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**Digital Preservation for Timeless
Business Processes and Services**

Escrow services for long time access: emerging trends and issues

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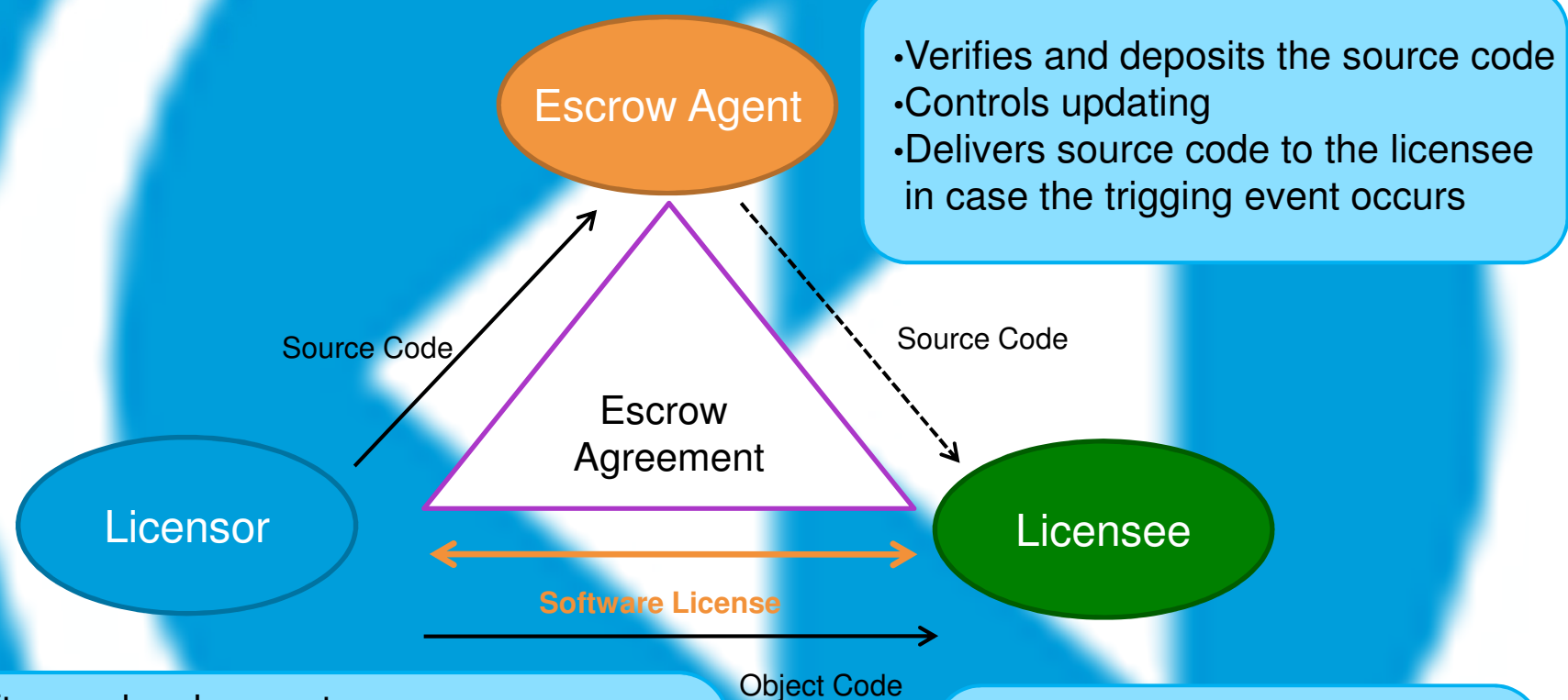
WHAT IS AN SOFTWARE ESCROW AGREEMENT?



An Escrow Agreement is a contract

Three-Party Contract	Two-Party Contract
Contracting Parties: <ul style="list-style-type: none">• Licensor• Escrow Agent• Licensee	Contracting Parties: <ul style="list-style-type: none">• Licensor• Escrow Agent
Escrow Agreement is negotiated between all parties	Terms of the Escrow Agreement are usually prepared by the Licensor
Terms are usually customized	Standard terms are used
All tree parties sign the contract	Licensor and Escrow Agent sign the agreement
	Software User sign the user enrolment schedule





- Verifies and deposits the source code
- Controls updating
- Delivers source code to the licensee in case the triggering event occurs

