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Who Owns Your Data?

Did you notice that Facebook modified their Terms of Service (TOS) earlier this year? The new TOS “grants Facebook an irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide license (with the right to sublicense) to (a) use, copy, publish, stream, store, retain... any User Content you Post... and (b) to use your name, likeness and image for any purpose, including commercial or advertising.”

Facebook in essence now “shares ownership” of the content of the data you upload to their service. Your pictures could appear in an advertisement or your company tagline may be sublicensed to your competitor. Other online services (YouTube, Google) have similar terms. If you felt safe because the previous terms you agreed to did not have this provision, think again.

“We reserve the right, at our sole discretion, to change or delete portions of these Terms at any time without further notice. Your continued use of the Facebook Service after any such changes constitutes your acceptance of the new Terms.”

Welcome to the age of online services. This brave new world offers convenience, connectivity, reduced complexity, lower capital cost, and other advantages, but also introduces a number of new concerns. What are the terms of your web hosting or property management software vendor as they relate to your company’s data? Let’s look at some of the key items:

- **Accessibility:** who are authorized users of your data?
- **Availability and Security:** access is given to authorized users when needed and unauthorized users are denied access.
- **Maintenance:** methods and timing for retaining and destroying your data.
- **Usage:** various ways your data can be used.

ON-PREMISE LICENSED SOFTWARE APPLICATION

Most business applications are designed to gather data (input), store it in a database, and provide information (output) through reports, graphs, and other manipulations of the data. With the traditional on-premise

approach, you purchase a perpetual license for a software application that you load onto your server or workstation.

The environment is under your control including physical access, selection of hardware and software, security methods, operating procedures, etc. This control provides more flexibility and greater responsibility. You are the clear owner of the data and also responsible for the backup, restoration, and the other technical aspects of data maintenance.

When you expand outside of your company boundaries, the attributes of data ownership get more complex. For example, providing outside availability to your agents in the field via the Internet raises security and usage issues. Although you may contract with outside resources to assist with these issues, they are under your control.

Should your software vendor fail, you will lose technical assistance and new feature development, but you retain access to the software and your data. Unfortunately, if you decide to switch to a different software application you will have a data conversion challenge. Although you have access to your data, it is unlikely that it will be extractable in a format that is the same as the new application.

OFF-PREMISE SAAS MODEL

An alternate software deployment approach is for an application service provider (ASP) to license the software application as an ongoing service on demand. Let’s examine the software as a service (SaaS) model in which the ASP hosts the application on their servers. You operate the application through a web browser via the Internet.

With the SaaS model the application control and responsibility flip to the ASP. You need to examine a number of documents to identify these controls and warranties:

- **End User License Agreement (EULA):** defines the terms of use of the software application.
- **Service Level Agreement (SLA):** specifies availability, performance, and other attributes of the



hosting of the application.

- ASP Contract: specifies service costs, billing, termination, etc.

Access to your data is now under the complete control of the ASP. The ASP contract will specify who in your organization will have access to the application. If the ASP deems that you have violated the terms of the contract they typically have the right to terminate your service. You can find yourself in this same situation if the ASP goes out of business. Either way, you lose access to the software application that interprets your data.

The ASP contract should also address data maintenance issues. Often there will be a number of options available to supplement the standard service offerings. Availability and security is addressed in the SLA with usage covered in the EULA. Use this as a general guideline as to where to find this information since each vendor will be different. Be sure to get answers to questions like:

- Do you have the right to obtain your data from the ASP if the service is not available for a specified period?
- What alternatives do you have to get your data in a timely manner?
- Is it required that the ASP provide advance notice of a lapse in service? How is this communicated?

WHO OWNS YOUR WEBSITE

As your business becomes more dependent on your website for prospecting and servicing your customers, its continued operation is also of concern. Ownership and other protection rules are determined by intellectual property (IP) laws. Website content, such as text and graphics, is usually protected by copyright. Copyright law prohibits others from reproducing, modifying, distributing, or selling the protected work unless permission is granted through a license or assignment. This means that your web developer will own your website unless you take steps to the contrary.

According to the United States Copyright Act of 1976, "Works Made for Hire: (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commis-

sioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."

The first part gives you ownership if the developer is an employee although a separate written assignment as part of your employment agreement is best. The second part enumerates three conditions:

1. the work is specially ordered or commissioned,
2. the work qualifies as one of the nine statutory categories, and
3. a signed written agreement specifies that the work was made for hire.

The best approach is to enter into a written agreement in advance of hiring the developer to make a "contribution to a collective work." If you missed this opportunity, the next best option is to ask the developer to assign the copyright they own to you. Many independent web developers may be unwilling to sign such an agreement. Their business may depend on reusing components of your website for other clients. They should be willing to give you a license for your site. Some items to address in this license are:

- Unlimited use of the web site for any purpose.
- Allow third party modifications.
- Ability to host your website on any web server.

CLOSING COMMENTS

It is important that you take steps to ensure that your organization has access to the tools needed to stay in business. The best approach is to contract with reputable vendors that have a proven track record. Review the agreements with an eye to the suggestions in this article. The good suppliers will already have these protections in place. Be wary if you sense any pushback or are told to "just trust me" as you perform your due diligence. Trust is to be demonstrated and earned. 🏠

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