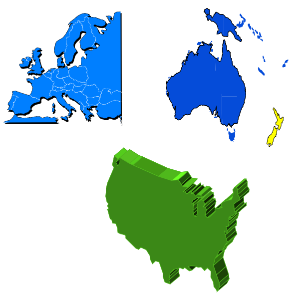
Friday, July 25th, 2011
Vol. 27, No. 07

Soft•letter

BUSINESS INSIGHTS FOR SOFTWARE DEVELOPERS & PUBLISHERS



Our excerpts from Flexera Software's software downloads report provides insights into global software sales and the impact of the recession on the industry..
See pages 4-5, 12.

Your Time is Up! What Do You Really Want? Getting to the Ask in the Sales Cycle

by John Baker, The Asking Formula and former American Express COO

Over the years, Softletter has published several articles on the various schools of diagnostic selling methodologies such as "Diagnostic Selling," "Solution Selling," "Concentric Selling," et al. Most of these systems are effective given the right circumstances and training, but when we read this article, we realized how few of them concentrate on the most important aspect of the sale, asking for what you want, and doing it effectively. And since the author has been both the salesman and the client being sold to in high stakes sales efforts, his perspectives are particularly valuable.

John Baker has held top leadership positions in sales, client service and operations in Fortune 25 companies for more than 25 years. John is a graduate of the University of Minnesota with BA and MBA degrees. John is also a former American Express COO and is representative of the type of decision maker software sales forces have been sweating in front of for decades. His new book ***The Asking Formula – Ask For What You Want And Get It*** *is scheduled for a late fall 2011 release. For more information, visit www.theaskingformula.com.*

If you're like most sales people, when it comes down to it, you are downright scared of being direct and to the point and telling people in no uncertain terms, "Here's what I want!"

Think about it. There's a conspiracy that encourages people to bury their most important wants and desires. Marketing trainers use consultative selling to draw people out. Social media consultants say "Selling directly is suicide!" People hem and they haw and they are afraid to ask you what they want to ask you the most. They feel vulnerable about being honest and up-front. It can petrify even the most experienced sales professional.

Yet when it comes to being successful in business, being frank, open and clearly asking people to give you what you want is what wins the day.

During my years in sales I've spent several years studying the fears and trepidation people demonstrate in situations across

continued on page three

Advisory Board

Cool New Tools for E-Marketing

by Joe Dysart, Softletter

Given the sheer volume of spam pummeling most E-mail users, it should come as no surprise that E-mail marketing toolmakers have been busy designing new applications that help your E-mail to standout in the E-mail boxes of your target audience. The emergence of E-mail titles sporting graphic 'billboards,' Flash E-mail campaigns on-the-fly, video coupons that must be viewed to be redeemed and similar products indicate that while legitimate E-marketers may never eradicate spam, they'll at least be able to give it a run for its money.

Here's a sampling of what's available:

- **A Smart Live Chat Box in Every E-mail.** For years, E-Marketers have been sending 'live chat boxes' in their E-mails, which they use to instantly engage a customer. Recipients simply click on a 'click-to-talk' button, generally located below the chat box, and begin text-chatting with a company representative about a product or service. Some live chat boxes even offer the option to auto-dial a customer if that customer types in a telephone number.

LivePerson (http://solutions.liveperson.com/online-sales/sb/) one of the pioneers in the field, has upped the ante by enabling its chat boxes to be sent in a marketing E-mail, and backing those boxes with behavioral analysis software. Essentially, software companies using the LivePerson product can program the software's behavioral analysis module to sense when a marketing E-mail is being viewed by a potential customer, how long it's being viewed, as well as other activity associated with that E-mail.

The application is perfect for software companies looking to gage how their marketing E-mails are being received—and interested in inviting a potential customer to chat via text or phone when a set number of preconditions for a potential sale have been triggered.

LivePerson's software also enables a software company to track a customer who clicks to their website as a result of receiving one of its live chat marketing messages, and then invite that customer to chat or talk by phone once the customer has triggered a number of preconditions for a potential sale there.

Smaller companies are more apt to use the application in tandem with a live company representative who tracks visitor activity in a Chatbox-enabled E-mail or on a company website, and then makes an overture to chat or talk at an appropriate time, according to LivePerson.

In contrast, larger firms are more likely to put the behavioral analysis technology on auto-pilot, allowing the software to look for customers who trigger a set number of preconditions, and then alert a company representative when it's time for a live human being to intervene and begin chatting with a potential customer.

continued on page nine

the whole spectrum of human interactions. As a COO at American Express, I've been through the experience of watching highly briefed sales people from top technology firms come in, go through elaborate presentations, and fail to ask for what they want (the sale). Or not be prepared for the inevitable obstacles and issues you'll face when dealing with decision makers at major enterprises. I've concluded that people do not know the best way to get what they want. I've then documented the simplest tactics and strategies that I've observed in the people who were getting exactly what they were after (including from me). My discovery was straightforward in its simplicity.

Very simply, the most successful people ask for what they want. Then they give the three very best reasons that explain why it makes perfect sense to say yes.