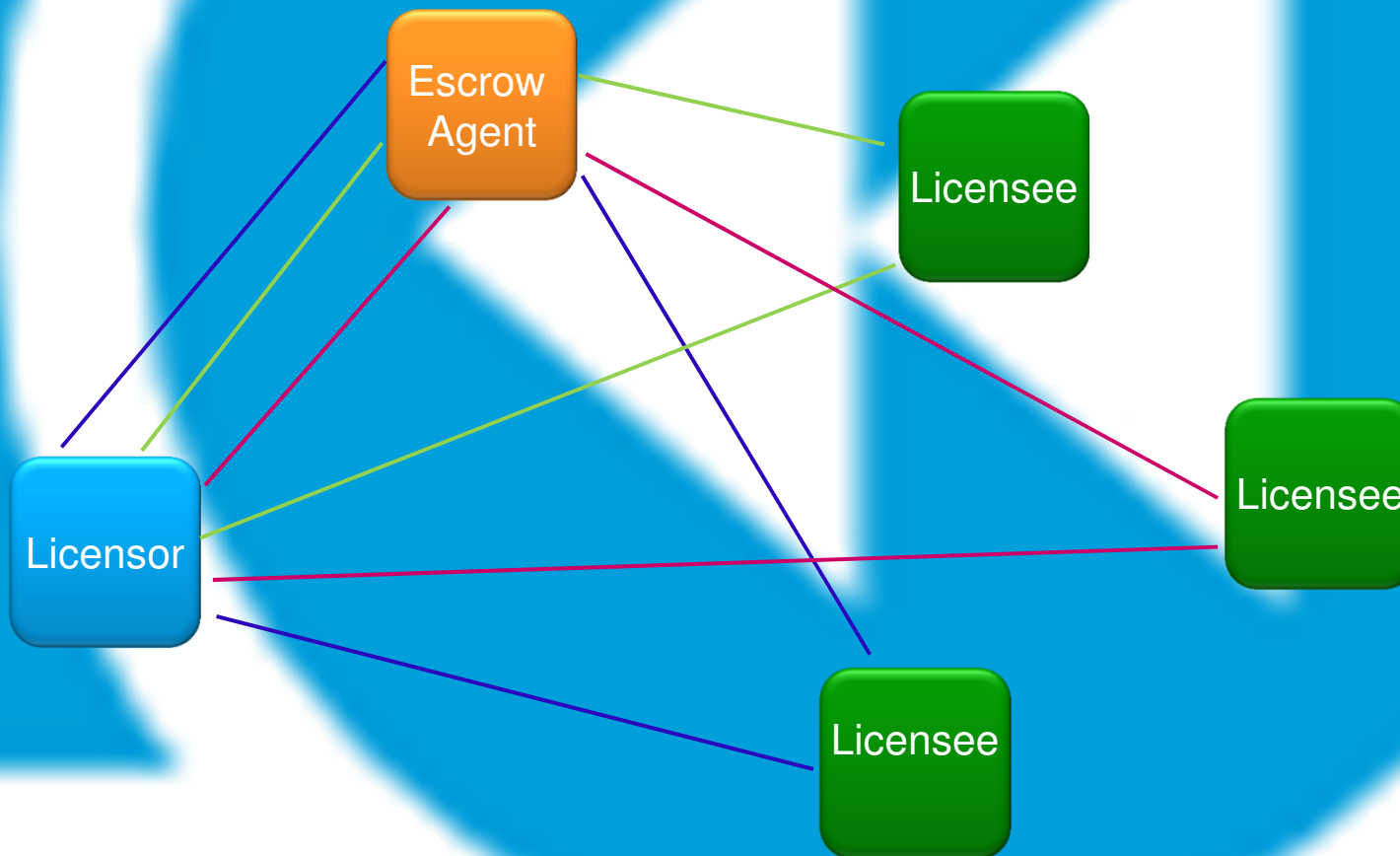
- Software development
- Delivers object code to the licensee
- Delivers source code to the Escrow Agent
- Obligation to deposit updates at the Escrow Agent

- Uses software
- Wants to secure investment
- receives, in case the triggering event occurs, the source code

