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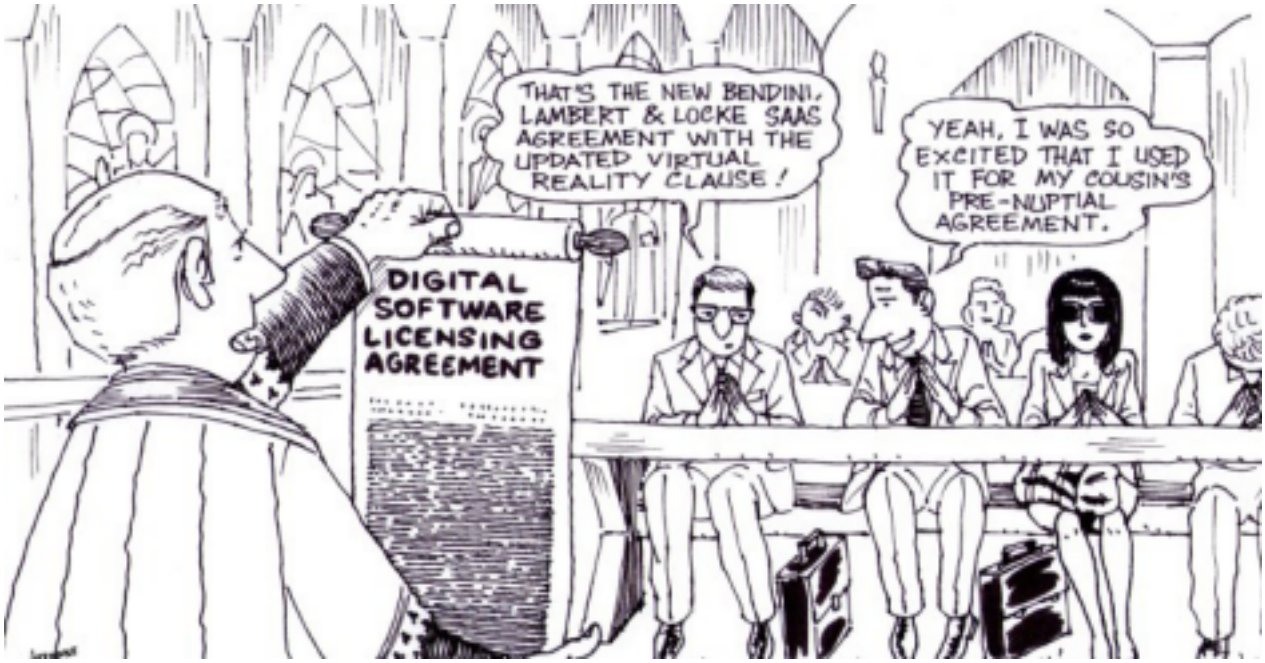
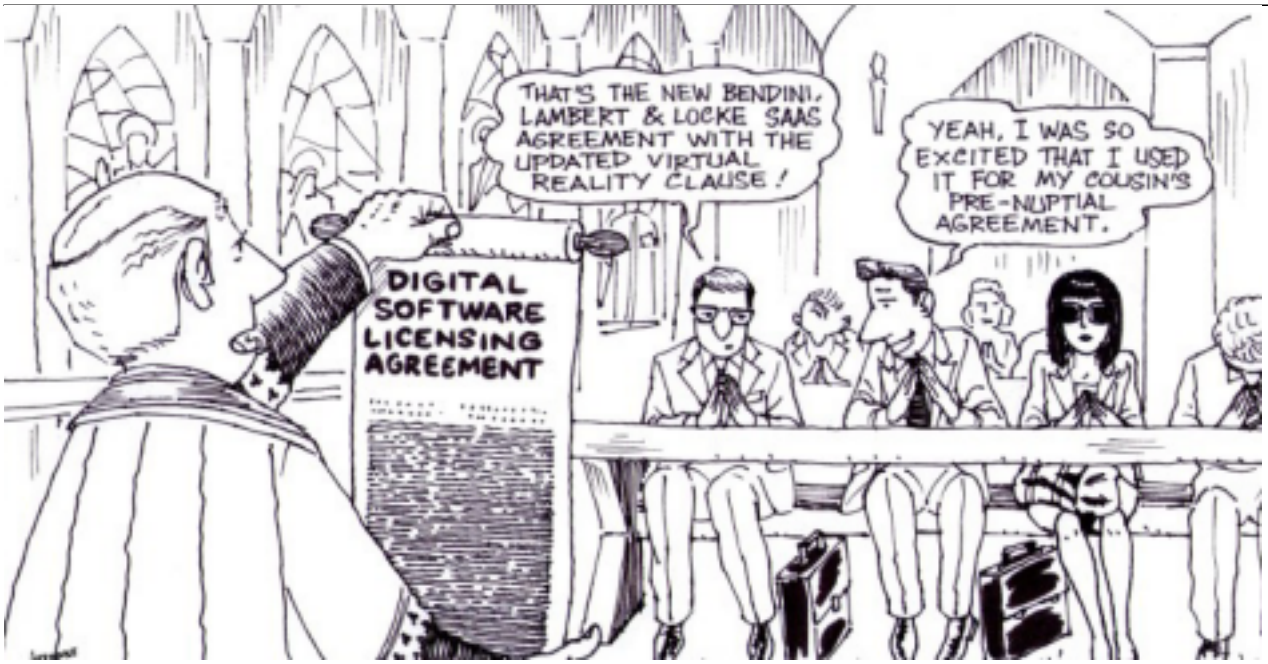
Template for Disaster

Commercial and Contracts





“Who knows what evil lurks in the hearts of agreements?” Not you, if you have an over-reliance on templates.

