



# SaaS Contracts

## A shift in implementing & optimizing software

by: Greg Goldberg, BTA General Counsel

One of my earliest internet memories is receiving a free CD-ROM in the mail from America Online (AOL). Much to my parents' chagrin, I would dial up the World Wide Web on my then-state-of-the-art 56k modem, tying up our family's phone line for hours on end. It is difficult to believe that was more than three decades ago. Today, floppy disks, CD-ROMs and DVD-ROMs are long gone, and purchasing software as a product is quickly transitioning into licensing software as a service (SaaS). This month, Legal Perspective takes a look at SaaS agreements.



SaaS is an alternative to purchasing software on traditional media or via download. In a SaaS arrangement, the essential software is never actually installed on the end-user's computer. Instead, the end user may download an application or a plugin to access a particular program, but the administrator hosts the core software in the cloud. The administrator also configures, manages and maintains the underlying cloud infrastructure and end-user connectivity.

SaaS arrangements appeal to a broad range of software administrators, dealers and end users for a variety of reasons. SaaS administrators benefit significantly from centralized hosting in the cloud, which enables fully remote maintenance, patches and updates. In practice, that means software administrators need not rely on end users to initiate annoying program downloads or system restarts. Software administrators can also customize price and service levels to match the needs of dealers and end users, ranging from smaller operations to giant enterprises at scale.

The advantages of SaaS arrangements to end users are equally compelling. SaaS services are ideal for shared applications such as email, calendar, communications and databases. SaaS can also streamline transactions between end users, their employees and their customers, including funds transfers, inventory management and customer relationship management (CRM) software. SaaS end users realize significant cost savings due to no up-front investment in equipment and seamless software integration. End users also enjoy increased flexibility to adjust for variance in headcount due to business expansion or contraction.

Despite the many upsides to SaaS arrangements, it is important to consider the relevant risks. An end user of cloud-based SaaS relinquishes control over service delivery and security to the SaaS administrator. That means SaaS end users are particularly susceptible to server downtime, service

disruptions, network dependency, data commingling and third-party cyberattacks. To account for some of these vulnerabilities, SaaS contracts need to be very clear about the rights and responsibilities of the respective parties.

Generally speaking, contractual obligations placed on SaaS providers include: access to the specified software application; software updates; data storage; data backup; data security; and customer support. At a minimum, a robust SaaS contract should address: services provided; pricing and payments; service levels; disaster recovery; limitation of liability and indemnification; initial and renewal terms; suspension and termination; transition rights; compliance obligations; acceptable use policies; and data protection.

Data provisions are especially important because the implementation of cloud storage means data does not reside with the software administrator or the end user. Critical provisions related to stored data include: data ownership; data access and use; data retention and security; data location; and security breaches. End users should be sure to retain ownership of all stored data (and related intellectual property); ensure immediate access to stored data on demand; secure transition assistance to a new provider in the event of termination; and specify proper formatting to ease transportability and transferability of data.

The evolution from CD-ROMs to SaaS models represents a tectonic shift in the way administrators, dealers and end users market, implement and optimize enterprise software solutions. As businesses increasingly migrate their back offices (i.e., software applications, data storage and IT services) from the server closet to the cloud, it is important to weigh the clear benefits against some of the less obvious trade-offs. I encourage BTA members to take advantage of their legal services benefit and reach out with questions or concerns about transitioning to SaaS.

**Clarification:** I received some feedback about my September 2024 column covering the new U.S. Department of Labor rules concerning overtime pay. I would like to clarify that the new minimum salary thresholds that expand eligibility for overtime pay to certain previously exempt roles *do not* apply to outside sales employees. I apologize for any confusion. ■

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