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BSD

SaaS

Navigating the Alphabet Soup of Software Licensing

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OSS

IaaS

GPL

GNU

PaaS

IoT

Agenda

- Generally Applicable Software and Service "Licensing" Considerations
- Cloud Computing Considerations
- Open Source Considerations
- Open Source as it Relates to IoT

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GENERAL ”LICENSING” CONSIDERATIONS

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Variations of Software Licenses

- On-Premise (vs. Hosted / Cloud)
- Shrink/Click-Wrap (vs. Negotiated)
  - Generally not negotiated, but enforceable
  - Superseded by negotiated license
  - Linked terms on webpages can change
- Source Code (vs. Object Code)
  - Confidentiality provisions
  - Limits on modification / derivative works
  - Escrow
  - Prohibit reverse engineering (when object code)

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Variations of Software Licenses

- User Type
  - Named user or designated seats
  - Concurrent users, may allow seat-for-seat exchange
  - Specific machines or number of CPUs
    - Virtualization issues
  - Enterprise-wide or site-wide
  - Allow bots?

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License Grant

- Conveys certain intellectual property rights in the software, *e.g.*, use, copy, prepare derivative works
- SaaS often provides "right to use" without license language
- Who is "Licensee"?
  - Affiliates / subsidiaries
    - Control: >50% ownership or voting control
  - Contractors and consultants
  - Third-party service providers
  - Bots?
- Sublicensable?
- Define "Licensed Software" or "Service" (in SaaS context)

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Scope Restrictions

- Permitted Fields
  - Commercial vs. non-commercial
  - Internal use restriction
  - Often prohibits service bureau or third-party data processing
- Permitted Business Volumes
  - Tiers
- Permitted Backups
  - Deletion upon termination

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License Term

- Perpetual vs. Defined Period
- Renewals
  - Automatic vs. negotiated
- Upon Termination
  - End use
  - Return, destroy copies, or end access
  - Certification by officer?

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Functional Specifications / Documentation

- Detailed
  - What software (or service) will and will not do
  - User interfaces, hardware interfaces, communications, systems, memory, operations, scalability, etc.
  - Watch for words that diminish accountability
    - “will attempt to …”
    - “within industry standards”
    - “As Is”

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Maintenance & Support

- Licensor provides patches, fixes, and minor upgrades
- Address defects, including security flaws
- Often fee-based with auto-renewal
- Which versions will be supported?
- How long will old versions be supported?
- Licensee modifications typically not covered
- Up times, response times, SLAs, mission critical

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Representations & Warranties

- Substantial conformance with specifications (not Licensee needs)
- Free of material defects, viruses, trojan horses, malware, back doors, and disabling elements
- Does not infringe any third-party IP rights (uncommon)
- Documentation is complete and suitable to deploy and operate the software
- Compliance with open source licenses
- Licensor's title to software and right to grant the license (uncommon)

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Risk Allocation

- Third-party IP infringement claims
- Licensor (service provider) options
  - Defend, indemnify, and/or hold harmless against claim
  - Acquire necessary rights for licensee to avoid the claim
  - Modify / replace software with non-infringing software
  - Terminate?
- Exclude infringement claims to the extent caused by:
  - Licensee's modification of software (not contemplated)
  - Use of software with unauthorized software or systems (not contemplated)
  - Use in violation of the license
- Unlimited or separate cap for IP claims
- Disclaimers & Limitations
  - Typical contractual exclusions / limitations on damages
  - Disclaim implied warranties and error-free operation

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Data Rights

- Analytics have become more important
  - Is Licensor allowed to use Licensee's data, even if only in aggregated form?
  - Define aggregation standard in accordance with applicable law (*e.g.*, GDPR vs. CCPA)
  - Restrict "sale" of aggregated data for financial or other non-monetary consideration

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Audit Rights

- Licensor often seek to inspect and review the Licensee's activities to ensure compliance and possibly extract higher payments
- Audits can be disruptive
- Legal should get involved early to define the scope and consequences
- Who performs? Licensor or third party?
- Confidentiality agreements?
- Risks to Licensee's systems – will Licensor indemnify if audit causes a disruption?
- Frequency?
- Rates applicable to true-ups

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CLOUD COMPUTING CONSIDERATIONS

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Terminology

- X as a Service (XaaS) Terminology
  - Software as a Service (SaaS) – cloud software application
  - Platform as a Service (PaaS) – cloud platform (operating system and hardware)
  - Infrastructure as a Service (IaaS) – cloud infrastructure (virtualized hardware)