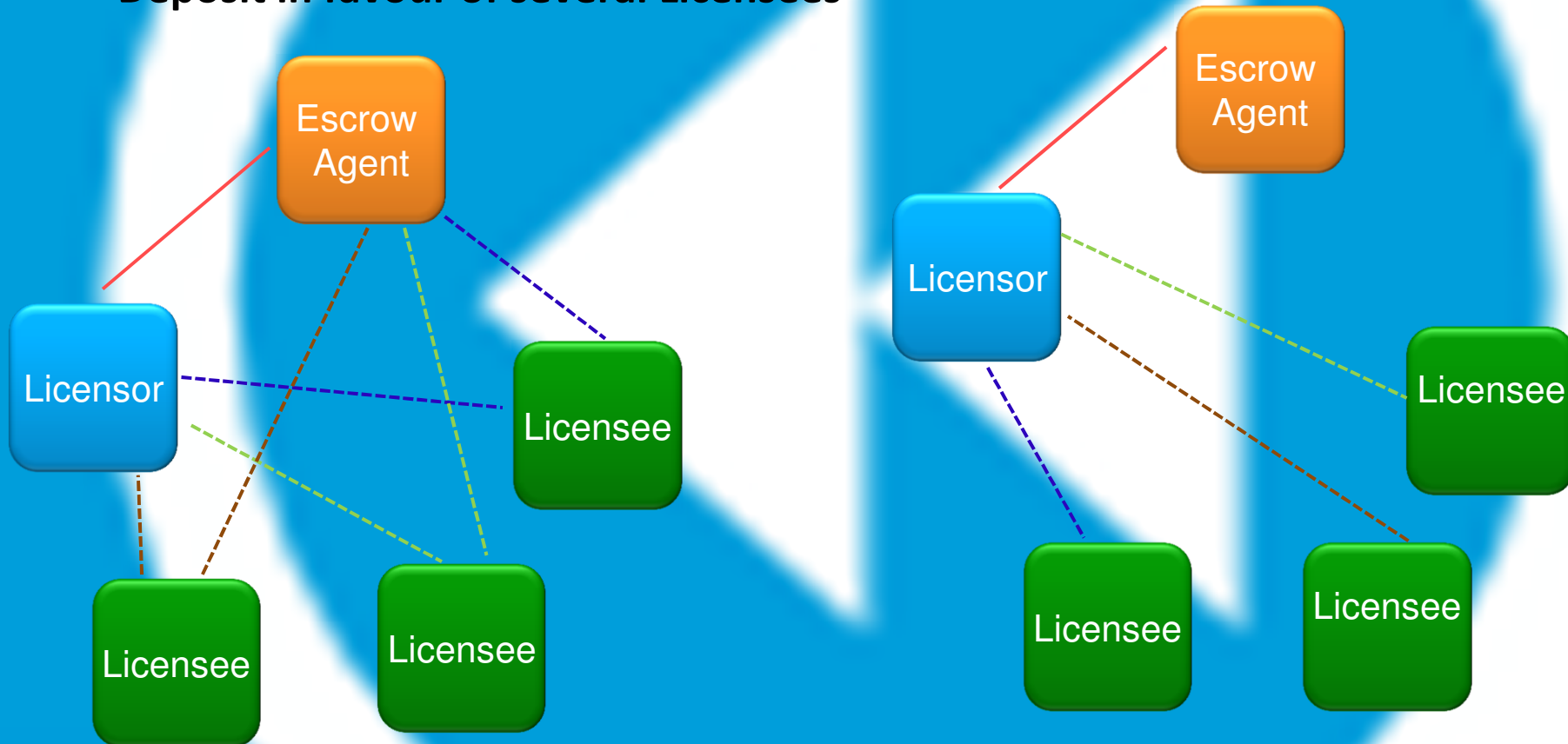
Deposit in favour of several Licensees



Deposit in favour of a determined number of Licensees



Deposit in favour of several Licensees



Joining by signing a three-partied contract

Joining by signing a two-partied contract

Reasons for a Software Escrow Agreement



Reasons for the Licensee

- Secure long time investments
- Risk management strategy
- Gets access to the deposit materials
- Licensor cannot remove deposit material
- Verification of the deposited materials

Reasons for the Licensor

- Prove independency of his development (IP-Rights)
- Confidence building measure
- Independent verification of deposited materials
- Helps to improve the quality of documents
- May be a back up in case of disaster



Risks to be covered



- Risk of Insolvency of the Licensor
- Liquidation or extinction due to the lack of funds
- No further development of the software
- Refusal or failure to fulfil the contractually established obligations
- IP rights assignment (if the new owner provides no escrow protection)

The Risk of Insolvency cannot totally be covered



Licenses for a determined period of time

- Treated like a leasing contract in Austria and Germany.
- Licenseses' obligation: periodical payment.
- Licensors' obligation: software maintenance obligation, eventually updating-obligations.

The Austrian and German Insolvency law establish that in case a **mutual contract** exists when the insolvency proceeding started, the **trustee in bankruptcy** has the **option** to fulfil the contract or to terminate it, if not **one** of the **contractual parties** has **fulfilled all the contractual obligations**. (A: § 21 IO, G: § 103 IO).

