

FUNCTIONAL REQUIREMENTS DOCUMENT AND JUSTIFYING LEGAL MEMORANDUM FOR RECOMMENDED E-CONTRACTING PROCESSES

Presented to [REDACTED]

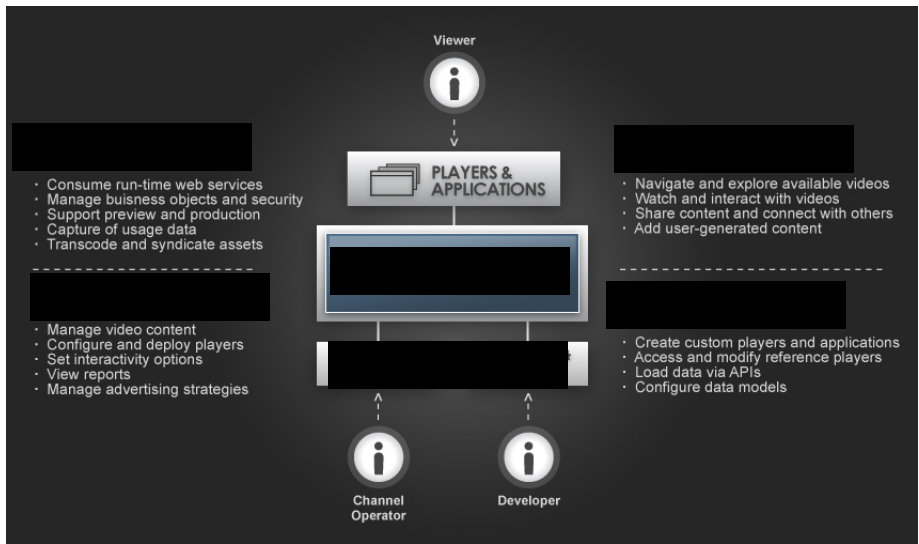
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Service Description



The service platform is comprised of two modules, a service management console and a development platform. Service provision is divided into “channels” that are essentially logical partitions of the service into content and access rights among customers. Log in into the service is through the same < .com> URL as the public corporate site.

The online interaction between customers and the service mostly consists of uploading customer video content, downloading ready made and custom developed video players, managing content, and generating usage reports. Video players downloaded from the service platform may be deployed by customers anywhere on the Web. advertises that customer third party end users can themselves upload video content to be added to existing content, but this functionality does not allow direct access to back end servers through .

contracts out to a service provider for hosting of the service platform. Hosting services for customer video content are independently contracted for by customers using third party providers, or by a third party provider resold by . In all service scenarios 's service performs a technical proxy role.

service contracts range in value from approximately \$10,000-50,000 per year. Payment terms are on a monthly or quarterly advance basis, and payment is made by credit card through 's finance office. It is not a business objective of to obligate customers to multi-year contracts with the intent of enforcing the entire term of contracts should customers seek early termination. Pricing of

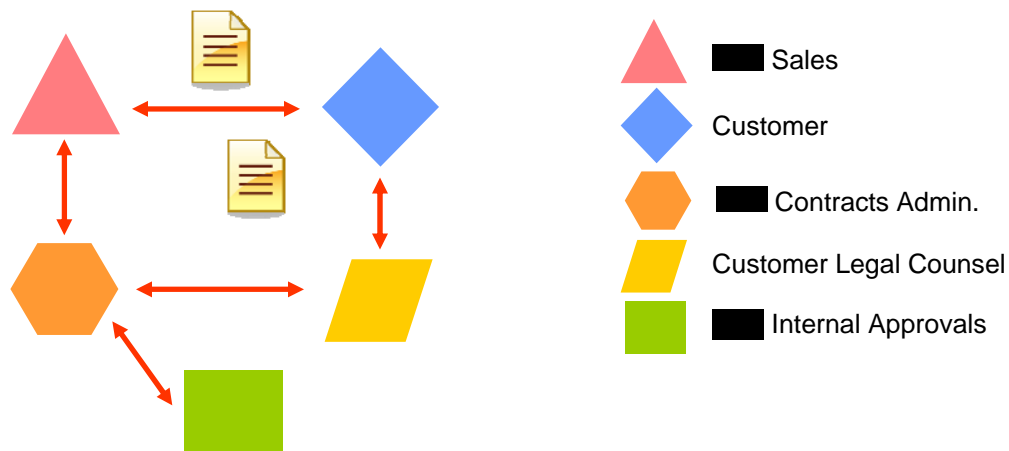
the service is essentially a flat rate based on number of channels, bandwidth (if service provision is included), and the rate of data transcoded per minute. Additional channels, bandwidth and traffic are negotiated upfront as premium services.

