Software as a Service Agreements

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Disclaimers

- We are not giving legal advice. Legal advice is fact driven and furnished to clients of the firm.
- We are providing general comments on the use of Software as as Service (SaaS) Agreements and common contractual provisions.
- These general comments may be helpful to you in identifying specific issues that you may want to discuss with your attorney and/or BD professionals and incorporate into the documents your business is using.
- Any sample provisions provided in this presentation are for illustrative purposes only. We make no representation as to the appropriateness of using these provisions for any specific company, transaction or agreement.

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Introduction

- Who are we?
- Issues in SaaS Agreements
  - Key Provisions/Protections
  - Licenses/Copyrights
  - Access to Data
  - Security and Privacy
  - Service Level Agreements
  - Payment and Billing

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Software License Background

- Software License: Licensor grants the Licensee the right to copy, reproduce, or otherwise use software in manner infringing on copyright
- Traditional Models:
  - Pen and Ink
  - Shrink-wrap
  - Click-wrap
  - Browse-wrap

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Software as a Service (SaaS)

- SaaS: A subset of cloud computing, where data is not just stored, but also processed, via a specific application in the cloud.
- Deployment Model: via the internet

SaaS Advantages

- Customer:
  - Service costs
  - Hardware costs
  - Ease of use
- Vendor:
  - Single version
  - Maintenance
  - IP Protection

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Disadvantages of SaaS

Licenses may be more appropriate if:

- Need for code customization
- Need for significant support/maintenance services
- Need for offline access
- Cloud security concerns

License Grant in SaaS Agreement

- School of thought that license grant is not necessary because no software is copied or stored on customer's computer
- However, a license is recommended because:
  - RAM downloads and plugins
  - Courts finding infringement from use of software
  - Customer protected in event of vendor bankruptcy

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Pricing

- **Two Pricing Models**:
  - Utility Model: charges for resources consumed
  - Subscription Model: set subscription fee for a particular amount of time (also based on number of users, storage limits, etc.)

Payment Structure

- Customer's Goals:
  - Motivate vendor's performance
  - Ease cash flow concerns and assist in operations and project management
  - Avoid obligation to pay despite failure to provide service

Payment Structure (cont.)

- Strategies: Customer seeks to include performance incentives/penalties
  - Milestone payments
  - Penalties for breach of SLA or implementation delays
  - Right to withhold payment for non-performance or dispute

Payment Structure (cont.)

- Milestone Payments: Appropriate for solutions requiring vendor implementation
  - Deadlines (not aspirational)
  - Penalty if not achieved
  - Customer benefit: defers payment obligations; incentivizes timely implementation

Contract Term

- Term: Typically 1 year contract terms
- Renewal: Typically renew pursuant to:
  - Evergreen: auto renewal unless Customer opts out
    - Risk of inadvertent renewal
  - Affirmative Renewal: Customer may affirmatively renew agreement
    - Risk of inadvertent termination

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Termination Rights

- Customer: Customer can typically terminate for:
  - Material breach
  - Serious service level failure
  - Repeated minor service level failures
  - Perhaps at will

Termination Rights (cont.)

- Vendor:
  - Significant material breach
  - Restricted termination right for customer's failure to pay (must show repeat failure)
  - Termination delayed until after adjudication
  - Greater harm to Customer

Post Termination Obligations

- Vendor:
  - Must provide exit assistance (subject to reasonable charge)
  - Assist in migration of data to Customer or new vendor

Contractual Protections – Customer

- Trial Period / Acceptance Testing
  - Acceptance process
- Data Protection / Ownership
- Limit subcontracting/assignment
- Service Levels

Contractual Protections – Vendor

- SaaS/Software Ownership
- Permitted Use
- No Modification
- No Copies
- No Assignment
- Permitted Users
- Virus Protection

Service Levels

- Basic definition: availability of service
  - What are the guarantees of availability?
- More usual approach: broader
  - Support
  - Security
  - Recovery
  - Termination

Service Levels

- What your agreement needs to do:
  - Define service levels
  - How are uptime and downtime defined and calculated?
  - Exclusions
  - Support/Operating Assistance
  - Remedies and cure periods – NOT TERMINATION
  - Reporting/Notice

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Service Levels

- Remedies/Credits
  - What is owed to customer if service levels not met?
  - Often: credit

Monthly Uptime Percentage	Service Credit
<99.9%	10%
<99%	25%

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Service Levels

- Exclusions
  - Scheduled Maintenance
  - Customer equipment malfunctions
  - Customer changes to software
  - Any cause unrelated to software or service provided by Provider

Service Levels

- Sample Provisions - Uptime

  "Uptime" shall mean the total minutes in the reporting month that the Services were actually available to Authorized Users for normal use.

Service Levels

- Sample Provisions – Reporting (Customer-friendly)

  On a **monthly** basis, in arrears and no later than the fifteenth (15th) calendar day of the subsequent month following the reporting month, Vendor shall provide reports to Customer describing the performance of the Services and of Vendor **as compared to the Service Level Standards**.