As the License contract is a contract for the performance of a **continuing obligation**, it is **not possible** that one party has fulfilled all contractual obligations.



The trustee in bankruptcy can terminate the license contract. The licensees' right to use the software expires.

When the License contract outlast, what effect has the insolvency to the Escrow Agreement?



Who is the owner of the deposit material?

If the Licensor is the owner



The trustee in bankruptcy will claim the handover of the deposit material from the Escrow Agent.



The Licensee has no possibility to get the deposit material.



If the Escrow Agent is the owner



The trustee in bankruptcy will claim the handover of the deposit material because although the Escrow Agent is the owner, economically the material is attributed to the Licensor (depending on the terms of the Escrow Agreement).



The Licensee has no possibility to get the deposit material.



If the Licensee is the owner



The trustee of bankruptcy has no possibility to claim the handover of the deposit material.



The Licensee gets the deposit material in case the triggering event occurs.



What other Escrow Agreements do exist?



Database Escrow

Is an Escrow Agreement where the database developer deposits the code that makes the computer database within the escrow agent.

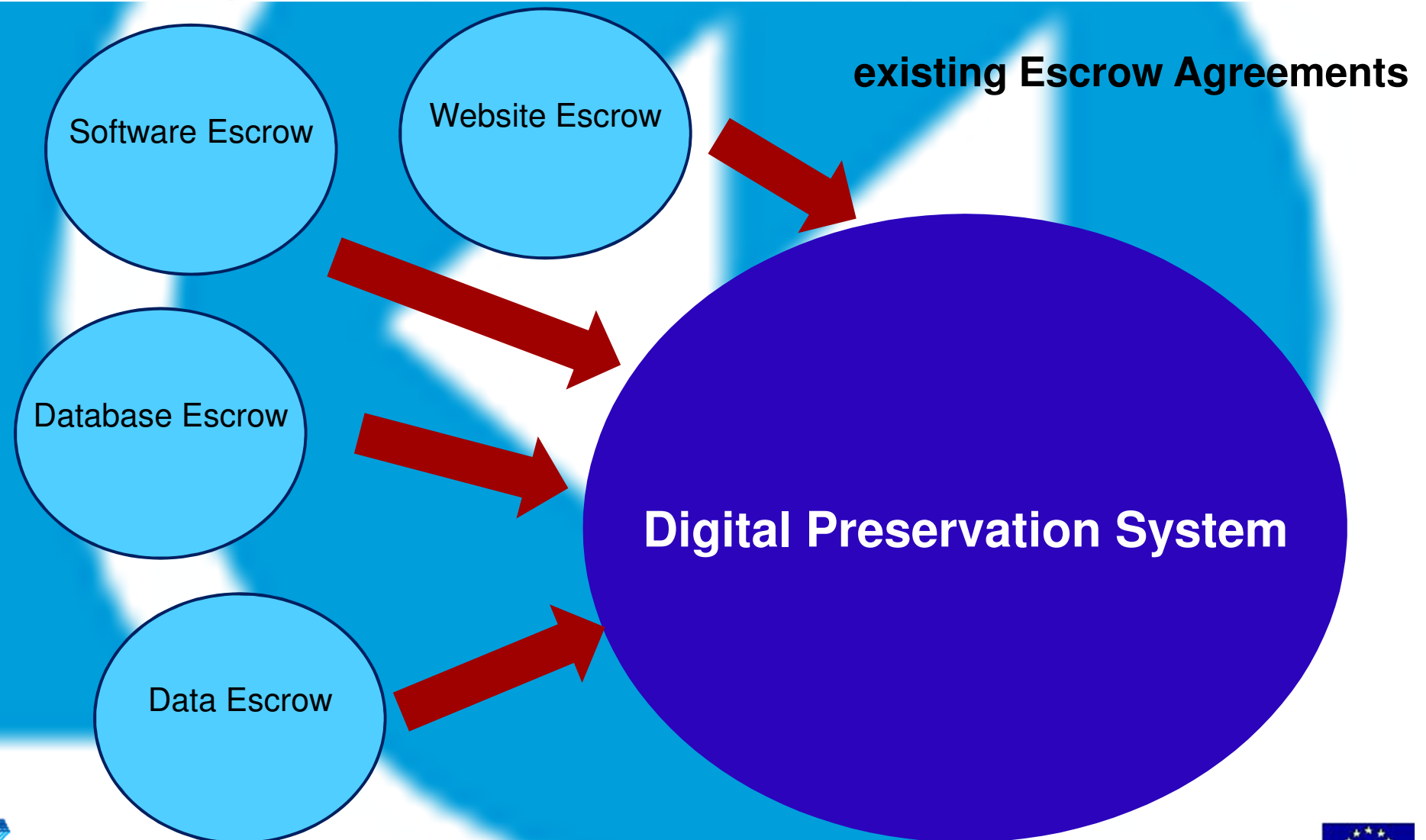
Data Escrow

In a Data Escrow one party agreed to deposit information at an Escrow Agent, pending the performance of an obligation by the other party. It was used in relation to databases, but is now used in the area of “cloud computing”.