In addition to the online video platform service, [REDACTED] offers associated consulting services such as Web development and marketing.

The market for [REDACTED] is internal company Web developers, executive managers, and ad agencies. The business sophistication of [REDACTED] customers varies greatly.

Current Contracting Processes

Process Flow:



Description of Current State: [REDACTED]'s contracting is entirely paper based. Contracts consist of an Order Form and a master-type [REDACTED] License Agreement that is incorporated into the Order Form by reference. The three page [REDACTED] License Agreement defines services as a "video publication service" but contains many provisions that are more commonly associated with traditional professional services not delivered online. A copy of the Order Form was unavailable at the time of this writing but is thought to contain basic commercial terms such as pricing, volumes, and payment terms, and is executed by the customer and [REDACTED]. Consulting services are contracted for in a separate, paper based statement of work document. All negotiation and administration of contracts is undertaken by a single person on the [REDACTED] staff.

The current process for service contracting is unsatisfactory due to the high incidence of negotiation of terms by legal counsel for prospective customers.

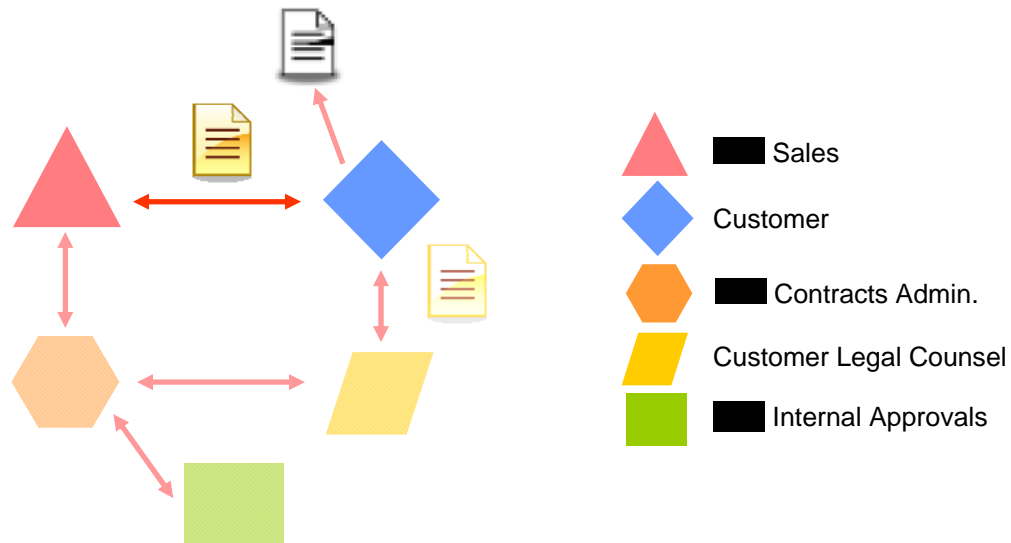
Dissatisfaction has risen to the point that the CEO has made comments to the effect that the company should consider doing business without contracts. While [REDACTED] desires to capture the sales cycle advantages of electronic contracting, it has limited Web development resources to commit to building an online process and limited tolerance for disruption of existing sales and business processes. Third party electronic contracting, contract management or e-commerce engines are not available solutions.

In [REDACTED]'s thinking, creating an online contracting process that eliminates all legal review by customers, requires minimal Web development, causes minimal change to existing sales and business processes, and utilizes existing contract terms without redrafting, would be ideal.