SOURCE: Stephen Guth, "Master Software As A Service Agreement Contract Template"

Service Levels

The Services shall be available **99.9%**, **measured monthly (*OR: each 30 day period*)**, **excluding** holidays and weekends and **scheduled maintenance**. If Customer requests maintenance during these hours, any uptime or downtime calculation will exclude periods affected by such maintenance. Further, any downtime resulting from outages of third party connections or utilities or other reasons beyond Vendor's control will also be excluded from any such calculation. **Customer's sole and exclusive remedy, and Vendor's entire liability**, in connection with Service availability shall be that for each period of downtime lasting longer than **one hour**, Vendor will credit Customer 5% of Service fees for each period of 30 or more consecutive minutes of downtime; provided that no more than one such credit will accrue per day. Downtime shall begin to accrue as soon as Customer (with notice to Vendor) recognizes that downtime is taking place, and continues until the availability of the Services is restored. In order to receive downtime credit, **Customer must notify Vendor in writing within 24 hours from the time of downtime**, and failure to provide such notice will forfeit the right to receive downtime credit. Such credits **may not be redeemed for cash** and shall not be cumulative beyond a total of credits for one (1) week of Service Fees in any one (1) calendar month in any event. **Vendor will only apply a credit to the month in which the incident occurred**.

SOURCE: ycombinator

Service Levels

- Sample Provisions – Scheduled Maintenance

  "Scheduled Service Downtime" is any interruption of the Service during which Vendor is performing routine maintenance on its servers and/or the Services in order to guarantee optimal performance of the servers and Services.

Service Levels

- Sample Provisions – Notice of Maintenance

  Vendor shall provide Customer with forty-eight (48) hours advance written notice (by electronic mail) of Scheduled Service Downtime. Vendor shall use its best efforts to perform the Scheduled Service Downtime during offpeak hours.

- Customer will want the notice period as long as possible – weeks or a full month.

Support

- What level of customer support or service will you provide?
- Key issues for agreements:
  - Telephone/chat support?
  - In person support, training or consulting?
  - Ongoing support
  - Severity Levels

Access and Ownership

- What your agreement needs to do:
  - Identify what data is on your cloud and who owns it
  - Vendor's pre-existing rights and products
  - Define number of users - who has access?
  - Backup and Recovery
  - Process in event of loss (who pays? And when?)
  - Transfer on termination

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Access and Ownership

As a part of the Services, Vendor is responsible for maintaining a backup of Subscriber Data and for an orderly and timely recovery of such data in the event that the Services may be interrupted. Unless otherwise described in an Exhibit to this Agreement, Vendor shall maintain a **contemporaneous backup** of Subscriber Data that can be recovered within two (2) hours at any point in time. Additionally, Vendor **shall store a backup of Subscriber Data in an off-site "hardened" facility no less than daily, maintaining the security of Subscriber Data**, the security requirements of which are further described herein. Any backups of Subscriber Data shall not be considered in calculating **storage** used by Subscriber.

SOURCE: Stephen Guth, "Master Software As A Service Agreement Contract Template"

Access and Ownership

Customer **retains** all of its right, title and interest (including copyright and **other proprietary** or intellectual property rights) in the Customer Content and all legally protectable elements, derivative works, modifications and enhancements to it. Customer hereby **grants** to Vendor a limited, revocable, non-exclusive, non-transferable right and license during the term of this Agreement to use the Customer Content only as necessary to perform the Services.

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Data Security and Privacy

- What your agreement needs to do:
  - Identify the type of data being stored in cloud
  - Identify laws and regulations that impose obligations on protection, disclosure and/or export of data
  - Cites to policies and practices to ensure privacy and security of data and requires adherence to them

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Data Security and Privacy

- Key Provisions:
  - Confidentiality/Non-Disclosure
  - Security
  - Privacy and Security Audits (?)

Data Security and Privacy

- Confidentiality/Non-Disclosure
  - Mutual
  - Should protect customer data from improper disclosure
  - Circumstances allowing disclosure
  - Service provider often agrees to ensure that its employees and contractors agree to abide confidentiality and non-disclosure provisions
  - Must return or destroy upon termination

Data Security and Privacy

Each Party agrees not to disclose the other's Confidential Information to any third person **except as follows**: (i) to the Party's respective service providers, agents and representatives, provided that such service providers, agents or representatives agree to confidentiality measures that are at least as stringent as those stated in this MSA, (ii) to law enforcement or government agency if requested, or if either of Party reasonably believes that the other's conduct may violate applicable criminal law, (iii) as required by law, or (iv) in response to a subpoena or other compulsory legal process, provided that the party provide the other with written notice at least seven days prior to disclosing Confidential Information under this subsection (or prompt notice in advance of disclosure, if seven days advance notice is not reasonably feasible), unless the law forbids such notice.

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Data Security and Privacy

- Security
  - What precautions are you taking to ensure security of customer's data?
  - Applicable law or standards (EU, PCI, HIPAA, etc)
  - Process on breach(es) of security
  - Audits?