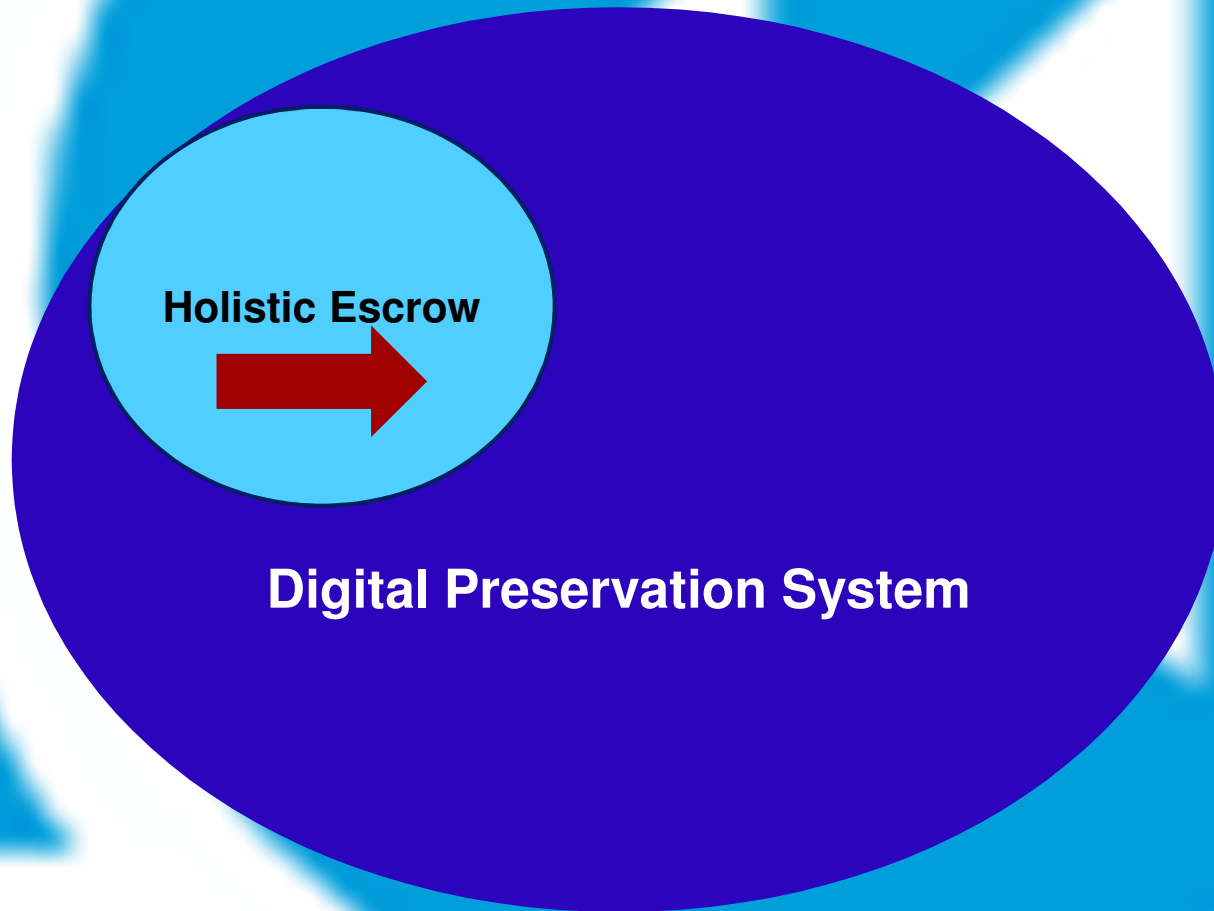
Website Escrow

The third party who is responsible for the website management deposits the code that constitutes the website at the Escrow Agent.

Escrow as Part of a Digital Preservation System?



Escrow as Part of a Digital Preservation System?



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Thank you for your attention!