But high technology sales people too often can't, or don't, do the above. In their desire to diagnose, build relationships, and understand a customer's innermost desires they often trip over their own sales methodologies.

Let me provide you with a recent personal example.

When I was at Amex, we put out a proposal to replace a legacy software system with a new product. The new product was going to run our benefits management business line; this line manages 401ks, pensions, and similar systems for Amex clients. Obviously, this was a complex piece of software with a complex sales cycle. Amex liked the software and the company worked its way through the typical obstacles, meetings, demos and approval levels. The last obstacle was a meeting with upper management, where a buy/no buy decision would be made.

The sales group was initially slated to have 90 minutes to present to this critical group, but their actual presentation time was cut to 45 minutes. People had trouble making the meeting, some of the senior executives had scheduling conflicts, etc. None of this is fair, but when you play in this arena, that's the way it is.

The sales group showed up with a **100 slide** PowerPoint deck. Now, they had two choices. They could a) have started the presentation by getting to the point by asking for the sale; that's what we were there for. Or they could b) rush through the slide set at high speed and attempt to execute their handoffs, let each member of the sales team talk as I'm sure they role played it beforehand and so on.

They chose option **b)** and it was a disaster; it was bit like listening to a presentation by the Chipmunks as they attempted to bend spacetime in front of us. When the presentation was over, the

"When dealing with decison makers in upper management, realize the 15 great reasons you want me to buy your software are never going to be the executive's 15 great reasons. That's why you need to uncover the three top reasons. And always be ready to explain them in 15 minutes (or less)."

— John Baker, The Asking Formula

continued on page six

Benchmarks: Key Highlights from Flexera's Software Usage and the Impact of the Global Recession, Part I of II

Flexera Software (www.flexerasoftware.com) is a specialist in software product licensing management. Many key software companies across the world use Flexera's systems to manage downloads and license entitlement and because of this, the company is in a unique position to provide global snapshots of the health of the global software industry (with the exception of SaaS subscriptions; however, despite the rapid growth of on demand, the industry is still dominated by desktop and on premise applications). This report focuses on economic activity in North America, Europe, Australia, and New Zealand; we'll be providing Asian and ROW snapshots in the future. The Flexera system counts new purchases of software in addition to patches and upgrades of software as part of maintenance agreements. As such, these download statistics can be closely correlated with a software provider's revenues from new and existing customers.

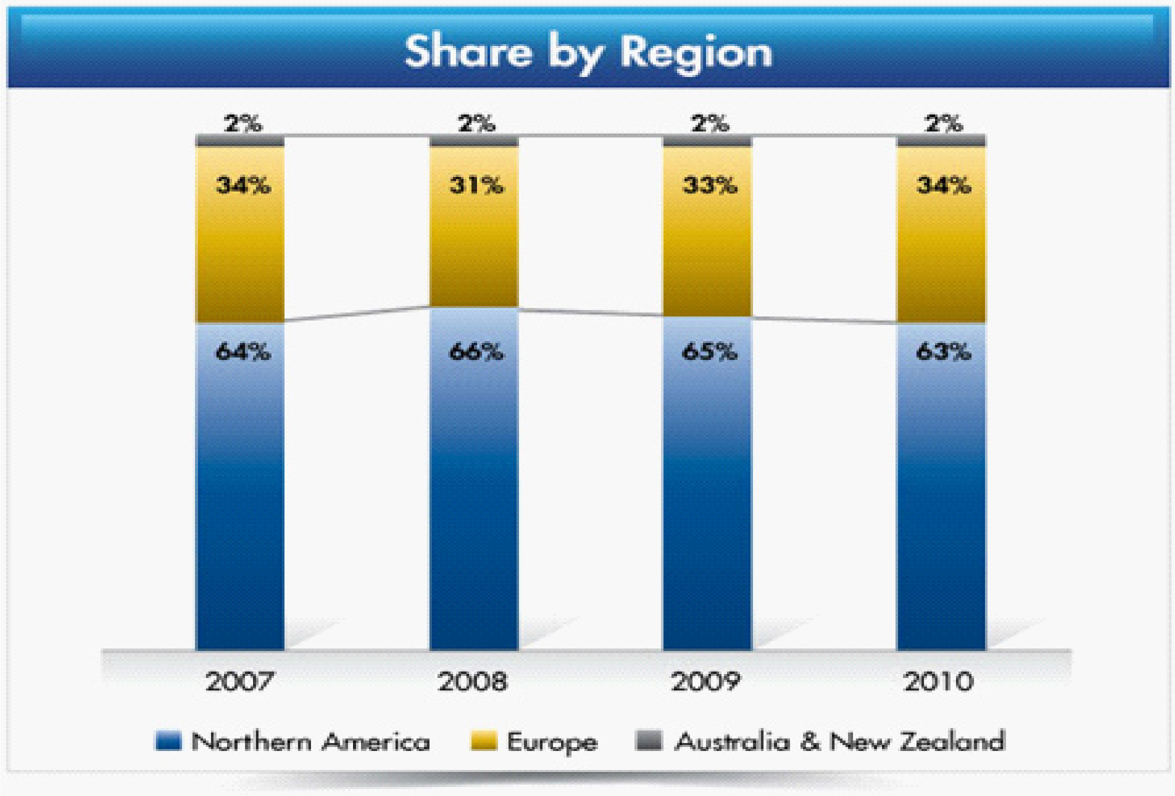


Chart One: Total Software Downloads by Region. Source: Flexera Software

As chart one above demonstrates, we note that the share of total downloads between North America, Europe and Australia stayed largely stable between 2007 and 2010; at a regional level, the global recession did not work to any specific region's advantage or disadvantage—all shared relatively equally in its impact.

