Revisiting Your SaaS Company's Key Customer Contracts in a Sluggish Economy

It has become increasingly clear over the past few months that businesses are in a cost-cutting mode, as the economy has become more and more sluggish. While your software company is likely focusing on its own cost-cutting strategy, have you stopped to consider whether your most significant customers might be doing the same? Is it possible those key customers may be focusing on how to cut the cost of their contract with your business? Could they be talking to one of your competitors? Could they be building their own proprietary product to replace the cost of your product?

A sluggish economy is the perfect occasion to audit and review your key customer contracts for weaknesses that might allow your customer to walk out the door as a cost-cutting move.

You might wonder why you should spend any resources on contracts when business is already sluggish: isn't this exactly the time when you should be reducing legal expenses, along with all your other cost-cutting efforts?

Well, no, actually. While, it has been my experience that this is in fact what most software companies do; however, I have been practicing now for 26 years and had the occasion to see a lot of sluggish economies, and given that experience, I would argue that it is exactly the wrong move to make in a sluggish economy. Why would I say this?

Imagine this: it is two months in the future. Over the last 30 days, all of your key customers have stopped paying on their contracts with you and have advised you that they are

suspending performance. You are confident that they are just cutting costs and have no grounds to terminate the relationship. You pull out the executed contracts and send them to your software attorney to review for the first time, confident that he or she will confirm your assessment. However, instead of confirming your position, your software attorney tells that the signed contracts were poorly drafted and that the customers may have had valid grounds to terminate.

In this scenario, if you had known there was something you could do to interrupt this chain of events and shore up the customer relationships before they collapsed, would it have been worthwhile to do it? Presumably, yes. If the customers were your truly your key customers, you probably had a lot riding on the continuation of those relationships.

If the fact pattern seems far-fetched, I've actually seen it play out many times during sluggish economies. The larger and more expensive the contract, the more at risk it is for termination in a sluggish economy. If you are confident it won't happen to your company, consider what kind of representation you had for the drafting and negotiation of that contract? Did you work with experienced software counsel who had advised other software and SaaS companies through multiple bad economies, and involve that counsel at every stage of the negotiation and drafting process and then implement all of his or her recommendations? Or did you cut a few corners in getting your deal done? Perhaps handled a lot of the negotiation and drafting without counsel, or relied on less experienced counsel that was more affordable? If you are like many software companies, you probably cut at least a few corners—perhaps you even cut a lot of corners—and the contracts executed by you and your key customers are full of holes.

What would truly be the impact to your software company of a complete loss of your three largest customers? Your six

largest customers? Your ten largest customers? How fast could you really recover in a sluggish economy?

If the prospect of this kind of business loss fills you with terror, then this is precisely why you should revisit your significant contracts now.

So, what is it that you can do to shore up your key client relationships now? Well, skilled software counsel can evaluate those contracts and identify the potential liabilities and then work with you to develop a strategy to renegotiate them. By taking the opportunity to renegotiate a weak contract before the contract terminates, you can extend the term of the relationship, fix the legal problems in the contract, and keep the customer happy in the first place by giving the customer a concession that the customer really wants in exchange for the longer relationship term that carries the relationship through the down economy.

Isn’t this a better outcome than losing a key customer altogether over a vulnerability in your contract that is exploited in a cost-cutting effort?

If your software company has not had its key software contracts evaluated recently by an experienced software lawyer, schedule a consultation today at https://calendly.com/prinzlawoffice. Let’s identify the vulnerabilities in your key contracts before a key customer exploits the vulnerabilities as a cost-cutting move and resolve potential problems in the relationships before they arise and become the reason you lose those relationships.

Capitalizing on SaaS Sales Opportunities During the Coronavirus Crisis Without Creating New Legal Risks

Although many businesses are concerned about the potential economic fallout of recent shelter-in-place orders in Silicon Valley as well as more limited office and business closings across the United States, the coronavirus crisis is presenting a unique sales opportunity to savvy SaaS companies, given the fact that much of the United States workforce has suddenly been forced to work remotely.

How can your company capitalize on the sales opportunities now presented by the increased demand for SaaS and other tech solutions while avoiding the legal pitfalls that can arise from economic uncertainty?