Proposed Models

1) *Retain Existing Paper Order Form, Post Existing [REDACTED] Services Agreement as Online Terms and Conditions, and Incorporate Online Terms and Conditions into Form by Referencing a Hyperlink on the Corporate Site ("Hyperlink Model")*

Process Flow:



Estimated e-Contracting Development and Disruption Costs: Minimal

Fulfillment of Functional Requirements: This online contracting model is the initial preference of [REDACTED]. The only change to the current state business that is required by this model is the reproduction of the existing [REDACTED] License Agreement as online terms and conditions on a Web page on the public corporate Web site, sans the execution blocks at the end, and addition of a one

sentence reference to the online terms and conditions in the Order Form. Posting the [REDACTED] License Agreement terms and conditions online will allow the contract to be printed out by customers. It is anticipated, however, that in the event prospective customers do view the online terms, some percentage of customers will print out the Web page and either attach them to the order form for their own records or forward them to their legal counsel, regardless of the online format.

Legal Enforceability: While this model is a legally enforceable approach to contracting for the [REDACTED] service, its enforceability is open to some question on grounds of unconscionability and integration. Further this model may not fully achieve the goal of eliminating legal review by customers.

The legal contract doctrines of unconscionability and integration are broad and their application cannot be precisely predicted based on legal precedent. Unconscionability comes from obscure presentation of governing contract terms. If terms are printed in small light print on the back of a form they may be found unconscionable. Integration is the assembly of contract terms through various sources. If a written contract is signed, and later the parties add to or change the terms but don't explicitly amend the contract by written amendment, the later agreement may not be found to change the earlier terms because it not related in any obvious way to the earlier agreement.

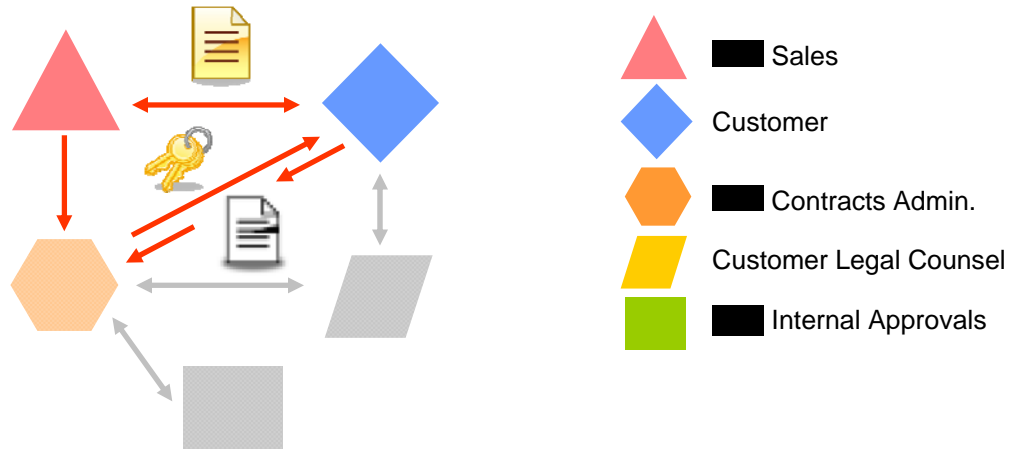
The central legal issue confronting use of this model by [REDACTED] is the question of whether it is reasonable to expect business customers to visit a Web site to view additional terms to an agreement even though they are not already accessing the site for purpose of entering into the agreement. Browser wrap agreements, i.e., terms of use, derive their enforceability from customers having a precedent reason to access the same Web site to engage the service.

To enhance the enforceability of this e-contracting model, [REDACTED] must have a genuine and integral business reason for posting most or all of its service contract online. In online contracting, the predominant reason for online posting of terms is that the nature of the service requires ongoing changes to terms. Examples of service changes are substituted software components, substituted network service providers and service levels, changes in security policies and procedures, and regulatory developments. In online terms and conditions a unilateral change clause with provision for notice to customers is included in the terms.

Implementation: To implement this model, [REDACTED] will add such a unilateral change with notice provision to its online version of the [REDACTED] License Agreement document. Further, the hyperlink reference placed in the Order Form will identify a separate Web page dedicated solely to the online terms and conditions; this dedicated page will also be accessible from the corporate Web site home page.