Data Security and Privacy

Vendor shall **use commercially reasonable efforts and industry accepted methods** to ensure the reliability and security of its Services, but **Vendor** is not responsible for unauthorized access to Customer's data or the unauthorized use of the Services. Customer is solely responsible for the use of the Services by any employee of the Customer, any person to whom Customer has given access to the Services, and any person who gains access to Customer's data or the Services as a result of **Customer's failure to use reasonable security precautions**, even if Customer did not authorize such use.

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Data Security and Privacy

In the event of **any** act, error or omission, negligence, misconduct, or breach that compromises or is suspected to **compromise the security, confidentiality, or integrity of Subscriber Data or the physical, technical, administrative, or organizational safeguards** put in place by Vendor that relate to the protection of the security, confidentiality, or integrity of Subscriber Data, Vendor shall, as applicable: **(a) notify Subscriber** as soon as practicable but no later than twenty-four (24) hours of becoming aware of such occurrence; **(b) cooperate with Subscriber** in investigating the occurrence, including making available all relevant records, logs, files, data reporting, and other materials required to comply with applicable law or as otherwise required by Subscriber; . . .

SOURCE: Stephen Guth, "Master Software As A Service Agreement Contract Template"

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Data Security and Privacy

- Sample Provision - Vendor Audit

  No less than annually, Vendor shall conduct a comprehensive independent third-party audit of its data privacy and information security program and provide such audit findings to Subscriber.

- (VERY Customer-friendly)
- Corresponding provision to allow Customer to audit?

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Vendor Warranties

- SaaS Performance
- IP Infringement
- Ancillary Services (if applicable)
- Legal Compliance (necessary)
- Virus Protection
- Offshoring of Data (if a concern)

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Warranty Disclaimer

- Vendor will seek to disclaim all implied warranties and remedies

Warranty Exclusions

Vendor will seek to exclude from warranty coverage problems caused by:

- Equipment, software or services of other party
- Virus/harmful code introduced by third party
- Power/infrastructure failures or interruption of service
- Data from third party

Liability Provisions

Agreement must address liability and remedies relating to:

- Confidentiality, privacy, security obligations
- Service levels
- Indemnification
- Limitations and exclusions of liability
- Insurance obligations of parties

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Indemnification

- Purpose:
  - Protect against liability for harm caused to third parties
  - Provide remedy for loss incurred by Customer or Vendor as well (another remedy for damages suffered)?

Indemnification (cont.)

- Typical language
  - *Defend, hold harmless, and indemnify*
  - *Any and all claims, actions, damages, judgments, awards, settlements, losses, liabilities, costs, expenses*
  - Include attorney's fees and costs of litigation/ arbitration

Indemnification for Breach

- confidentiality, privacy, data security
  - necessary
- Warranties
- may result in consequential damages
- infringement of IP rights
- Damages to property or persons
- Negligence or willful misconduct
- Performance
  - Maybe not appropriate if SLA sets sole remedies for performance

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Indemnification – Defense Costs

- Necessary: in addition to losses/liabilities for claims, must cover costs of defense
- Assume Defense: obligation should begin with assertion of claim
  - Indemnifying party will reasonably insist on control of defense

Indemnification

- Limitation of Liability: Agreement must exempt indemnification provisions (especially if "true" indemnification for third party claims) from any limitation on liability

Remedies

- Vendor Seeks to:
  - Impose exclusive remedies (as stated in agreement)
  - Disclaim responsibility for breaches/interruptions that it cannot reproduce or verify
  - Exclusions on liability provisions
  - Limitation of liability provisions

Types of Damages

- Direct Damages: loss resulting directly from breach
- Consequential Damages: indirectly caused by breach (e.g., lost profits)
- Punitive Damages: in excess of loss

Limitation of Liability

- Limit types of damages
  - Consequential
  - Punitive
- Limit amount of damages
  - Specific dollar amount
  - Multiple of contract price or receipts

Limitation of Liability – Appropriate Exclusions

- Confidentiality
- IP Infringement
- Indemnification
- Gross Negligence or willful misconduct

Why an attorney?

- You don't remove your own appendix
- Get your form documents in place
- Business Partner/Advisor
- Identify areas of potential risk and means of mitigation.
- Ensure that agreements address your business and legal concerns.

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Free, Form Agreements

- There are several free, form agreements out there online. **BEWARE**!
- Some are better than others. None are tailored to your company, product or market.
- Nor do any account for specific issues of risk or functionality that you may face.
- We recommend consulting with an experienced attorney before adopting any SaaS agreement for your company or agreeing to sign any SaaS agreement with another party.

Which attorney?

- You hire a lawyer, not a firm
- Referrals from trusted colleagues, contacts
- Trust, Expertise, Rapport
- Price and Value
- 3rd Party Ratings and Validation (sometimes)

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- 23 attorneys
- Fairfax, Leesburg,
- Full service civil practice.
- Represent companies at all stages of life cycle.
- Experience in general counsel services, full range of commercial agreement, government contracts, IP protection and transactions, large civil litigation practice.
- Fee structure.

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QUESTIONS?

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