Oracle licensing for development and test
A trap for application developers?


The Oracle Technology Network

Most developers will be aware of the concessions available by the major software vendors for usage of programs for development purposes. Oracle operates this through its Oracle Technology Network (OTN).

Customers may of course utilise full use licenses in a development environment – indeed the standard Oracle license simply refers to its software being available for use ‘for Your internal business operations’ without distinguishing between environments.

Additionally trial programs may be downloaded for ‘trial, non-production purposes’ but these are for evaluation only and the limited license ends after 30 days.

The OTN license is therefore very valuable and covers almost all of Oracle’s technology, eBusiness suite, PeopleSoft, JD Edwards programs as well as related developer tools. Downloads are available in the normal way from the Oracle Software Delivery Cloud. But there is a concern – the possibly alarming controls that Oracle seek over any application that might be developed.

OTN license limitations

Acceptance of the OTN license is necessary and it’s important to know the limitations:

- The license is described as a ‘Technology Network License’ but it does cover Oracle applications as well as its database technology;
- The right to use is for the internal use of the Programs but only for the purpose of developing, testing, prototyping, and demonstrating the application;
- This is reinforced by a limitation of ‘only as long as Your application has not been used for any data processing, business, commercial, or production purposes, and not for any other purpose’;
- Your contractor(s) can also use the Programs, provided they are acting on your behalf to exercise license rights and also that you are responsible for their compliance in such use;
- A written agreement is expected between you and any contractor acknowledging the restrictions on use;
Key restrictions:

1) No making available to third parties apart from your contractors;
2) No removal or modification of Oracle’s markings eg copyright and trademark notices;
3) No use of the programs to provide third party training;
4) Non-assignable;
5) No reverse engineering (unless required by law for interoperability), disassembly or decompilation of the Programs;
6) No disclosure of benchmark tests to others unless Oracle agrees.

Until recently the OTN license was effectively restricted to one developer/one server and no use could be made, even for your internal purposes, on a shared development platform. That restriction was however lifted in September 2014.

Could Oracle be seeking to extend control over your application?

However, as ever with Oracle, there is some unexpected wording which is all too easy to overlook. One of the conditions is that ‘If You want to use the Programs or Your application for any purpose other than as expressly permitted under this Agreement, You must obtain from Oracle or an Oracle reseller a valid Programs license under a separate agreement permitting such use.’

At first glance, that looks uncontroversial: if you go beyond the OTN license you need to obtain a full-use license. But note that the restriction on use is not just over the Programs but also of your application (‘If You want to use the Programs or Your application for any purpose...’). It reads that the payback in entering into an OTN license is a restriction on subsequent use of your application eg commercialisation - even if it contains no Oracle code, is not an adaptation of any Oracle product and does not compete with any Oracle application but is simply an independent product which may interface with Oracle software.

‘...the payback in entering into an OTN license is a restriction on subsequent use of your application eg commercialisation - even if it contains no Oracle code....’

The provision would have been satisfactory if referring only to continued use of Oracle programs; why has Oracle chosen to insert the additional words ‘or Your application’?

It might be thought that the additional control on later use of your application was simply a typographical error. But this wording in the 2014 OTN license is new drafting and developed from earlier wording which declared, more explicitly, that, for instance, any commercial use of the application required ‘an appropriate license’ from Oracle.

The Oracle position is quite different from, for instance, Microsoft and Adobe where their respective Visual Studio/MSDN and SDK licenses only seek to control usage of their own proprietary code rather than any programs independently developed to function with their products

The OTN license is subject to Californian state law but the impact of the attempted control(s)
by Oracle will have effect for European licenses within Europe: European Law will therefore apply irrespective of the choice of law provision in the license.

In Cerno’s view, such a restriction is of serious concern. Is it intentional or is (yet again) an example of Oracle’s inept legal drafting? Certainly, if Oracle ever sought to restrict usage of any such newly-developed application- as opposed to its own code - it would almost certainly fall foul of European and US competition / anti-trust laws most notably as abusive conduct contrary to Article 102 of the Treaty of the Functioning of the European Union. This prohibits the imposition of unfair trading conditions, and/or the imposition of obligations on other parties in contracts which are unrelated to their subject matter, by their nature or according to commercial usage.

The test environment

**Oracle’s 2015 ‘Database Licensing’ guide conflicts with its own OTN license.**

The OTN license makes clear that test as well as development is permitted. However, Oracle’s own guidance in the form of its ‘Database Licensing’ document (Version: 16 December 2015) appears to contradict this position.

The license says that use is permitted for ‘for the purpose of developing, testing, prototyping, and demonstrating Your application’. But the Oracle document declares the opposite:

**Test Environment:** All programs used in a test environment must be licensed under an OMA, OLSA, or other appropriate Oracle (or Oracle authorized reseller) license agreement.

Oracle’s 2015 ‘Database Licensing’ guide conflicts with its own OTN license. So which is correct? The documents are governed by the laws of the State of California but, in our view, it is the license agreement wording that prevails. The reason for this is that the OTN license declares explicitly that it is the ‘complete agreement’ superceding all other documents. And moreover, the Oracle ‘Database Licensing’ guide declares, in its footer, that it is ‘for educational purposes only’ and that ‘it may not be incorporated into any contract’. Yet more ambiguity on the part of Oracle.

**Conclusion**

‘...because of the jeopardy of competition law claims, Oracle would be well-advised to retreat from its current wording in the OTN license....’

The Oracle Technology Network is of immense help to developers of programs which are intended to work alongside Oracle technology or applications. The license rights granted by Oracle have freed up over the last three years beyond a one developer / one server model to any development.
The test or staging environments are still puzzling: the latest Oracle guidance from December 2015 declares that these must be independently licensed but the OTN license, by contrast, does allow testing without a full-use license. Cerno’s view is that the license prevails and that users may rely on its explicit wording.

There is one major concern: the incorporation of a contractual demand that any use or commercialisation of your newly-developed application requires a full-use Oracle license – even if no Oracle code is incorporated and the developer is not putting any related Oracle programs to production use.

Such an imposition, if enforced, is almost certainly a breach of EU and UK competition laws. It extends Oracle’s reach beyond legitimate controls over its proprietary software to software developed independently by its licensees. It is not known whether this is an anodyne typographical error or something more determinedly controlling by Oracle. Either way, because of the jeopardy of competition law claims, Oracle would be well-advised to retreat from its current wording in the OTN license and look only to seek to protect its own software rather than to be expecting licenses for applications created by others which contain no Oracle code.

© Cerno Professional Services 2017

All rights reserved. This publication may not be reproduced, adapted, translated or distributed without the prior written consent of Cerno. Where this analysis refers to or offers any legal interpretation, this is opinion only and has not been tested or confirmed in any court of law: readers must rely on their own legal advice to check and corroborate any conclusions or assertions made. Cerno disclaims all warranties as to the accuracy, completeness or currency of the information referred to in this analysis and has no liability for errors, omissions or differing interpretations. This analysis represents opinion only on the part of Cerno and others may have differing views.

Cerno Professional Services Limited © 2017