2) Retain Existing Paper Order Form, Convert Existing [REDACTED] License Agreement into Online “Terms of Service,” Post Terms of Service on Public Site to be Accepted at Log In into Service, and Reference Terms of Service in Order Form (“Terms of Service Model”)

Process Flow:



Estimated e-Contracting Development and Disruption Costs: Moderate

Fulfillment of Functional Requirements: Like model 1), the impact of this model on current state business processes and its required Web development costs are minimal. Like model 1), contract terms and conditions are still viewable on the public corporate site because the [REDACTED] service log in page is located on the public site. Like model 1), a single sentence reference to the online terms is added to the Order Form. However, this model goes farther towards reaching [REDACTED]'s goal of eliminating legal review of contracts by incorporating the [REDACTED] License Agreement terms and conditions into the process of actually accessing the service and by characterizing the terms as part of the service instead of as part of a sales contract. It is anticipated that technical personnel of a customer organization will perform the log in and agree to the terms of service, which business personnel will sign the Order Form. While this model leaves open the possibility of inconsistent responses to the terms of service and the Order Form, it is anticipated that the risk of loss of business due to inconsistent responses is low.

Legal Enforceability: While this model is similar to model 1) it has two substantial differences: A) the point in the contract formation process at which the customer fully enters into the contract with [REDACTED], and B) the mechanism by which the terms govern the contractual relationship.

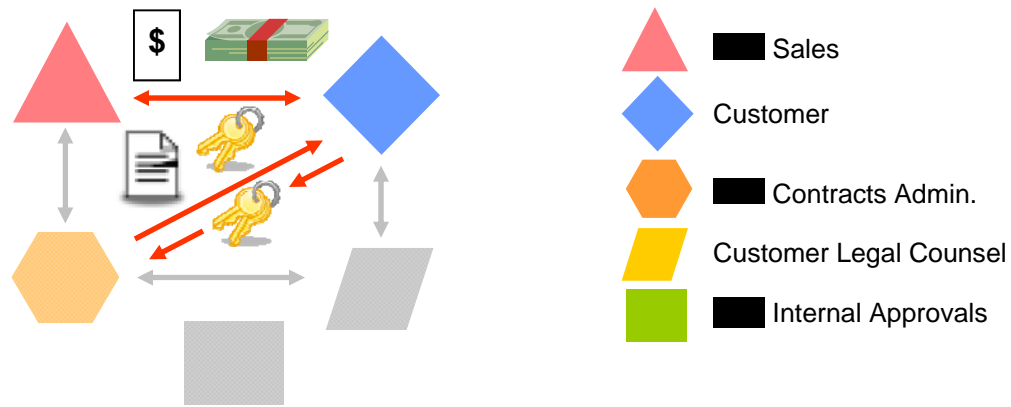
This model is analogous to shrink wrap agreements for boxed software and click wrap agreements for software downloads: payment is made according to point of sale terms (e.g., price, quantity, start and end dates, payment terms), and other terms and conditions relating to use of the software are subsequently agreed at the point of initial use. Although courts in the US have never reached a consensus on the enforceability of shrink wrap and click wrap software licenses, a prevailing legal rationale for their enforceability is that customers may decline to accept the license terms and seek a refund of the purchase price. Likewise, [REDACTED] would need to accept the business practices of willingness to renegotiate the terms of service using the existing [REDACTED] License Agreement, and to refund any monies paid if the customer is unwilling or unable to successfully renegotiate with [REDACTED].

As the title “terms of service” indicates, the [REDACTED] License Agreement terms and conditions govern actual use of the service and everything that results from service use. Terms of service do not create an underlying contract that governs the relationship between [REDACTED] and customers prior to or independent of usage of the service. Some examples of the difference between the two mechanisms are the need to contract separately for associated consulting services offered by [REDACTED], and the possibility that other individuals in the customer organization accessing the service may object to the terms despite previous acceptance of the terms through usage.

Implementation: A reference to the terms of service is added to the Order Form stating that online “Terms of Service” apply to all use of the [REDACTED] service during the entire duration of the agreement. Inclusion of commercial terms in the Order Form that must be established prior to initial use of the service, such as duration of agreement and payment terms, are required. On the [REDACTED] service “My Account” log in Web page a sentence will be prominently displayed stating that all use is governed by the “Terms of Service” along with a hyperlink to a separate Terms of Service page displaying the terms. The existing [REDACTED] License Agreement is not specific enough to an on demand service to be appropriate for use as Terms of Service. Either the [REDACTED] License Agreement will be rewritten or the Developer’s Website Agreement used instead.