As a former litigator, I have witnessed numerous scenarios where a slavish devotion to template agreements paved the road to disaster. Organizations felt that the template agreement was sacrosanct and dared not contemplate how new facts and situations might require its alteration.

Obeisance to and reliance upon a “template” is not surprising, given the history of the term. The etymology of “template” traces back to the Latin word “templum,” which means not only “plank or rafter,” but also means a “temple, shrine, sacred, or consecrated place.”

Many cultures have adapted historic religious concepts to today’s mores and practices. For example, in most locales, it is no longer de rigeur to stone people to death for working on the Sabbath. (Indeed, there would be much stoning of lawyers if such a rule were still in place.) Similarly, one cannot rely solely on historic templates as the times change.

When translated into Swedish, one word for “template” is “mönster.” Remove the diacritical marks above the “ö” and you have the perfect English-language descriptor of templates run amuck.

As a former federal trial attorney and financial services regulator, I often encountered situations where companies violated their own agreements with customers. Why? Because they did not know what was in those agreements.

Maybe once upon a time, they read a template customer agreement but never noted when the template changed — or how each version of their template impacted their practices with respect to future customers. Only after class action or regulatory enforcement did they realize that not all customer agreements were the same.

Using templates lulled them into a false complacency around knowing the content of their customer agreements. In reality, their templates evolved over time, and they should have been reading and implementing each agreement independently.

In the business-to-business context, an over-reliance on templates can lead to even bigger disasters. Businesses are more likely to have attorneys representing them, and business deals are often a higher dollar amount, which means the salespeople pushing the deals are more willing to negotiate in order to get the deal done.

The result is a contract that might look a lot like the standard template agreement yet contains multiple significant deviations from the template that are overlooked during contract implementation … until it's too late.

For example, a major commercial property manager thought its standard lease template was in place with a tenant. The property manager failed to note that the notice requirements had been renegotiated, and, as a result, missed the opportunity to exercise an option to re-assess and potentially raise the rent.

Many large organizations have grown through acquisition. As a result, even if they deploy their own templated agreements going forward, their day-to-day work relies on implementing agreements created by their predecessors and acquisitions. Even if all these inherited prior agreements could be changed, the next acquisition just brings in more types of templates.

Large companies may have hundreds of different agreement templates, meaning they need to start reading each agreement, rather than assuming that all agreements of a certain type are the same. The failure to treat each agreement individually can lead to dangerous assumptions.

For example, some inherited templates might not request that the customer opt-in to receive calls via an auto dialer. The company may face substantial Telephone Consumer Protection Act liability when contacting customers subject to these inherited agreements.

Without careful attention to the contents of each agreement, the use of templates can breed a pernicious complacency throughout the organization. Employees assume that agreements need not be read because they are inviolable and blessed from above.

When a new situation arises where the standard template doesn't fit, the employee chooses to use the template regardless, because doing so creates the least internal organizational friction. The end result is an agreement that doesn't fit the transaction and cannot be smoothly implemented.

Surely templates can serve a certain purpose: We cannot afford to write each business agreement from scratch. However, we need to remember that speed in drafting is not the sole benchmark for a successful agreement or successful relationship.

The most successful business relationships are those where both sides receive the benefit of their bargain. This means they need a contract that actually reflects their bargain. And, more importantly, the real relationship work begins after the contract is signed.

Because templates change over time and key terms may be custom-negotiated, implementation of the contract must be based on reading its actual terms, rather than assuming it follows the same format and terms of a mythical template from the past.

As an in-house counsel, you should not assume that the use of a template for a certain type of agreement means that you know the terms of all of your relationships. Start sampling your historic agreements to see how they have changed over time.

If your organization has had acquisitions, sample the agreements of acquired entities as well. And start talking with your business colleagues about how often they need to change agreement terms to conclude a negotiation.

Most importantly, even if you think it’s just a standard template that you know by heart, read the key terms of each agreement anyway, because that is what the court and your counterparty will rely upon.

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Neil Peretz has served as general counsel of multiple companies, particularly in the financial services and technology industries, as well as a corporate CEO, CFO, and COO.

Outside of the corporate sphere, he co-founded the Office of Enforcement of the Consumer Financial Protection Bureau and practiced law with the US Department of Justice and the Securities and Exchange Commission. Peretz holds a JD from the University of California, Los Angeles (UCLA) School of Law, an LLM (master of laws) from Katholieke Universiteit Leuven (where he was a Fulbright Scholar), bachelor's and master's degrees from Tufts University, and has been ABD at the George Mason University School of Public Policy.

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