

# Software License Agreements: *the complete download*



ACC Western Pennsylvania

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# Why this discussion?

- “Do you have a form software license agreement?”
- “It’s just like any other commercial agreement”
- *No one size fits all!*



# I/O

- Types of software agreements
  - License vs SaaS
- Service level agreements
- Pricing models
- Why attorneys need to review the scope of work
- Open source code: when does it matter?
- Data security
- Licensing generative AI tools

# Technical terms

- Source Code

- Human-readable programming language
- Often maintained as trade secret

- Object Code

- Binary code that is compiled from source code
- Executable by computer processor

```
1 <!DOCTYPE html>
2 <html lang="en">
3 <head>
4 <title>My perfect website</title>
5 <meta charset="utf-8" />
6
7 <link rel="preconnect" href="//s3.mysite.com" />
8 <link rel="preconnect" href="//www.mysite.com" />
9
10 <meta name="viewport" content="width=640, initial-scale=1">
11
12
13 <script>
14 var mytag = mytag || {};
15 mytag.cmd = mytag.cmd || [];
16 (function() {
17     var gads = document.createElement('script');
18     gads.async = true;
19     gads.type = 'text/javascript';
20     var useSSL = 'https:' == document.location.protocol;
21     gads.src = (useSSL ? 'https:' : 'http:') + '//www.mytagsservices.com/tag/js/gpt.js';
22     var node = document.getElementsByTagName('script')[0];
23     node.parentNode.insertBefore(gads, node);
24 })();
25 mytag.cmd.push(function() {
26     var homepageSquareSizeMapping = mytag.sizeMapping();
27     addSize([945, 250], [200, 200]);
28     addSize([0, 0], [300, 250]);
29     build();
30     mytag.defineSlot('/1023782/homepageDynamicSquare', [[300, 250], [200, 200]], 'reserved-div-1');
```



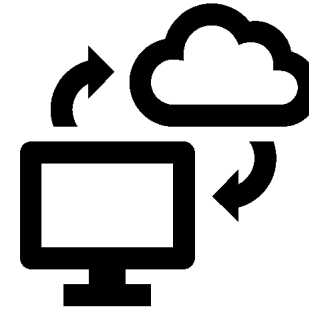
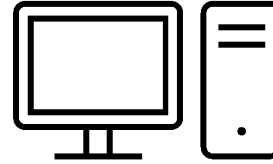
```
1010011001110000011010101
0001110001010100011110001
1100001111110101010101111
0011010011010101010111001
1100011010100001100011100
1010101010000111001101010
1101001110101100111011011
1001101010110101110101011
1010101000100110001111010
1101010100111001011000101
```

# More technical terms

- API = Application Programming Interface
  - Allows one party's software to interface with another party's software
- Platform as a Service

# Types of software agreements

- License
  - License to installed copy
- Software as a Service (SaaS)
  - License to access hosted service
- Combination of the above



# Additional services in software agreements

- Custom development
- Maintenance and support



# Other software-related agreements

- Data sets
  - Geographic data, marketing data, price data, event stats
- Content licensing
  - Images, audio/video files, news feeds, documents
- API licensing
  - API – application programming interface
- Platform as a service
- Open source





# Anatomy of the agreement

## License (installed software)

- Customer = licensee
- Code is installed on customer's equipment
- Term
  - Perpetual, or
  - Limited period, renewable

## SaaS (hosted service)

- Customer = subscriber
- Customer gets no code (or minimal code)
  - Customer accesses service via web or app
- Term
  - Subscription-based (monthly, annually, etc.)

# Installed software licenses: key terms

- What code does the customer get?
  - Source code, object code, or both?
- Customization?
- Optional modules and features?
  - May list in order form



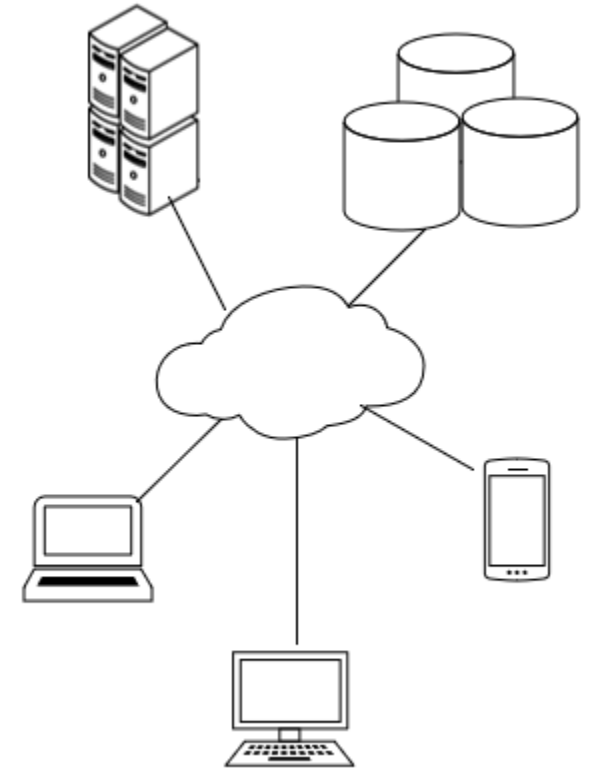
# Installed software licenses: more key terms