Chart two on page five, **Year-Over-Year Growth in Completed Downloads by Region**, shows the trend with year over year growth in completed downloads in North America, Europe and Australia. Compared to North America, the variability in download activity year over year in Europe is lower. Specifically, in 2008 Europe grew only by 6% versus 20% for North America and 26% in Australia and New Zealand, while in 2010, Europe dropped only by 12% versus 17% for North America; Australia was back in positive territory with 3% growth. Thus, while Australia and North America tend to show relatively strong growth in times of economic growth, the corollary that they demonstrate relatively significant declines during recessionary times is also true; this is a sharp departure from the 80s, 90s and through the first half of the new century's first decade, periods when the US software industry resisted serious downturns. Thus, Europe appears to be a more stable region for software ISV's, despite upticks and downticks in the economy. But chart three reveals a more complex picture.

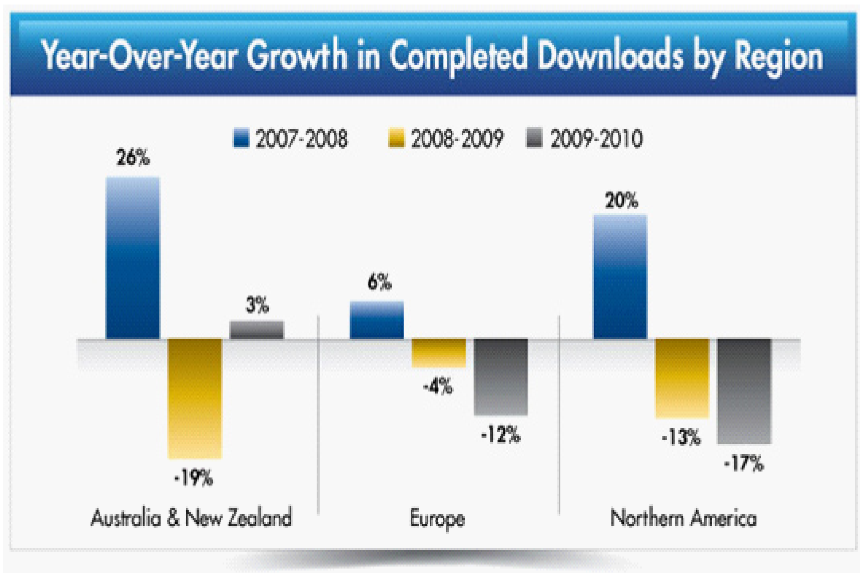


Chart Two: Year-Over-Year Growth in Completed Downloads by Region. Source: Flexera Software

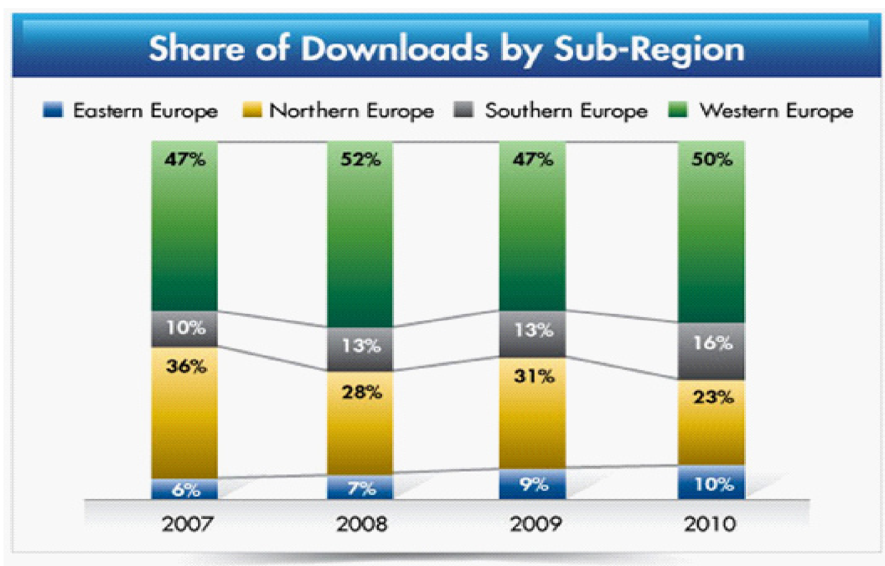


Chart Three: Share of Downloads by Sub-Region. Source: Flexera Software

continued on page 12

executive committee didn't quite know what the sales group wanted and the sales personnel never quite got around to telling us what they wanted to do. I personally felt sorry for the group; they were a quality company and the product was solid. I'm sure the experience was enormously frustrating for them.