First and foremost, increased customer demand presents an opportunity to improve poorly drafted contracts, which can be more easily renegotiated in conjunction with a customer-initiated request. If your customer is looking to add user access or other services as a result of the new focus on a remote workforce, then you may want to update your customer contract at the same time, particularly given all the predictions of a post-coronavirus recession. It would be in your company's best interests to have a strong contract in place with your customers in the event of any recession, since poor economic conditions tend to result in contract cancellations by customers. If you have never had your customer contract reviewed by a lawyer with SaaS contract expertise, now might be a perfect time to do so in conjunction with meeting any new customer demand, so that your business is better prepared to weather an economic downturn and customers

looking for loopholes to walk away from your agreement.

Second, if your customer is looking to add authorized users at new locations, ensure that you are addressing the new sales by properly amending your existing contract as contemplated by the SaaS lawyer who originally drafted the contract. More often than not, I see companies making huge mistakes with subsequent SaaS sales, where they execute amendments that incorrectly override key terms in their original contracts or add significant legal loopholes into the original contracts. Obviously a poorly drafted amendment can completely undo any investment you made in a well written original agreement, and can create legal disputes where you previously had none. So, you definitely want to exercise a high degree of care to ensure that any new sales are appropriately addressed by a correctly drafted amendment.

Additionally, you need to consider whether any implementation services will be required to make these additions, whether the possibility of future implementations was contemplated by the original contract, and how the delivery of implementation services might be impacted as a result of the coronavirus pandemic or any economic conditions that might arise as a result of the pandemic. In the prior recession, implementation was one of the most commonly disputed issues between software companies and customers.

Third, if your customer has gone entirely remote, you need to anticipate a greater demand for various types of support services, which also creates new customer sales opportunities. For example, perhaps instead of one-size-fits-all free standard support, there may now be a customer demand for multiple levels of paid, enhanced support services. However, if your company suddenly decides to completely revamp support services in response to new customer demand, you definitely need to make sure such changes have been contemplated in your original contract, and to the extent they have not, make sure the contract again is appropriately amended to address a

complete revamp of your support offering.

Fourth, you may find that your customer now has new custom functionality or feature development needs in response to changing service demands by the customer's own client base, which is similarly responding and trying to adapt to the same crisis. If you are fortunate enough to have this type of opportunity arise, then you need to ensure that ownership of custom functionality features was sufficiently contemplated by the original contract with your customer, not only with respect to whether or not those features can subsequently be made available to your entire customer base but also with respect to the specific terms for costs, timetable, and specifications for development. To the extent these issues are not fully addressed by your original contract, you will want to make sure they are properly addressed by separate agreement. In light of the current crisis, you will want to ensure that any potential delays that might arise due to the coronavirus crisis have been properly addressed in the terms.

Fifth, the new circumstances may present new customer demands for live and recorded remote training that did not exist previously, which may be able to be sold at different price-points. However, again, if such an opportunity for sales presents itself, you should ensure that your original contract contemplated the possibility of different levels of training for a fee being purchased by the customer. If not, then you will want to ensure that your agreement is properly amended to reflect the new training service offerings. And of course, if your customer is seeking training to be provided by a particular instructor, you will want to ensure that the possibility of that instructor falling seriously ill to coronavirus has been contemplated and any risks properly addressed.

Sixth, the new remote circumstances may present customer demands for enhanced levels of service in terms of available bandwidth and other service enhancements, which you also may

be able to make available to customers at different price-points. Should this arise, you will again need to ensure that the possibility of different levels of service was contemplated by the original agreement, and if not, appropriately amend the agreement to address this possibility.

Finally, the new remote circumstances may present opportunities to sell new professional services to your customers that you had not previously considered. Should an opportunity of this nature arise, then you will need to ensure that the possibility of future professional services was contemplated by the original agreement, and if not appropriately amend the agreement to address this possibility and then potentially draft a separate professional service agreement that addresses the contemplated services required by the customer.

All in all, the coronavirus crisis is presenting a unique business opportunity for cloud-based SaaS providers to deliver more services to a workforce suddenly forced to work remotely. However, to capitalize on the opportunity to meet the demands of a newly remote workforce, SaaS companies will need to apply a high level of care to the technical drafting of their contracts. Otherwise, to the extent they cut corners, they are likely to pay the price by attracting customer disputes in a subsequent weak economy.

To explore how you might capitalize on SaaS sales opportunities in the current business climate, please schedule a consultation today at https://calendly.com/prinzlawoffice.