- Updates = bug fixes / security updates
  - Should require customer to accept and install mandatory updates
  - Typically, free for a limited time
- Upgrades = new features
  - Typically, not included – requires additional fee



# Hosted service agreements – key terms

- Define the service
  - General description – benefits service provider
  - List specific functions – benefits customer
- Describe it as right to access a service, not license to access / use software code
- Customization?
- Service Level Agreement (SLA)



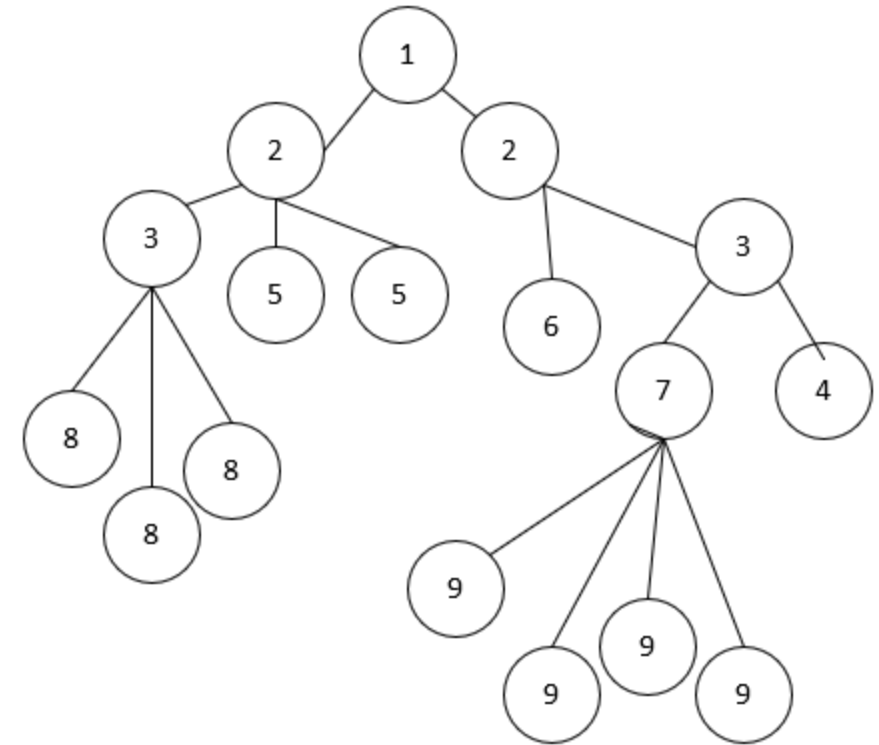
# Service Level Agreements (SLAs)

- Define service categories and expected response time
  - Example:
    - Level 1 = system down, respond within 1 hour
    - Level 2 = some features down, respond within 4 hours
    - Level 3 = system functional but degraded, respond within 1 business day
- Minimum required uptime (99+%)
  - Exclude scheduled maintenance
  - Consider: Does the service provider control uptime, or is it a third party such as AWS?
- Consequence of failure to meet service levels / uptime

# Common terms

# Usage rights

- Who can use the software / service?
  - One end user
  - Specific # of end users (seats)
  - Number of devices
  - Enterprise-wide
- Internal use only, or to provide services to others?
- Consider EULAs, too



# Restrictions on use

- No assignment or sublicensing
  - (except as specifically permitted)
- No copying / no modification / no derivative works
- No reverse engineering / accessing source code
- No redistribution of content



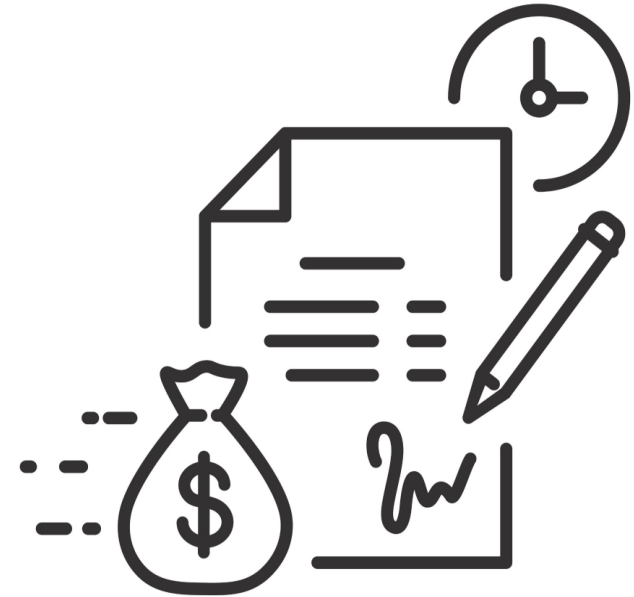
# More restrictions on use

- Security – no sharing of credentials
- No unlawful use
- No export
  
- Optional:
  - No competition with licensor
  - Additional restrictions if required by third party licensors