They didn't make the sale and they lost the deal. In the final analysis, because they neither got to the meat of their message nor to the point of asking for what they wanted they were—relative to their competition—perceived as lacking understanding, disorganized and slightly unprofessional.

Think about it. One of the things you look for in a technology vendor is the ability to respond in an ad-hoc, just-in-time manner. You want a partner that can communicate complex issues with clarity and brevity. You want to do business with someone who can respond appropriately to reality, not just stay on a pre-planned script.

So, in one way, having their time cut by 50% was a terrible disadvantage. But, in another way, it was a golden opportunity for them to show that they were agile enough to think on their feet, match their style to the situation, handle change and maintain their composure when a situation didn't go as planned. But they failed the test.

"The most effective presentations I've seen that ask for the order involve no PowerPoint presentations. The representative shows up well prepared to discuss the "3 Cs"of their offering—confirmation of pain, claim to fame, and contrast (with the competition)—and asks for the order."

— John Baker
The Asking Formula

This was an extreme example, but I see this all the time. A high tech sales professional has worked for months with his client, product demos, pricing issues, an integration plan, customization of the software, a robust training plan, etc. After all of the time, effort and energy he knows that he/she has overcome the financial, technological and human issues with flying colors. What he doesn't know is if the client is ready to commit to the deal; it always seems to be something that will happen at the next meeting.

Even experienced sales people, young and old are often stumped over asking someone for the order. They stumble and bumble their way through touchy feely talk about their hobbies, the weather, their pets, family or weekend plans, anything but what they are really after.

And yes, the experts tell you that it's important to build a relationship, or you have to draw out the prospect, or listen for buying clues, and any number of other items, but the crucial, bottom line issue is that they never get around to asking the big question.

Yet the quickest and best way to ask for the order is to go right up to his client and say:

> "What do we need to do to get your business? Would you please let me know specifically? I want you to know what you need me to do to move things forward. You've seen how everything works, how well integrated it will be, that it's going to make a real difference. Can we meet at 10 AM to close a deal?"

It's crucial to identify the exact most important request, and brainstorm before you decide on the best reasons. Each reason needs to be carefully selected from a larger number of options and be backed by three important facts."

Let's circle back to that sad example I mentioned earlier, the sales group that had their 90 minutes cut in half. How should they have prepared for this critical meeting? Here's how:

- First of all, a hundred slide PowerPoint presentation was a big mistake. If that length of presentation is ever called for, it should be part of a technical and prototyping cycle, not something that's dumped on a group of impatient and time sensitive decision makers. In most cases, you can assume that someone with a C-level title has had their staff vet you and your product before you step into their office. Your job at that point is to ask for what you want, not launch into another educational cycle. How long should the slide set have been? Assuming the sales team was going to receive their full allotted 90 minutes, 20 would have been appropriate. Once they realized they were going to have 45 minutes, the slide set should have been cut to 10.

- Since this group decided to use a PowerPoint deck, it should have been organized so that the first slide on the deck asked us for the order. The next three slides should have provided reasons for us to do this. The last slide in the deck should have again asked for the order.

- Those three slides should have focused on three key reasons why we should have said "yes." Those reasons can vary from sales situation to situation. In this case, the most important points were compatibility, capability, and budget. But in most cases, your key reasons will follow the rules of the "3 Cs." You need to **confirm** the pain that led you be in front of an executive decision group in the first place, you should provide your **claim** to fame (faster, cheaper, more powerful, etc) and you should be prepared to provide a strong competitive **contrast**.

- They should have structured their 45 minutes to include about 20 minutes of focused information staying within the 3Cs boundaries and 20 minutes of asking for what they wanted.

"When presenting to decision makers, every slide in a deck should be thought of as your last slide."
— John Baker, The Asking Formula

Let's focus more on that PowerPoint deck. It would be impossible to provide a hard and fast rule of thumb for the maximum length of a .ppt deck. Obviously, a lot depends on audience, topic, desired outcome, stage of the sales cycle, etc. But in general—especially when you are in front of senior execs or the buying decision makers—you should handle most presentations in 7 sections or slides. Here's my suggestion for your deck outline:

- Introduction (Who we are).

- What We're Here For (Your Ask).

- Reason #1 (Why should the audience want to give me what I am asking for...what problem am I solving, how does my product/service solve it, how is my product/service different from the competition).

continued on page eight

- Reason #2 (see above).
- Reason #3 (see above).
- Restate Your Ask
- Close (Thank you...any questions?)

Here's your opening script...*"Thank you for your time today. I understand we have X minutes together. Before we open it up for questions, we've prepared 7 slides we'd like to review with you...."*

"Technology sales people don't know how to shut up."
— John Baker
The Asking Formula

This puts you in control of the audience and your presentation. Why seven slides? That's about all your audience is going to let you present before jumping in and interrupting with their questions and train of thought. You might as well get your ideas communicated first.

As a back up, you can have as many slides in your "Appendix" as you want or think you'll need. If it is a technical sale, you'll want all of your specs and parameters listed. You should have detailed back up and proof statements for all of your three reasons. You should be able to access these slides given the audience's line of questioning. But it's overkill to include them in the formal slide deck.

