as *mySAP Enterprise Resource Planning (mySAP ERP)*. Diageo was also granted a licence to use the *SAP Process Integration* software (**SAP PI**), which enabled interaction between SAP and non-SAP applications.

The mySAP ERP software was used to manage, among others, Diageo’s manufacturing, stock and supply chain. Customers would contact Diageo’s sales team to place orders and the sales team would then access the database generated by the mySAP ERP software to obtain data on existing stock levels. Matters

progressed smoothly until around 2012, when Diageo procured the development of two new applications, “Gen2” and “Connect”, which were subsequently interfaced with the mySAP ERP system via the SAP PI software. Notably, using the Connect software, Diageo’s customers were now able to pay for and review their orders in the mySAP ERP system directly, without needing to liaise with Diageo’s sales team.

Arguments

Claiming additional licence and maintenance fees of over £50 million either under the Agreement or as damages for breach of licence, SAP contended that the Gen2 and Connect applications impermissibly enabled Diageo’s customers, who were not Named Users, to directly or indirectly use and/or access the mySAP ERP system. In defence, Diageo maintained that the interaction between the non-SAP systems and the mySAP ERP software via the SAP PI software did not constitute unauthorised use and/or access. This was because, among others, the licence to use the SAP PI software allegedly amounted to a kind of “gatekeeper” licence, providing for an alternative means of access to the mySAP ERP software.

Unauthorised indirect access or use

Ordering an account of the additional licence and maintenance fees due from Diageo, the judge ultimately ruled in favour of SAP and found that the plain and obvious meaning of Clause 1.1 of the Agreement was such that only Named Users were authorised to directly or indirectly use and/or access the mySAP ERP software. Further, although the terms “access” and “use” were not defined in the Agreement, these were construed by the judge to mean “*acquiring visibility of, or in connection to, mySAP ERP software*”, and the “*application or manipulation of the mySAP ERP software*”, respectively. Both “access” to and “use” of the mySAP ERP software had thus been impermissibly carried out by the Gen2 and Connect applications. Diageo’s “gatekeeper” argument was also rejected owing to the presence of another term in the Agreement expressly providing that use of the SAP PI software was not included as part of the standard *mySAP Business Suite* licence. This term thus made it clear that the licence to use the SAP PI software was merely an addition, rather than an alternative, to being authorised to use the *mySAP Business Suite* as a Named User.

Comments

SAP v Diageo sets a precedent for licensors to impose fees for indirect access to software via third party systems. Of significance, however, is that the Agreement in this case did not define what constituted “use” of or “access” to software, with the result that it

fell to the court to construe these terms. Had such terms been defined in the Agreement from the outset, it is arguable that a dispute would not have arisen in the first place, as Diageo would doubtlessly have appreciated the precise limits of its software licence. Overall, it is therefore vital that any party seeking to enter into a software licensing agreement carefully reviews its terms and forms a clear understanding of the scope of the proposed licence. Care should also be taken to ensure that all essential terms are expressly defined and that the fees chargeable for usage of software are exhaustively prescribed.

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Published by the Technology, Media & Telecommunications Practice

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