3) *Replace Existing Order Form with Paper Quote Form Signed by [REDACTED] Only, Email Log In Information with [REDACTED] License Agreement Terms and Conditions, Activate Account Upon Payment (“Quote Model”)*

Process Flow:



Estimated e-Contracting Development and Disruption Costs: Minimal to Moderate

Fulfillment of Functional Requirements: The CEO of [REDACTED] has mentioned that he would like to do business without using contracts. No paper contract documents are signed by customers in this model. Instead, [REDACTED] gives customers a paper quote form signed by [REDACTED] for the proposed service. The quote informs the customer that log information will be sent separately and that the [REDACTED] service is subject to applicable terms. Following the quote, either before or after the customer makes an initial payment, [REDACTED] sends an email to the customer that A) references the quote by number, B) contains log in information—User ID and Password, Web page hyperlink, and step by step instructions on how to log into the service, and C) the [REDACTED] License Agreement terms and conditions without the signature blocks. The log in instructions state that by activating the service, i.e., making payment and logging in, the customer accepts the [REDACTED] License Agreement terms. This model aggressively serves [REDACTED]’s goal of eliminating legal review of sales contracts by eliminating written documents requiring signature and by eliminating a discrete acceptance event online.

Legal Enforceability: Contracts do not require signature of a written document by both parties to be legally enforceable, unless such a written contract is mandated by statute. Offers and acceptances that constitute a contract can be communicated in other ways. Acceptance can take the form of payment or other acts in furtherance of the performance of the agreement. Terms of the contract are enforceable as long as they are mutually assented to by the parties, meaning they must have been in their contemplation at the time of the offer and

acceptance. In this model the customer's payment and log in into the service constitute legal acceptance of the terms of an underlying contract.

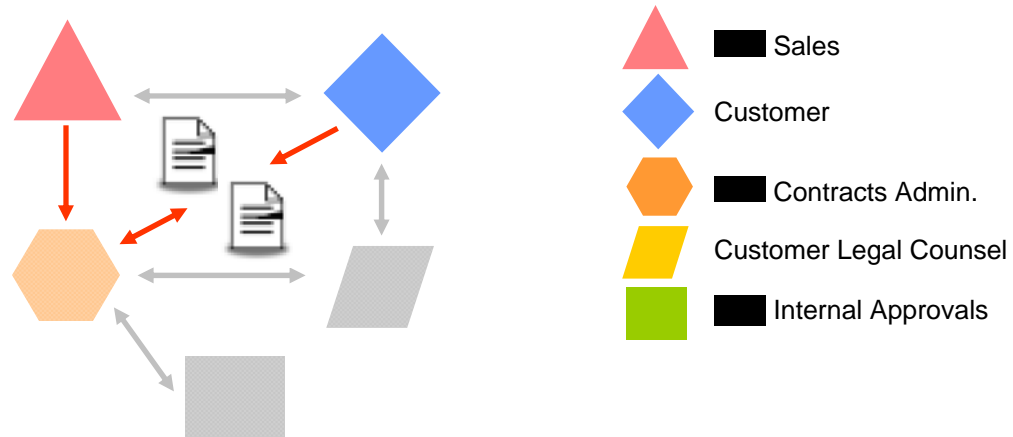
Not requiring payment until after providing log in information avoids susceptibility to question on grounds of adhesion, however, a finding of adhesion is more difficult where business parties are involved. Adhesion is imposition of terms and conditions by one party on another party without an opportunity to comprehend and assent to the terms. Also possible but unlikely is susceptibility of this model to novation by terms and conditions accompanying a customer purchase order because a mutually agreed contract with a non-integration clause is not established in a single document at a certain point in time.

The model also offers the advantage, similar to model 4) below, of directing the responsibility for accepting terms to an individual in a customer organization though sending email, which supports the legal doctrine of attribution, an important element of enforcing contracts.

Implementation: The quotation form will state that log in information will be provided and that the service account will be activated upon payment or that payment is required within a certain time frame after initial use of the service. The quotation form does not need to mention the contract terms explicitly, only that terms governing the service exist. The [REDACTED] License Agreement will be converted to an unmodifiable graphic format and placed in the body of the email containing log in information. A statement that "activation" of the service will constitute acceptance of the terms and conditions, or like wording, will be displayed prominently in the body of the email. The emailed terms will incorporate the paper quotation by reference, requiring added language to the existing paper contract text. The terms will also include a statement that they supercede purchase order terms and that the terms cannot be amended by purchase orders.