Another point technology professionals miss is that often times the people they are presenting to are a mix of both technology and business leaders. I have sat through presentations where the presenter and my IT leader have gone off on some orgasmic tech speak confabulation for 30 minutes leaving the rest of us looking at our watches. Not good.

After years of watching technology sales people hem and haw, I began to develop what I came to call "The Asking Formula." It has three key rules:

- Only offer information that is meaningful. The rest is trivial. Yes, context is important. If implementing your product in a company involves a technical review, fine. That won't be the right time to ask for an order, but it will be the right time to ask for the next meeting to analyze the reviews findings and at that next meeting to then ask to schedule a meeting to meet with the key decision makers so you can ask for the sale.
- Get to the point and ask for what it is you want.
- Be quick about it.

It's about that easy, and the power of this strategy is more than a little amazing. This method can be successfully used to penetrate difficult accounts, close difficult sales calls, shorten a sales cycle, protect price margins, reduce meeting time, speed up PowerPoint presentations, structure personnel reviews, tighten sales letters, focus company communications with suppliers, shrink corporate

continued on page 10

Toktumu, a SaaS provider that offers web-based phone services, recently added live chat from Velaro into its marketing mix.

"We are thrilled with Velaro's live chat integration with Zendesk," a customer relationships management package, says Peter Sisson, founder and CEO of Toktumi. "Now we can actively engage visitors to Toktumi.com and send custom invitations to specific customer segments, and all the information we gather can be sent directly from Velaro's live chat window back to our Zendesk help desk account."

Indeed, some software makers are so impressed with the potential of live chat, they're adding it to their own products. Netmining, a leading provider of web marketing software, recently turbo-charged its package with new chat capabilities.

"By placing intelligent technology behind live chat capabilities, Netmining and Velaro will enhance a marketer's website, moving it beyond a passive medium to an interactive sales floor," says Toon Vanparys, Netmining's CEO.

- **E-mail Title Drop-Down "Billboards."** The next time you "mouse-over" an E-mail title, don't be surprised if a tiny graphical billboard pops up. E-mail marketing company Advenix has come up with a way to program marketing E-mails so that tiny colorful company logos, product images and the like spring up when recipients mouse-over the E-mail titles.

"Advenix VisualSubject lifts the restrictions of the 10-word subject line, enabling marketers to more efficiently and effectively communicate with their customers," says Justin Khoo, Advenix's president. "E-mail recipients simply run their cursor over the subject line, and the "billboard" drops down with graphics and text."

Besides being a novelty, Advenix helps overcome the E-mail marketing fatigue plaguing many consumers these days, resulting from facing E-mail boxes each morning packed with unwanted commercial offers.

"In the case of E-mail, subject lines are frequently truncated in the inbox, so the recipient often doesn't even see the complete offer," Khoo says. ""Users prefer to engage with the VisualSubject unit rather than open an E-mail based solely on the subject line and sender text."

E-Marketers create the graphic billboard for their E-mail subject lines by uploading an image to Advenix's Web-based system before a campaign. Each E-mail they send is also encoded with a 'pointer,' which calls up the image from Advenix's server when a recipient's mouse passes over the email's title line.

To see one of VisualSubject's E-mail billboards in action, check out: http://www.advenix.com/visualsubject.htm.

- **Free Video Hosting for E-mails Featuring Video Links.** If you're looking for an inexpensive way to add a video link to your E-mail promotions, YouTube (http://www.youtube.com) has an enticing offer—we'll do it for free.

continued on page 11

memos and compress E-mail messages.

What's more, it's proven to be quite helpful in corporate and business personal interactions with personnel, especially with supervisors and staff. And it really helps if you put your money where your mouth is, as illustrated below (this example is taken from a company that submitted a winning bid to me):

> "Let's implement the contract plan as follows. We'll meet with your top three Directors by the end of the week. We'll develop a transition plan, identify the actions needed, and set the implementation schedule, and document the planning on the company-wide calendar.
>
> Then we'll deploy the program and watch the results. I bet this will change and improve the company in ways you've been hoping for and more. And it will happen in less than a week!"

"If you can't tell a senior decision maker within 30 minutes why they should purchase your product, they'll take over the meeting until you do. And then you'll be out of time."

— John Baker
The Asking Formula

This is a clear conversation with less opportunities for misunderstanding and earned the vendor points for being thoughtful.

Building a relationship is great, but taking responsibility and delivering the results is what builds trust. The biggest problem with never getting a direct answer, is that it gets in the way of the real progress. It's pointless. It wastes time and effort. It allows for procrastination. It enables people to avoid rejection. After all, if you're busy probing the needs of the prospect you don't have to risk actually doing the work. And, it avoids the issue that when you ask, the answer may be "No." By not asking, hope can spring eternal and you can avoid hearing that terrible, terrible word. But "No" is a opportunity. "No" is the beginning of the next ask.

After the "No," the question is the next why. Is there a price objection? If you're properly prepared, this issue should have been thoroughly explored during the sales cycle and the lead up to the point where you ask for what you want. In some cases, having that big PowerPoint deck ready to be referenced is appropriate, but I was impressed by a sales professional who pulled out a memory stick, plugged it into a laptop, and quickly pulled up the section of the proposal that covered competitive pricing, ROI, etc.

