by Lori Henry Thompson, CSAM

Face the Changes

How to Protect Your IT Investments Through Mergers and Acquisitions

The phone rings and it is your favorite sales rep from the software publisher that provides a key product for your IT environment. The call is to tell you that his company was just acquired by a competitor. Your heart sinks a little bit because you have just completed a year-long implementation of its flagship product, which also devoured a significant chunk of your IT budget for the year. Even though he assures you that everything will be business as usual, you can't help but feel some uncertainty about how the product will be supported, and even whether or not the acquiring company will continue to develop or support the product line.

Failure to protect your company against these risks could result in losing your investment in the software product or placing the organization in an immediate non-compliance position.

Over the last five to 10 years, mergers and acquisitions of software publishers totaled in excess of $100 billion. In addition, the number of software reseller mergers and acquisitions totaled more than $350 million. Software resellers represent the sector of business known as "distributed" software, which is where the type of software acquired is generally for the desktop or is associated with applications used on some server systems. Publishers use software resellers to distribute their products to end-user companies.

My industry experience centers on the distributed software market serviced by publishers and their reseller partners. I have provided consulting assistance to help clients sort out licensing and contract issues when software publishers merge or are acquired. Also, I have personally experienced acquisitions in the reseller industry, both with my own company and client companies, in an effort to decrease the affects of software reseller mergers. Both types bring their own set of challenges to the IT asset professional.

Technology mergers and acquisition increase annually. Listed below are a few examples of the $100 billion spent on software publisher mergers or acquisitions in the last few years:

- Microsoft acquired Visio (2000)
- Business Objects acquired Crystal Reports (2005)
- Adobe acquired Macromedia (2005)
- Symantec acquired Veritas and Brightmail (2004), and PowerQuest, OnTechnology and others (2003)
- IBM acquired Rational Software (2002)

Companies have to be quick to adjust to changes in licensing and support when a software product, software or reseller company is acquired. You need to know what will happen to your software licenses and contracts when software companies merge. You need to know how to protect your company and your license rights. If you rely on a software reseller to maintain your purchase data, you will need to know what happens to that data when software providers merge. Finally, you need to know that your software license purchases have been reported to the software provider accurately. Failure to protect your company against these risks could result in losing your investment in the software product or placing the organization in an immediate non-compliance position.

SOFTWARE ASSET MANAGEMENT

Preparation for managing mergers within the software industry must be a consideration when developing a software asset management (SAM) plan. If you have the key components of a SAM plan, you probably are well equipped to manage each type of acquisition. With or without a SAM plan, there are several key suggestions for making the transition easier when a merger occurs.

One of the major consequences an end user company will suffer when a software product is acquired is that the acquiring company may change the pricing, how the product is distributed or the end user license agreement (EULA) that governs how the software can be used. Those consequences should be addressed within your SAM strategy through well negotiated and managed license contracts, complemented by industry accepted compliance tools. Here are some key points you may want to consider when creating or updating your SAM strategy:

- **Obtaining product support and maintenance after the acquisition.**
- **Confusion over how to purchase new licenses.** For example, my company has clients with IBM ELA and Passport Agreements, purchasing licenses through a reseller and direct purchase agreements with Rational Software. When IBM acquired Rational, it took more than six months for them to integrate Rational's product line into IBM's price lists and distribution channel. Until the product lines were integrated, special arrangements were required in order for our clients to purchase Rational licenses through their reseller.

Developing a sound SAM plan along with its consistent execution will place your company in a strong position to weather mergers and acquisitions.

- **Blending your existing license agreement with the license agreement of the acquiring company.** For example, Microsoft's purchase of Visio occurred during a time period when a number of customers were renegotiating their Microsoft licensing agreement. In a very short period of time, it was imperative that Visio user companies get an accurate count of all their licenses, upgrades and maintenance in order to incorporate those licenses into a new Microsoft agreement. Company resources were strained in an attempt to meet the short turnaround and unexpected license accounting requirement. In addition, it was important to understand the upgrade and maintenance rights for each product.
- **Discount levels may be affected by the acquisition.** Using the IBM and Rational example, even though the Rational products are now included in the Passport license pricing, the discount levels are different.

