

Technology Escrow: a Business Continuity Tool

Rebecca Wetzel

If the health of your business depends upon third-party technology that is deeply embedded into your business, then technology escrow services should be included in your business continuity planning toolkit. To understand why, picture this. A vendor that develops software around which you have woven your core business declares bankruptcy and lays off its entire development team. Soon after that you experience a “show-stopping” software bug--but no technical staff remains at the company to help you, and you cannot correct the problem yourself because you do not have access to the source code. If you also lack the money, the means, and the time needed to migrate to another vendor’s product, this chain of events could cripple your business.

A technology escrow service can enable you to keep your business running smoothly in such a situation. The service provides a legal arrangement by which a developer deposits into a third-party escrow account everything needed to use, maintain, and/or customize the product. Deposited materials can include source code, auxiliary files, libraries, databases, notes, drawings, notebooks, and/or a host of other items. These materials, which represent a developer’s proprietary “crown jewels,” are usually updated regularly within the escrow account, and released only if the developer breaches the promise to maintain and/or update the product due to circumstances such as bankruptcy.

Most people think that technology escrow applies only to software products, but it can apply to any technology related to intellectual property. Take, for example, the case of ION Sensor Nederland b.v. based in Voorschoten, whose products gather seismic data for oil and gas exploration. Faced with a make-versus-buy decision, the company recently decided to outsource hardware development and manufacturing. The hardware is strategically important to the company’s business, and with even large, established companies like General Motors filing for bankruptcy these days, ION Sensor wanted to protect its business interests should the supplier no longer meet its needs.

According to Kees Faber, ION Sensor’s technical service manager: “We had to be able to manufacture the device ourselves if all hell froze over. To move to another supplier would take time and could cost us market share, so we decided we needed escrow services. At first I thought this was only for software, but my legal department pointed me to Iron Mountain who could do this for hardware too. It cost less than I anticipated, and it was relatively easy to get the information from the supplier. A DVD with all the information we needed was sent to an Iron Mountain vault in England. The information will only be ours in an emergency if [our supplier] fall(s) over. I don’t want to find out how valuable this [service] is, but if it happens we are in a better position than if we had not done it.”

Escrow services are routinely bought at the request of software licensees’ purchasing departments who wish to protect their companies’ business interests. In some cases, however, software vendors proactively offer to deposit their source code into escrow

accounts to overcome customers' concerns about the vendor's viability. Vendors are increasingly comfortable with the concept of escrow because it protects their intellectual property from falling into the hands of competitors, yet makes it available for customers' use if a vendor cannot fulfill its contractual obligations.

With the recession top of mind these days, many customers are buying technology escrow services to ensure business continuity, should the economic grim reaper snuff out suppliers of their business-critical software. According to Bodo Mross, managing director of escrow service provider HanseEscrow Management GmbH in Hamburg, "Most of our customers are afraid of the insolvency of their software vendor, but in reality it is more common that we hand source code to the licensee because vendors take products from the market or don't fulfill their maintenance obligations."

Technology escrow services are becoming main stream. Throughout the Netherlands and the rest of Europe, enterprises are becoming increasingly knowledgeable about technology escrow, and more and more are buying escrow services. HanseEscrow's Bodo Mross, estimates that some 10 to 15 percent of EU companies whose businesses rely on third-party mission-critical software buy technology escrow services today, and he predicts that number will rise to 30 percent within 10 years.

As customers become more savvy and suppliers become more financially pinched, customers' bargaining power in terms of what they can require in technology escrow contracts is increasing. Tim Sewart of Beachcroft LLP, legal counsel to UK-based software escrow service provider Intellect Enterprises, notes that, "An IT company is more likely to go out of business today than it was a couple of years ago. This weakens suppliers' bargaining power. In 1992, if software escrow services were mentioned, the supplier would have said 'forget it.' Now there is more competition, and customers can ask for much more."

But technology escrow services are not for everyone, and Tim Sewart advises software customers to evaluate their needs carefully before buying. "Ask yourself whether it is appropriate in your circumstances. Look at the software you are licensing, and look at your alternatives in case your supplier goes out of business. Do those alternatives give you a more practical remedy than bringing software maintenance in house? Your answer to that question will determine whether or not it makes sense."

A number of European technology escrow providers have expanded their offerings beyond merely providing escrow accounts. UK-based NCC, the largest technology escrow provider in Europe, for example, offers extensive testing and validation services. According to NCC's marketing manager Sangeeta Sastry, "We use the source code and the documentation [in the escrow account] to build the application and see if there is enough information so that should there be a release it will be valuable to the customer. We even go to the developer's site if needed. We provide a 100 to 150 page report to document how to build the application. [This ensures that] the customer can build and maintain the source code. Even the developer will have the report to build the software correctly on their site."

The technology escrow services offered by other escrow service providers such as Deposix Software Escrow GmbH headquartered in Munich also include proactive components. According to CEO Stephan Peters: “We do an initial verification [of the materials deposited]. We accept up to four updates per year, and each time we do verification. We check whether data is readable on the carrier. Can it be decompressed and decrypted. Is it virus free? We make sure there are no Micky Mouse videos on it and that sort of thing. This is included in our annual fee. Then we provide a technical verification. We test the software, making a compiled bill run, and we make sure that particular functions are included based on specifications handed to us by customers. For example, we will make sure that it is version 3.1 rather than version 3.0.”

Iron Mountain, the technology escrow market share leader in the US, has expanded its escrow services into Europe. Iron Mountain’s primary business is physical and online data protection and recovery, which dovetails well with its technology escrow service offering by providing very secure storage for escrow account materials.

Given that there is considerable variation in the range of services that technology escrow service companies offer, it is prudent to do your homework when choosing a provider. This will help you find the right fit for your needs. Figure 1 provides a list of some of the companies providing technology escrow services in Europe.

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Figure 1 – Escrow Service Providers in Europe

Company Name	European Headquarters	URL	Storage Location for Dutch Customers
APP (L'Agence pour la Protection des Programmes)	Paris	http://app.legalis.net/	France
Deposix Software Escrow GmbH	Munich	http://www.deposix.de/	Germany
HanseEscrow Management GmbH	Hamburg	http://www.hanse-escrow.de/	Germany
Intellect Enterprises Ltd.	London	http://www.intellectenterprises.co.uk/	UK
Iron Mountain	London	http://www.ironmountain.nl/ipm/escrow/	UK
Logitas	Paris	http://www.logitas.com/	France
Merak n.v.	Mechelen	http://www.merak.nl/	Netherlands
NCC Group, Inc. (doing business in the Netherlands through the subsidiary Escrow Europe)	Manchester	http://www.escroweurope.com/nl/home.aspx	Netherlands
Softcrow B.V.	Amsterdam	http://escrow.softcrow.com/	Netherlands

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