There comes a point in the sales cycle when the customer is ready to make a decision and consultative selling stops. Is the customer going to bite or not?

It's sort of like a vendor at a ballpark consultatively selling you a hot dog: "On a 1 to 10 scale, rate your level of discomfort with your hunger?" "Tell me your main objective with the hot dog?" "When you had a hot dog before, how satisfied were you with the mustard and ketchup ratio?" Isn't he more effective when he just yells:

"Hot dogs, hot dogs, come and get your hot dogs!"

Just give me the damn wiener!

John Baker, The Asking Formula, 12552 Riverview Road, Minneapolis, Minnesota, 55347; 612-227-429-9126. Email: john@theaskingformula.com. Website: www.theaskingformula.com.

In a move to become the defacto platform for video on the web, the company has rolled out a series of free tools that essentially enables any company to host and showcase a promotional video at absolutely no cost.

Simply add YouTube's free video player to your website, and include a link to that player in your promotional E-mails. When embedding the YouTube player in your website, you have the option to post the YouTube player "as is," with its familiar chrome border and YouTube logo. Or your website designer can customize the player with its own "skin."

That customized look can feature your company's logo, as well as a look and feel that's distinctive to your company or company's press center. (With either option, a faint, YouTube watermark appears in the right-hand corner of your video.)

The player creation tool also enables you to optimize your video for the search engines by allowing you to include titles, descriptions, ratings and viewer comments associated with your video.

For a how-to video on how to add the YouTube player to your website, check out (http://www.youtube.com/youtubeonyoursite). There's also a separate how to video (http://www.youtube.com/watch?v=uTwWEtVtu58) on how to customize your player.

The real beauty of the player is that the technology enables you to offer a window to your news videos on your own site, while shifting the hosting and transmission costs associated with the viewing of that video to YouTube.

The reason? While the player is embedded on your website, your actual video is uploaded onto YouTube's computer servers. That means every time someone views the video, its YouTube's servers that are actually transmitting video—not your company's Web servers. So it's YouTube's servers that are picking up the bandwidth transmission costs, not your company.

- **Video E-Coupons—Not Your Typical Clip-and-Save.** Coupons Inc., (http://www.couponsinc.com/corp/index.asp), one of a number of E-marketing firms riding the growing use of E-coupons on the web has come up with an electronic coupon powered with the promotional wallop of video.

  The catch—users need to view the 10-60 second promotional video embedded in the coupon before the discount offer can be redeemed. Smart.

- **Branded 'Widgets' for Higher Search Engine Returns.** Firms hip to the growing popularity of widgets (http://desktop.google.com/plugins/)—handy little tools that track temperatures, headlines, stocks and the like – have discovered that the free, downloadable programs are great website traffic builders. Paste a link to a popular widget in your marketing E-mails and your company's rank on the search engines can spike significantly.

Benchmarks

Between 2007 and 2010, Eastern Europe and Southern Europe grew their share of European downloads from 16% in 2007 to 26% in 2010. This came primarily at the expense of Northern Europe, which lost share during the same period, from 36% in 2007 down to 23% in 2010. Thus not surprisingly, while Europe as a whole appears to be more buffeted from upturns and downturns in the economy, certain subregions in Europe are faring better than others.

Countries in Eastern Europe face export restrictions from the US Department of Commerce—as a result, US-based ISVs and device manufacturers have to pay closer attention to software downloads arising in this region and ensure that appropriate compliance checks are in place. But Eastern Europe is currently a far more dynamic marketplace, with less socialist policies and regulatory restrictions than what is found in Northern Europe; also, these economies are starting from "further behind" and have more room for growth.

Not surprisingly, even within European subregions, certain countries dominate in terms of software download activity. For example, in each sub-region, three countries constitute from 71% to 89% of all software downloads in that particular sub-region. Chart four below shows the top three countries in each European region. Southern Europe is dominated by Italy, Spain and Portugal, which collectively account for 89% of all download activity. United Kingdom, Sweden and Norway dominate 80% of all download activity in Northern Europe.

Western Europe's top three countries are Germany, France and the Netherlands, which collectively represent 82% of all download activity in that region. Eastern Europe is somewhat more fragmented than other regions with its top three countries, Russia, Poland and the Czech Republic, accounting for 71% of total downloads in the region.

Sub-Region	Top 3 Countries by Completed Downloads	Share of Top 3 Countries of Total Sub-Region Downloads
Eastern Europe	Russia, Poland, Czech Republic	71%
Northern Europe	United Kingdom, Sweden, Norway	80%
Southern Europe	Italy, Spain, Portugal	89%
Western Europe	Germany, France, Netherlands	82%

Chart Four: Top Three Countries by Sub-Region. Source: Flexera Software

In Part II of this article, we'll analyze which countries lost share to others over the course of the recession and take quick look at download trends in Asia.

Legal

Content Rights in the Cloud

by Michael Whitener, VistaLaw

You may have noticed the disturbing trend among social media companies and other cloud-based infrastructure service providers to claim expansive rights to content posted on their servers. Fortunately, vigilante justice is alive and well on the web, so these power grabs are quickly detected and, in many cases, just as quickly reversed by the service provider.

