Why “SaaS Agreements” are not “SaaS Licenses”

Have you ever heard the term “SaaS license” or “SaaS Licensing” being used among lawyers and businesspeople?

There is a misconception that there is such a concept as a “SaaS license.” However, in fact, two principles are actually being confused: the “software license” and the “SaaS agreement.” Why does this matter? Well, if you do not know the type of agreement that you are drafting, you are going to confuse the important terms in the agreement, and this is going to have a huge impact on what you draft or negotiate. In addition, if you do not know what you are drafting, this is going to impact other terms beyond the agreement such as taxes and revenue recognition. So, the bottom line is that it does matter what you draft.

What is different about the concepts of “SaaS agreement” and “Software license” ?

Also, the concepts of “SaaS agreement” and “software license” are completely different. In the case of a software license, the licensor grants to the licensee the rights to use a specific piece of intellectual property, the software, under certain conditions and limitations, and if you exceed the parameters of the grant, you will be infringing on the intellectual property. The license grants licensee the right to use the software for the length of the copyright or other specific period of time and will specify who can use the software, how the software can be used, and under what conditions the software can be used. In contrast, in the case of the SaaS agreement, no intellectual property rights will be granted in the software. Instead, the grantee receives access rights in the software in the cloud and in a bundle of services. The rights that the grantee receives are more along

the lines of what someone might receive to intellectual property in content posted on a website on the Internet. The internet user might have the right to view the posted content, but that right does extend to doing anything to the content beyond just viewing it.

What rights are provided in a “SaaS Agreement?

In the case of the SaaS agreement, you may have rights to certain services in addition to access rights, such as hosting, maintenance, and technical support by way of the SaaS agreement, but your rights are to services and not to intellectual property in the software.

What rights are provided in a “software license”?

In the case of the software license, the rights to hosting, maintenance and technical support are generally going to be obtained through other agreements.

Another difference between the two concepts is that in the case of the software license, you have more control and the ability to change service providers if a service is not being provided at the level you require. In the case of the SaaS agreement, you are “stuck” if you are unhappy with the quality of any service. So, the quality of the service delivered is far more important in the case of SaaS agreements than in the case of the software license. You cannot just easily move your content if you are unhappy with a particular service, as you have no direct control over the content in the case of the SaaS agreement. In essence, you delegate that control to a third party, the SaaS provider.

So, the “SaaS agreement” and the “software license” are two fundamentally different concepts, and the term “SaaS license” or “SaaS licensing” is just a confusion of those two concepts.

If you have questions about whether your SaaS agreement was incorrectly drafted as a SaaS license, please schedule a

consultation with us today at https://calendly.com/prinzlawoffice.

Does Your Customer Software License or SaaS Agreement Leave Your Company Vulnerable to a Dispute Over Implementation?

If your company is like most in the software space, your product requires some sort of initial set-up and configuration for customers that in an enterprise scenario can require a significant investment of time and resources. However, many software contracts are silent regarding what is involved in this initial phase of a business relationship, which results in many disputes. The Silicon Valley Software Law Blog discusses this issue in the following blogpost:

http://www.siliconvalleysoftwarelaw.com/does-your-customer-software-license-or-saas-agreement-leave-your-software-company-vulnerable-to-a-legal-dispute-over-implementation/

Distinguishing Between the

Software License and the SaaS Contract

The Silicon Valley Software Law Blog looked at what the differences are between the software license and the SaaS contract models in a recent blog posting linked below:

http://www.siliconvalleysoftwarelaw.com/software-licensing-vs-software-as-a-service-saas-the-importance-of-the-technology-model-to-contract-drafting

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Good Drafting of SaaS and Software Licenses Requires Knowledge of Technology

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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.