4) Finalize Sales Discussions, Post Order Form and ██████████ License Agreement as Click Wrap Contract on Unique Non-Public Site Page, Email Customer Notifying of Posting, and Process and Archive e-Contract (“e-Contract Model”)

Process Flow:



Estimated e-Contracting Development and Disruption Costs: Moderate to Significant

Fulfillment of Functional Requirements: This model is at this time the least preferable to ██████████ due to its Web development requirements and its change impact on the existing sales process.

Legal Enforceability: This contracting model follows the well established “Click ‘I Agree’” electronic contract model that is contemplated by US State and Federal electronic signature laws. It is analogous to electronic storefronts on the Web except that the electronic process is initiated later in the sales cycle. ██████████’s service is not sufficiently commoditized, and the service is too complex requiring explanation by Sales, to be sold entirely through an e-commerce engine.

The greatest challenge to the enforceability of e-Contracts is admission of them into evidence in courts of law. The US electronic contacting framework requires that customers are made to view some or all contract terms and affirmatively accept them as a technical prerequisite to continuing with an online process until completion. Above and beyond these minimal requirements, a competent e-Contracting system should record the date and time of acceptance, associate information about the online user with the acceptance event, archive the Web page displaying terms and conditions to document not only the content of the terms and conditions but how they were displayed, and follow documented operations procedures that adhere to recognized industry standards.

Implementation: Dedication of Web development personnel to an e-Contracting system development, implementation and testing project is required.

Survey

James River Consulting conducted a 4 hour research project to benchmark the suggested online contracting models above with the e-contracting processes currently employed by software-as-service (SaaS) and platform-as-a-service (PaaS) providers. The research did not follow any scientific survey methodology.

DreamFactory, an on demand suite of office applications that provides development capabilities, utilizes a "Click 'I Accept'" online contract and posts a copy of the online terms and conditions on its public Web site.

LongJump, an on demand business application development platform, includes a hyperlink to "Terms of Service" both on its free trial registration page and its account log in page. The Terms of Service expressly state that they are not a license but a services contract.

Rollbase, another suite of on demand business applications and development platform, includes a hyperlink on the free trial registration page to online terms entitled "User Agreement & Terms of Use" which are accepted by clicking a check box on the registration page. The terms of the agreement applies to both free trial and purchased subscriptions. The online agreement references a separate "Order Form" into which the online terms say they are incorporated. The Order Form is paper because, according to the terms, an exchange of faxed copies constitutes a binding contract.

Other voice on demand (VOD) platform providers do not appear to use any type of online contracting.

ExtendMedia, Endavo, IVT, Delve Networks, and Ooyala have no online terms and conditions for services. Onstream Media posts "Terms of Use" for its products and services on its corporate site without mention of an acceptance process.

Maven Networks was purchased by Yahoo and does not appear to conduct business as a separate entity.

Brightcove posts "General Terms and Conditions" on its corporate site which by the terms govern the "Service" and the "Website." Publishers are governed by the "Publisher Services Agreement," which can be viewed by signing up for a free trial and accepted by clicking a checkbox, and the "Acceptable Use Policy," which is accessed through a hyperlink in the General Terms and Conditions.

Multicast Media Technologies has a “policies & legal” hyperlink on the bottom navigation bar on their corporate site. Within the text of the policies and legal Web page is a non-active link to a “General Terms & Conditions of Service” PDF document posted on the site. According to its terms, the General Terms & Conditions in incorporated by reference into “Services Agreements” (probably the equivalent of [REDACTED] Order Forms) and otherwise take precedence over all other agreements and proposals entered into by the provider. There is no mention of a “Click ‘I Accept’” process for acceptance of the terms.

Ignite Technologies posts “Terms and Conditions” on a page on its corporate site that work as general terms for both use of the site and the company’s products and services. Vague reference is made to additional terms for products and services, which terms “may be posted from time to time.”

EdgeCast Networks, a CDN, posts an Acceptable Use Policy on its corporate site and has an online chat service for generating quotes.

Recommendations

Models 1) and 3) are the recommended models for [REDACTED], given the company’s operational and resource constraints. Model 4) is the most sound online contracting model for purposes of legal enforceability. Model 2) would require a complete redrafting of the current services agreement and a reconceptualization of the service as an on demand service and not as a professional service.