The Prinz Law Office Announces Opening of San Francisco Office

Press Release 5.1.19

Why SaaS Companies Need to Anticipate Insurance Requirements in Advance of Negotiations

If your SaaS company is like most, you postpone the procurement of insurance policies until you absolutely have to obtain them, expecting to be able to obtain whatever you need on demand.

However, if your SaaS company anticipates a significant deal is on the horizon, you should be anticipating your needs in advance of actually starting those negotiations, or you may find yourself in a situation where you have to commit to maintaining insurance during the relationship that you may not actually be able to buy on the open market. Why is this a problem? Well, this puts you in the position of potentially breaching the terms of the "significant" deal before you ever start performing those terms, which can obviously have serious consequences for your company's business if your breach is ever discovered. Since the usual insurance terms in these types of deals require the submission of certificates of

insurance as proof of coverage, any failure to procure the insurance required is not likely to stay undiscovered for an extended period.

Notwithstanding the foregoing, even if you do not breach the terms of the negotiated deal, it is far better to negotiate the scope of indemnification risks you will be incurring with advance knowledge of the terms of the insurance policies you already have in place, as you can then negotiate limits of liability within the coverage of the insurance coverage previously obtained.

So, what types of insurance requirements should a SaaS company anticipate when it goes to negotiate a significant deal?

First and foremost, SaaS companies should anticipate the requirement of a general commercial liability policy. This is a standard commercial insurance policy that every business, regardless of whether or not in the software industry, should keep.

Second of all, SaaS companies should anticipate the requirement of a commercial auto insurance policy to cover the risk that employees or contractors may have an accident while traveling back and forth to a customer or business partner's work site.

Third of all, SaaS companies should anticipate the requirement of an errors & omissions policy to cover the risk that company workers will intentionally or negligently act in a way that harms the customer or business partner.

Fourth, SaaS companies should anticipate the requirement of a cyberinsurance policy to cover the risks of hack attacks, data breaches, and third party cybercrimes, as well as notification costs and other costs to remedy a breach after it occurs.

Fifth, SaaS companies should anticipate the requirement of an umbrella policy to cover losses in excess of the insurance

limits available.

What types of limits of coverage should a SaaS company anticipate? In my experience, larger deals will come with larger expectations, so the more significant the deal, the more insurance your company should be lining up in advance.

The bottom line is that doing some advance planning with respect to insurance before your software company commences negotiations on a significant deal will save your company the worry down the road of being discovered to be in breach of the deal you just closed if you find that meeting the insurance requirements you agreed to is not quite as easy as you anticipated. Furthermore, it will enable you to go into negotiations better prepared to be able to negotiate terms that actually protect your company.

If you have questions about your SaaS company's insurance planning, please schedule a consultation today at **https://calendly.com/prinzlawoffice**.

Software Agreements Lawyer Kristie Prinz to Speak on "Drafting Software Hosting Agreements for ASP and SaaS"

Software Contracts Lawyer Kristie Prinz will give a live webcast for Florida-based MyLawCLE on "Drafting Software Hosting Agreements for ASP and SaaS" on March 15, 2018 from 1 to 3 p.m. PST.

SaaS Attorney Kristie Prinz Shares Powerpoint Presentation on “Negotiating Software as a Service Contracts” for Clear Law Institute Event

SaaS Attorney Kristie Prinz has made available for viewing her Powerpoint presentation prepared for the recent event “Negotiating Software as a Service Contracts.”

“Negotiating Software as a Service Contracts” November 2, 2015 Powerpoint

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SaaS Lawyer Kristie Prinz to Speak on Negotiating Software as a Service Contracts Hosted by Clear Law Institute

SaaS Lawyer Ms. Kristie Prinz will be featured as a speaker for the webinar “Negotiating Software as a Service Contracts” for the Arlington, Virginia-based Clear Law Institute on

Monday, November 2nd at 10 a.m. PST/1 p.m. EDT. For more information about the upcoming webinar, please **click here**.

SaaS Lawyer Kristie Prinz Shares Powerpoint Presentation on “Negotiating Software as a Service Contracts” for Stafford Publication Event

SaaS Lawyer Kristie Prinz has made available for review her Powerpoint presentation prepared for the recent event “Negotiating Software as a Service Contracts”:

“Negotiating Software as a Service Contracts” by Kristie Prinz.