The following are a few recent examples of the blatant attempts to claim rights to user-posted content that have come to light:

- **Facebook.** Facebook set off a fire storm when an alert user discovered that the company had quietly changed its terms of service to give Facebook a license over its users' data even after they removed it from the site. Previously, once a user closed an account on the Facebook network, any rights Facebook claimed to the original content that had been uploaded would expire. Under the new terms, Facebook gave itself free rein to use that content for virtually any purpose, including sublicensing.

- **Google.** Although Google's motto is: "Don't Be Evil," the Google Apps terms of service stated that users who post content via the Google services "grant Google a worldwide, non-exclusive, royalty-free license to reproduce, adapt, modify, publish and distribute such Content on Google services for the purpose of displaying, distributing and promoting Google services." When a cyber-storm erupted, Google acted quickly to repair the damage by stripping out the offending language.

- **Dropbox.** Dropbox recently changed its terms of service to read: "You grant us (and those we work with to provide the Services) worldwide, non-exclusive, royalty-free, sublicenseable rights to use, copy, distribute, prepare derivative works (such as translations or format conversions) of, perform, or publicly display that stuff to the extent we think it necessary for the Service." As in the case of the Google Apps terms of service, word of the Dropbox change spread quickly and Dropbox apologized and backed down. (More on Dropbox follows.)

- **LinkedIn.** Most recently, LinkedIn users were surprised to discover that LinkedIn had changed its user settings to create a default setting whereby user names and photos could be used for third-party advertising. The changes allowed LinkedIn to mine the usage habits of its users to determine what products and services they're interested in, and then use their name and photo in what amounted to an endorsement when those products and services are advertised to other users.

These cloud service providers have a duty to notify their users of these significant changes to their terms of service. If they fail to do so, they're risking an enforcement action by the Federal Trade Commission for engaging in "unfair or deceptive trade practices" as well as private lawsuits. Yet too often, little or no notice of these changes are provided. In the case of LinkedIn, there was an announcement of the policy change on the LinkedIn blog—but how many people read the corporate blog on a regular basis? Was any notification sent to LinkedIn's 100 million members? Nope.

The irony is that these cloud platforms themselves allow users geeky enough to keep track of

continued on page 14

terms of service revisions to notify other users and take collective action. When a few LinkedIn users became aware that the service could use their names and photos in advertising, they quickly posted notices on LinkedIn explaining how to opt out of the service. A virtual flash mob of LinkedIn users began “dissing” LinkedIn for the changed policy, and LinkedIn was shamed into apologizing, saying, “We hear you loud and clear,” and confessing that “we could have communicated our intentions—to provide more value and relevancy to our members – more clearly.”

LinkedIn also agreed to refrain from using member photos for advertising purposes as the default setting. Members are continuing to press LinkedIn to change the settings from “opt out” (by default you’re allowing LinkedIn to use your name in ads, but with the option to change the setting) to “opt in” (your name can only be used if you explicitly agree).

When we hear about overreaching terms of service like these, it’s easy to assume Big Brotherish, “we own you” intentions. But let’s take the cloud vendor’s point of view for a moment. In our litigious society, they want to be sure they have all possible bases covered to avoid liability—privacy, confidentiality, ownership, intellectual property, warranties, indemnities, technical support and the like.

Thus you have bizarre clauses like the following found in the Apple iTunes Terms and Conditions: “You also agree that you will not use these products for any purposes prohibited by United States law, including, without limitation, the development, design, manufacture, or production of nuclear, missile, or chemical or biological weapons.” Using my Lady Gaga playlist to produce biological weapons? Thanks for the idea!

But even if terms of service are really intended as just one huge safety net for the cloud vendor, there’s no excuse for not notifying users when a change is made that expands the vendor’s rights over its users’ personal information. Digital privacy is at the center of a huge debate, and so it’s perplexing that so many service providers continue to take a ham-handed approach to these issues, and then profess astonishment when users rebel.

It’s not all that hard for cloud companies to protect themselves yet not overreach. A good example is the current Dropbox terms of service, which (after the company’s initial missteps) say simply:

“You retain full ownership to your stuff. We don’t claim any ownership to any of it. These Terms do not grant us any rights to your stuff or intellectual property except for the limited rights that are needed to run the Services, as explained below.”

What is “explained below” are specific cases such as making certain product features visible to the user and backing up data. Dropbox demonstrates how clear terms of service can be when they’re drafted by real people instead of gun-shy lawyers.

If cloud service providers continue to play sneaky and fail to disclose privacy-threatening revisions to their terms of service, what are end users to do? (Short of actually reading terms of service, that is, which almost no one does.)

One answer comes from the Electronic Frontier Foundation, a non-profit organization dedicated to “championing the public interest in every critical battle affecting digital rights.” The EFF has launched a website called “The Terms-of-Service Tracker” (www.tosback.org) that keeps an eye on the websites of dozens of social networking sites, online businesses and other Internet communities, and sends out alerts when there are major changes.

continued on page 15

Legal

You may be astonished to learn, for instance, that according to the EFF, Facebook has revised its terms of service nine times since last April.