# Pricing terms

- Flat fee or subscription?
- Enterprise, per-seat, or usage-based?
- Tiered pricing?
- Audit rights



# Additional pricing terms

- Custom development services
- Installation and training
- Service / support / maintenance fees
  - *Updates* typically included in subscription models;
  - *Upgrades* are typically not included
  - May include separate support / maintenance terms

# Pause - questions

# Confidentiality

- **Licensee's obligations**
  - Source code (if provided)
  - Third party data sets (if provided)
  - Other information accessed through the software
  
- **Provider's obligations (maybe)**
  - Information uploaded by licensee
  - Output generated for licensee
  - Customer's usage data



# Privacy policies are different!

- **Privacy policy**

- Legally required disclosure
- Informs consumers what a service may do with the consumer's personal information

- **NDA in license terms**

- Negotiated agreement
- Outlines permissions and restrictions on use of certain types of information
- Use may be permitted if not expressly restricted

# Warranties / Limitations on Liability

- **Provider's goals:**

- Software provided as is; strict limitations on liability
- Customer will not violate restrictions on use
- Preconditions (notice, opportunity to cure, replacement of code)

- **Customer's goals:**

- Software will perform described functions in accordance with all documentation
- Security of customer's data and information
- Compliance with laws
- Non-infringement

# Statements of Work / Exhibits

- **Provider–friendly:**

- *Licensee may access the Acme Space Modulator software that Provider provides to Licensee*

- **Licensee-friendly:**

- *Provider will provide Licensee with full access to the Acme Space Modulator Software as described in the Proposal dated ### and the functional specification enclosed in Exhibit A*

# Things to look for in the SOW

- Describe what will the software will do for the customer
  - Consider attaching proposal, if available
- Custom development services
  - Pricing
  - Scope
  - Acceptance and testing
  - Intellectual property rights: ensure that agreement protects provider
  - Timelines and milestones



# Things to avoid in the SOW

- If representing provider:
  - Open-ended commitments
  - Unrealistic timelines
  - Obligations to do extra work without extra payment
- If representing customer:
  - Vague descriptions of deliverables
  - No acceptance or testing
- If representing either party:
  - Conflicts with the legal terms
  - Scaling back or expanding warranties



# Pause - questions



# Source code escrow

- Third party holds code for benefit of customer
- Conditions of release
  - Breach, bankruptcy, failure to support
- Must specify what customer can and cannot do with the code upon release
- Consider:
  - Who pays for escrow service?
  - Required to update code in escrow?
- *Don't rely on the escrow service's terms of release and license terms!*



# Data security

## PROVIDER WANTS

- Provider may use Customer Data and data about Customer's use of the Provider System to improve its product and service offerings.
- Provider may use or disclose Customer's usage data in aggregate form (without identifying Customer) for any purpose.
- Provider may disclose Customer Data to a successor to its business that includes the Provider System or systems that are derived or that replace the Provider System.

## CUSTOMER WANTS

- Provider may use Customer Data solely for the purpose of providing the services to Customer under this Agreement.

# Data security

## PROVIDER WANTS

**X**

## CUSTOMER WANTS

- All Customer Data shall be stored on servers located within the United States. No Customer Data shall be exported outside of the United States.
- Provider shall at all times maintain a written information security policy containing protections that are consistent with industry standards. Provider shall comply with the policy and provide Customer a copy of the policy upon request.
- HIPAA or financial data – additional requirements

# Data security

## PROVIDER WANTS

- Provider may, but is not obligated to, retain Customer Data after termination of this Agreement.

## CUSTOMER WANTS

- Provider will return all Customer Data to Customer in downloadable format upon request of Customer at any time, and also within five days of termination of this Agreement.

# Making the license enforceable

- Signed agreement
- Click-through
  - Must allow user to access and download a copy



# Generative AI tools



stability.ai



AI  
[MRE] [OVERVIEW]

copy.ai



# Considerations when using generative AI

- Incorrect output
- Bias of output
- No copyright in AI-generated content
- Not secure – be careful with information provided
- Risk of IP infringement
  - Is output derivative of the training material?
- Open-source code risks
  - (If used to generate software code)



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