SaaS Lawyer Kristie Prinz to Present on Negotiating Software as a Service

Contracts for Program Hosted by Strafford Publications

SaaS Lawyer Ms. Kristie Prinz will be featured as a speaker for the webinar “Negotiating Software as a Service Contracts” for Atlanta-based Strafford Publications on Tuesday, September 8 from 1 p.m.-2:30 p.m. EDT. To review the itinerary or sign up to attend, please click **here**.

Software Licensing vs. Software-as-a-Service (“SaaS”) : The Importance of the Technology Model to Contract Drafting

Updated 6.11.24

When I am first retained by a software or SaaS company, I inevitably have a conversation with my contact at the company about their technology model: what is your technology model: “SaaS” or “software license”? Nine times out of ten the client either will be unable to answer the question or will say that they are working under one technology model and send you contracts that reflect the exact opposite.

Why do I ask the question? Drafting an appropriate software contract (or even reviewing and providing feedback on a

particular software contract is going to be dependent on whether or not the terms reflect the model. If either the client or the drafter are unclear on the model, then the contract is not going to be a high quality contract.

What is the distinction between a "software license" and a "SaaS agreement"?

In software contracts, perhaps the single most common issue that gets confused is the difference between a software license and a SaaS agreement. But the concepts are very different. In a software licensing model, the software company offers a physical piece of software via cd-rom or electronic download from a website to be downloaded, installed, run, and operated on a piece of hardware that is typically physically on site at a particular company or residential location. There may be one user or multiple users of the software. The software may be installed on a single piece of hardware or multiple pieces of hardware. There may be services associated with the software that are offered to the licensee such as implementation, customization, training, maintenance, and technical support. In some cases, the company may even offer separate hosting services. However, the software itself is made available to the licensee as a tangible product.

How the SaaS Model is Different

What is different about the SaaS model? In the SaaS model, the software company generally makes no tangible software product available to its users, and the product itself is only available "on the cloud" as a hosted platform. As in the licensing model, there may be one user or multiple users of the platform. But the platform itself is only accessible through the cloud. Thus, the quality of the various services provided is critical because the ability to access and use the hosted platform is entirely dependent on the quality of the experience delivered. In the SaaS model, there is no separate

maintenance service provided because that is all expected to be included as part of the hosted platform service package, along with the hosting and technical support. You may still have separate implementation, customization, and training services, however, that are made available separately from the hosted platform. The key feature of this model, though, is the very fact that you are offering a "service" model rather than a "tangible product" model.

Key Mistake SaaS Companies Make with their Contracts

What is the primary issue I see contractually? More often than not, companies say they are offering a "SaaS" model but their contract is in fact based on the software licensing model. What alerts me to this fact? Usually it's the presence of a license grant to the software and the lack of any clauses explaining all the various services provided pursuant to the platform. It's also not uncommon to see a maintenance agreement attached to the agreement, which is not what I typically expect to see in the hosted platform model. Also, there is often a lack of attention to any of the issues or concerns that you would have in a model where you never receive a physical product, and where you have absolutely no control over data security, your ability to save or download the data on the platform, or how well you can access the platform in the first place. Another problem that you may see is a lack of concern over how you are charged for accessing the model when some sort of set up process is involved. Obviously, if you are being charged on a monthly basis for accessing a platform and a set of related services, you don't want to be charged until set-up is complete and you can access the platform and immediately use it. This is less of an issue in a licensing model where the fee is usually billed once and not charged again during the life of the product.

Why it is important to understand the difference between the two technology models?

The bottom line is that these two models are very distinct business and technology models and the contract will absolutely not be correctly set up if the appropriate technology model is not determined and/or understood in advance of drafting. The same is true in contract reviews: it is impossible to provide accurate feedback in reviewing a contract if the technology model is not thoroughly understood before the review is started. Everything starts with the technology model.

Be Prepared to Explain to Your Software Attorney Your Technology Model

So, if you retain an attorney like me to work with your software company on contracts and you are asked about your technology model, be prepared to answer the question. Thoroughly sorting out the terms as they relate to the model is critical to the proper drafting or proper revision of your contracts, and spending billable time on this issue is time very well spent, as the job cannot be done properly otherwise.

Has your software or SaaS company been using the wrong technology model for your contracts? Schedule a consultation with us today to discuss how to update your contract to the right technology model at this link.