As we entrust an increasing amount of our personal information to cloud-based services, it's imperative that we understand how we're allowing that personal information to be used. Unfortunately, it's all too easy to click the box that says we've read and understood a service provider's terms of service when we've done no such thing. Bad idea, given the trend in terms of service toward claiming virtually unlimited rights to own, share, sell and otherwise monetize anything we post online. And for SaaS companies involved in managing customer content, IP, and similar assets, an opportunity for you to either distinguish yourself by enlightened, customer friendly policies or potentially create a PR nightmare for your firm when the inevitable pushback ensues when someone actually takes time to read your terms of service.

A CLOUD CONTENT "CUSTOMER BILL OF RIGHTS"

So how does a cloud service provider avoid the content rights controversies and resulting destruction of good will that have plagued Facebook, Google, LinkedIn and others?

One approach is to declare upfront that customers have certain rights to the content they entrust to the cloud that the service provider will recognize and honor. Elements of such a "bill of rights" governing customer content, for integration into a service provider's terms of service or privacy policy, might include the following declarations:

1. **The customer owns the content.**

2. **The service provider will only use customer content for the purpose of providing services to the customer.**

3. **Any service provider license rights to customer content will be described in detail and limited to those truly necessary for the services.**

4. **The service provider will fully disclose any use of personal or aggregated information it collects based upon customer content.**

5. **If some content is shared with other users as a feature of the service, the service provider will allow customers to control their own privacy settings.**

6. **The service provider will fully disclose its data security policies and procedures.**

7. **The service provider will promptly inform affected customers of any data security breach.**

8. **The service provider will tell the customer where the content is stored.**

9. **The service provider will comply with any customer request that the customer's content be removed from the service provider's servers.**

10. **The service provider will inform its customers of any proposed changes to these "rights."**

These declarations will help a service provider be viewed as one of the good guys with the customers' best interests at heart.

Michael Whitener, Principal & Co-Founder, VistaLaw International LLC, 1875 I Street, N.W., 5th Floor, Washington, D.C. 20006; 202-429-5526. E-mail: mwhitener@vistalaw.com.

Cardfile

Cloud Content Legal Rights Resources

- **Meida Tech Law:** (www.guardian.co.uk/media-tech-law/cloud-computing-legal-issues www.ereleases.com): Useful article that includes coverage of media and copyright issues on the Internet..
- **LiveScience** (http://www.livescience.com/9247-ces-2011-wrangling-rights-cloud-based-content.html). Article that focuses on digital distribution rights and issues.
- **Mashable** (http://mashable.com/2011/01/12/data-ownership/): Interesting.
- **Zeldman.com** (www.zeldman.com): Web news site that hosts a recent and interesting discussion Andy Rutledge and others data ownership in the Cloud.

COMPUTERWORLD COLUMNIST PRESTON GALLA ON IE SECURITY: "Once upon a time, Microsoft software was seen as riddled with security holes, an open invitation to malware. Here's yet one more piece of evidence that has changed and Microsoft is locking down Windows: Internet Explorer is by far the most secure browser when it comes to drive-by-downloads, with a remarkable 99% effective rate, compared to the second most secure, Chrome at 13%.

Those results comes from security research firm NSS labs. NSS Labs tested Internet Explorer 9, Opera 11, Safari 5, Firefox 4, and Chrome 12 and the findings were clear and dramatic: No browser comes close to Internet Explorer for protection against what the firm calls 'socially engineered malware" (Quoted on http://blogs.computerworld.com/18816/more_evidence_microsoft_is_locking_down_windows_internet_explorer_leads_the_pack_in_protection_against_drive_by_downloads?source=CTWNLE_nlt_msft_2011-08-18, 08/17/2011)

INFOWORLD COLUMNIST ROGER GRIMES ON THE ISSUE OF MAC VS. WINDOWS SECURITY: "Still, the question of whether Mac or Windows is more secure is no longer relevant. The computer security paradigm is shifting at this very moment. Cloud computing, Web 2.0, and mobile technologies are exploding, and with those changes, traditional attacks are making way for a new crop that ignore platforms. Think ANSI bombs, boot sector infectors, macro viruses -- seen any of those lately?

I worry about the risks associated with cloud compromises more and more. I know hackers have a far easier time taking over multiple websites hosted on a single Web server than they would taking over sites hosted in separate machines. Whether you're a Mac or a Windows shop doesn't factor into the equation. For example, if someone compromises a public cloud product and takes over one customer's instance, how easy would it be for that person to get to all the cloud's data?" (Quoted on http://www.infoworld.com/d/security/no-contest-mac-vs-windows-security-169886, 08/16/2011)

Colleagues made off with your last issue? Go to www.softletter.com. Click Subscriber Login in the upper right of the home page. To view the current issue and to search archives of hundreds of articles by keyword, topic, or issue date, log in and enjoy!

Soft•letter is published 12 times per year;

ISSN: 0882-3499.

Subscription rates: $395 worldwide. Subscription office: Aegis Resources 34 Sugar Hill Rd.