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Due Diligence and Transition

- Functional solution acceptance occurs when the contract is signed, not following transition acceptance
- Misalignment of functionality to customer business processes = customer business process re-engineering (not termination or vendor remediation)
- Transition acceptance, if any, is really limited to implementation and configuration and, not proof of solution
- Responsibility for data conversion needs to be clearly specified

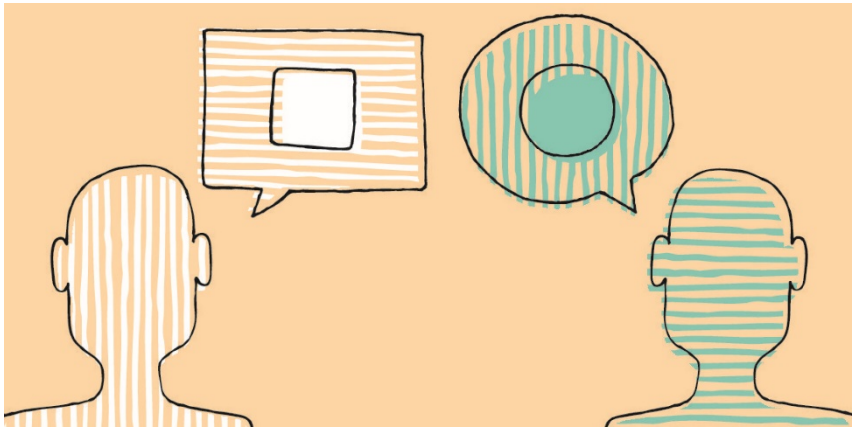


Price and Term

- Natural tension between price and term
  - Termination fees are typically higher in the SaaS / Cloud context than in traditional services arrangements
  - Creates tension between reducing price by extending term and diminishing customer flexibility and leverage by losing meaningful ability to terminate for convenience
  - Important consideration for customers, especially where high levels of process re-engineering are required to leverage vendor technology
- Duration of pricing commitments
  - For the initial term? For some number of renewal terms?
  - Is incremental pricing committed for the same period? A shorter period to incentivize increased consumption?
  - Pro's and Con's of Auto-Renewal

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Scope of Use / Changes in Scope

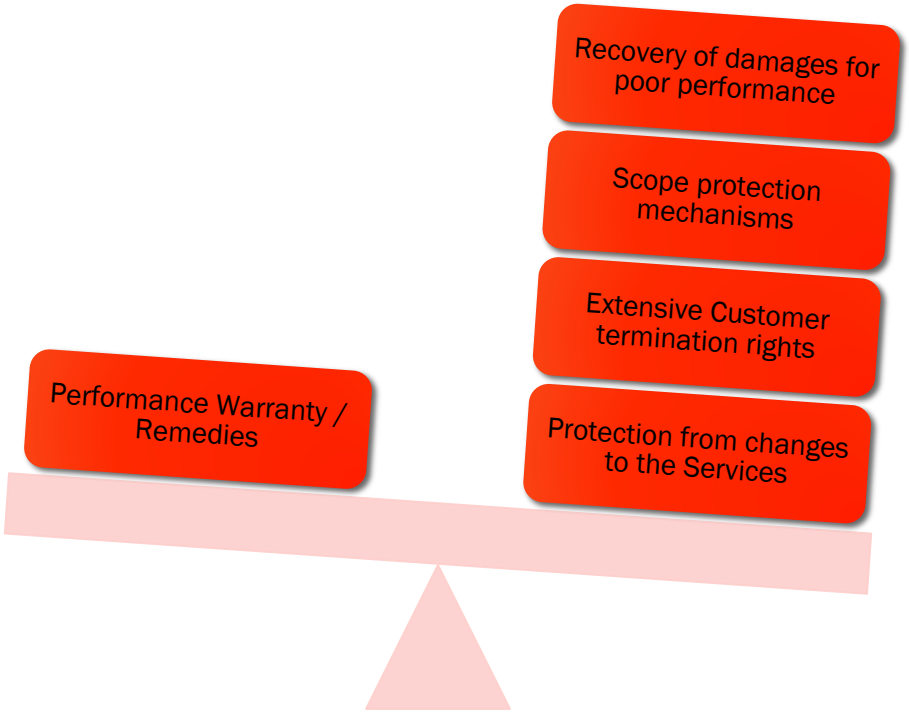


- Can additional quantities of users, capacity or other license metrics be purchased for a predictable (discounted) price?