Good Drafting of SaaS and

Software Licenses Requires Knowledge of Technology

Updated 6.25.24

There seems to be a common universal belief among many companies that there is a single form agreement circulating among software lawyers with the perfect terms that can just be cut and pasted into their agreements if they can just find the right attorney who can furnish that 'perfect' form agreement. I have lost count of the number of times I have been told by clients that they don't need anything from me other to provide said 'perfect' template. A few have even equated my or another attorney's ability to provide them with the 'perfect' form template to the level of expertise of the attorney.

Why Reliance on a Template is the Wrong Way to Draft a Software Agreement

The reality, of course, is that merely cutting and pasting from a form agreement—even a very well-written form agreement—is precisely the wrong way to draft this type of agreement. In fact, I would take this one step further and take the position that it is precisely the wrong way to draft all technology agreements. Furthermore, it is my opinion that an attorney's willingness to provide any document purported to be a 'perfect' software template is likely to be inversely correlated to his or her level of drafting experience in the space. I certainly was far more comfortable with the idea of furnishing a template in response to a client request of that nature as a very junior and inexperienced attorney than I am today, when I know better. I've seen all too well how companies may take the 'perfect' template provided and rely on it for years and years without understanding that the form required many long hours of attorney customizations and revisions before it was ever put

into use for their business.

Knowledge of the Specific Product Described in the Contract is Essential

While there absolutely are standard terms that you will find in all software agreements—whether SaaS or software licenses—which may form the basis of high quality software template for either the software license or SaaS model, a well-drafted contract is more than just an assortment of the "right" terms, it reflects the actual product offering to customers. Thus, the drafter needs to not only know and understand how to draft these contracts but also have a very high level understanding of what the product offering to customers is. Otherwise, the contract will be of a very poor quality, regardless of how good the lawyer was that put the original form agreement together that the contract may be based upon.

For example, in the enterprise license model, a company may purchase a license allowing a set number of user rights. In such a model, a well-drafted license would at least explain what constitutes a user, how users can be added and deleted, what rights the users have to the various license grants made (which should go beyond the simple 'use of the software'), the cost of purchasing new users, and the cost of purchasing the initial set of users. But the decisions on how to structure each of these terms would be entirely dependent on the business model and product offering made available by the specific software company. Thus, if the terms selected are being cut and pasted from an unrelated form agreement, it is almost certain that the terms chosen will be wrong and make no sense.

The same problem occurs with the cutting and pasting of SaaS agreements. In the enterprise model, again, you may similarly have users with different access rights, which are the SaaS equivalent to a license. Your enterprise customer may want to

start with 100 users and anticipate needing to add 100 more in a period of months. Your enterprise customer may also anticipate losing some users and want to get some sort of credit for the users lost. You may have different pricing based on when the timing of the purchase of new users. Given all these different drafting and business model choices that can be made, if the terms selected are simply being cut and pasted from an unrelated form agreement, again, it is almost certain that the resulting agreement simply will make no sense.

The structural choices in how you draft these kinds of agreements do not end with the user rights. For example, there are choices that the drafter has to make based on what type of data is being collected by the product, where the data is being stored, the level of risk to the company if the data is accessed by a third party, and what needs to happen to the data at the end of the relationship. Also, there are choices that need to be made based on whether use of the product depends on importing pre-existing data into the software and effectively reading such data. It is not uncommon for enterprise customers to have much higher requirements with respect to data than a small business client would generally have. Fees, technical support, and training are other common areas of significant variation from product to product.

A Well-Drafted Agreement Will be Structured Around the Unique Features of the Specific Product

The bottom line is that a well-crafted software license or SaaS agreement will be structured around the technology, features, functionality, and business model of the applicable product and will not be based merely on a set of “perfect” terms from any template. As a software company, that means that if you retain an attorney to advise you on your contracts, your attorney should absolutely be pushing you to provide significant details about how the technology, features, functionality, and business model of your product

work, among other issues. If you are not getting those kinds of questions from your lawyer, then it is highly likely that the terms of any contracts that your attorney reviews or drafts for you will reflect a similarly low level of understanding about those same concepts.

If you are concerned that a software license or SaaS agreement your software company is relying on has not been structured around the unique features of the specific product addressed in your contract, I invite you to reach out and schedule a consultation with me today at this link.