MINIMIZE THE RISKS

You should prepare for and manage the risks associated with a software acquisition in order to ensure that your investments in the technology will be sustained. Once you have decided to purchase the product, your best defense in the event of an acquisition is to negotiate clauses into your agreements. Gartner Research lists several clauses that you should include in a license agreement:

- Establish that the terms of your contract survive any acquisition or merger of your software vendor
- Contractually freeze license prices for at least a year after the merger or acquisition
- Guarantee product support for a specified period of time
- Lock in maintenance pricing and price caps
- Gain rights to source code in escrow
- Any changes to license agreement terms and conditions can only be done via an addendum
- Include a clause that requires that product functionality be maintained if the acquiring company changes the product functionality

Having the appropriate contractual clauses within your licensing agreement is important, but there are steps that you can take now to protect your investments once you become aware of an acquisition. The best defense against the consequences of software industry mergers and acquisition activity is a strong offense. Developing a sound SAM plan along with its consistent execution will place your company in a strong position to weather mergers and acquisitions. The steps below will help bolster your SAM readiness:

- Know your total license counts
- Have all purchase documentation for those licenses.
- Review your licensing agreements for language that discusses an acquisition
- Understand your EULA for each product
- Understand the upgrade rights and maintenance rights for each product
- Contact your publisher representative for more information
- Use your reseller of your distributed product for information and analysis
- Discuss ramifications of major changes in your environment if the product is discontinued
- Research acquiring companies license agreements
- Determine if renegotiating the license agreement would be beneficial. In the Visio example above, the addition of Visio license purchases under a Microsoft Select Agreement did allow some clients a higher discount level

SOFTWARE RESELLERS

Reacting to mergers of software publishers is something that companies will have to deal with as the industry consolidates. Another important consideration is what to do when your software reseller (instead of the publisher) is acquired or merged. In this situation, there can be ramifications that can affect your compliance for a particular software product. Below are a few examples of the more than $350 million spent on this type of merger or acquisition in the last few years:

- CompuCom acquired Entex (1999) and MicroAge (2000)
- Level 3 Communications acquired and merged Software Spectrum and Corporate Software (2002)
- Platinum Equity acquired CompuCom and merges with GE ITS (2004)

While consolidation within this sector is not as active as the software publisher sector, you should be prepared if one is announced. Many companies depend on their software reseller to store their software purchase history and provide EULA information and other license information documents. This can be very convenient, provided you only purchase from one reseller and provided that reseller stays in business. Mergers within this business sector may cause havoc with purchase history, license purchase confirmations and with what licenses a software publisher's records show you own.

If you have decided to choose a sole or primary software reseller for your distributed software, you should establish a contractual agreement with them to protect your licensing and compliance integrity. The clauses suggested by Gartner above also apply to software reseller contracts. Safeguarding and maintaining your purchase data is very important for overall software compliance. Strategies for managing an acquisition or merger of your software reseller include:

- Keep impeccable records of your purchases from publishers and through resellers. You must make sure that all your licenses purchases are accounted for by reconciling on a regular basis. This is especially important if you are purchasing from a number of resellers. I consulted with a client that was going through a compliance audit and had purchased through two main resellers, but end users were allowed to also purchase through multiple avenues using a corporate credit card. Our ability to reconcile license installs with purchases was compromised and there were many additional hours spent retrieving purchase data from individuals.
- Reconcile your purchase records and your software reseller's purchase records with the publisher's records of your purchases. Do this on a quarterly basis. Analyze any variance. There may be timing issues, but be concerned if a large variance cannot be explained. You want to ensure that your purchases are accounted for with the software publisher in a timely manner in case of an acquisition.
- Understand any timing differences from when you place an order to when the publisher acknowledges the purchase. A very important decision when choosing a software reseller should be how they report your purchases to the software publisher. In some cases, software resellers report purchases on the same day to some software publishers, including Microsoft. But license agreement reporting requirements for other vendors may be 30 to 90 days. This may affect your compliance status in the event the reseller is acquired before reporting your purchases.

Acquisitions and mergers within software publishers will continue as the industry consolidates. Therefore, it is critical for asset managers to be aware of the changes going on and take the necessary steps to plan for those changes. You should include clauses in your licensing agreements that protect your investment in case of an acquisition. You should also select a software reseller that is not only financially stable and has excellent data warehouse capabilities, but also has a well-established reputation with software publishers. Finally, early preparation will make any acquisition or merger easier to manage, saving you from the burdens of unplanned cost, time and worry.

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