The Performance Warranty Tradeoff

SaaS/Cloud

Traditional Model



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Performance Warranty Considerations

- A warranty that the services will perform *[substantially] [in all material respects]* in accordance with the services specifications and vendor policies
- A warranty that changes made by the vendor to the services and its policies will not
  - *Customer*: Have *[an adverse effect] [a material adverse effect]* on Customer's business, its receipt and use of the services and/or its cost to receive and/or use the services
  - *Supplier*: *[Materially diminish or degrade] [Have a material and adverse effect on]* the services
- Will the services specifications and policies be memorialized in the contract?

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Performance Warranty Remedies

- The right to terminate the arrangement?
- A refund of amounts paid for services following the date of termination?
- Exclusive remedy?

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SLAs and Remedies

- Vendor SLA targets are typically not negotiable
- Coverage for uptime, resolution and response time vary with negotiation around
  - “Up” or “available” vs. “functional”
  - Response vs. resolution
- Remedies can be negotiable
  - Increased credits (rare)
  - Right to terminate for repeated SLA failures (more common)
- Credits as sole and exclusive remedy
  - Typically non-negotiable
  - *BUT*: Consider whether exclusivity extends to termination rights and warranty remedies
- Whether reporting and credits are proactive vs. reactive to customer-reported tickets / claims is a negotiable item



Risk Allocation

- If data security is an issue, tension will exist relative to
  - Recovery of foreseeable types of damages for data breaches
    - Cost of investigation and remediation
    - Notice to *[potentially]* affected data subjects vs. notice "required by law"
    - Credit monitoring and fraud insurance for affected data subjects
    - Response to inquiries from data subjects
    - Speculative damages (e.g., lost profits, reputational harm, etc.) likely off the table
  - Separate or "super" cap for data breaches and vendor cyber liability coverage
- Exclusion from contractual limitations of liability for fraud, willful misconduct, gross negligence frequently negotiated
- Customers can seek to leverage insurance to mitigate small provider risk

Exit Rights

- Many vendors limit post-term use to making data available for download for some period
- Consider whether continued use of services is also required and for what period
- Data format / export requirements need to be discussed and agreed
- Rights of use for third party providers if predictable need for replacement vendor to handle deconversion

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OPEN SOURCE CONSIDERATIONS

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OSS: Open Source Software

- Software released under an open source license, which grants a copyright license to the source code subject to certain license restrictions
- Source code is made available to inspect, modify, enhance, and redistribute
- Often, but not always, developed through public collaboration
- Often AS IS without support or warranty, but sometimes can pay for supported versions
- Not necessarily less secure than proprietary software

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OSS Licenses

- Examples:
  - GNU GPL
  - GNU AGPL
  - GNU LGPL
  - CDDL
  - EPL
  - MPL
  - Apache 2.0
  - BSD
  - MIT















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Copyleft OSS licenses



- Copyleft provisions: any modifications and/or extensions of the OSS that get distributed are subject to the OSS license
- “Viral” – applies OSS license to linked proprietary code, requiring distribution of the source code
- GPL v2 and GPL v3 have strong copyleft provisions, but SaaS not considered distribution
- Affero GPL (AGPL) extends copyleft provisions to SaaS software hosting
- LGPL allows dynamic linking to proprietary code without infecting the proprietary code

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OSS in Proprietary Code

- 95% of OSS audits (*e.g.*, Black Duck) find unknown OSS in the proprietary code
- Even permissive OSS licenses often include notice requirements
- Developing an open source policy can educate software developers to appropriately use OSS and reduce risks of copyleft issues

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OPEN SOURCE AS IT RELATES TO IOT

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IoT: Internet of Things

- Devices connected to the Internet
- Examples: Smart watches, streaming devices, voice controllers, smart doorbell cameras, smart locks, smart light switches, smart thermostats











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IoT and OSS

- Distribution of IoT device with OSS triggers distribution provisions under applicable copyleft OSS licenses
- IoT device code is often monolithic
  - Viral copyleft issues
  - Compatibility of licenses in the software architecture
- Notice requirements in OSS licenses
  - IoT device may not have user interface to display legal notice
- Anti-Tivoization in GPL v3 licenses

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