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Software-as-a-service – Legal nature: Shifting the existing paradigm of copyright law

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ABSTRACT

Today's business environment is no longer defined exclusively by bricks and mortar. Business models of software distribution are constantly evolving as new technologies develop. Traditional retail versions of software products are mostly replaced with digital distribution of copies of software products. However, these ways of software distribution are by no means exhaustive. Functionality of software is not necessarily tied with provision of the copy of the relevant program to the user. Instead he can receive access to it via the Internet without the need to install software onto his computer. This type of business model received the name "Software-as-a-Service" (SaaS) or, sometimes "Cloud Computing". The legal nature of relations arising between the user and provider of distant access to such software is subject to considerable debate in Russia. The main problem is that at first glance it resembles the features of various types of contracts, recognized in the Civil Code of Russia, although not falling completely within any of them. At the same time the type of agreement chosen by the parties defines the legal framework, which governs relevant relations and relevant tax consequences. This article aims to analyze the nature of existing relations between the user and SaaS-provider and to define whether it can be characterized as a license, service, lease or some kind of *sui generis* contract. Based on the analysis the author comes to a conclusion that as delivery of copies of software becomes less and less relevant for the software industry, due to the new business models implemented by vendors, the rights to use the particular copy of software around which the traditional copyright regime has been built, become more and more superseded with the right to access such software. Thus traditional contractual models developed for IP distribution (license agreements, assignment agreements) and, more generally, the legal framework of existing copyright law that is centered on the core idea of the "use" of the copy, are no longer adequate regulators in the digital era where remote access to objects of copyright will soon start to dominate.

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1. Software-as-a-service: brief description of the distribution model

The concept of software-as-a-service is almost as old as commercial computing. From the mainframe era of the 1960s and into the minicomputer days of the 70s, computers were expensive and many small and medium-size companies obtained computer resources by means of remote access (the so called "service bureau" model). During the PC era remote access to software was not so popular, since the temptation to have everything you need on your own computing device (which became affordable for many users) was very strong. However, development of Internet infrastructure, broadband and mobile access "resurrected" the ideas of distant access to software. An Application Service Provider (ASP) business model has emerged since the end of 90s and was subject of a big buzz during the so-called 'dotcom' boom. However, it is claimed that this model had little value added and was just no more than hosting off-the-shelf applications. The main disadvantage of the ASP model was the lack of adaptation/customization to the online environment: ASP providers were usually not the developers of software, thus remaining highly dependent on the vendor of such software in matters of customization, support and maintenance. In the SaaS model, software is usually developed by the SaaS vendor which means that it is adapted to the web environment from the very beginning and there is an opportunity to deploy enhancements and modifications without dependence on the vendor.[2] As one can see, the SaaS model shares much in common with the ASP model (provision of distant access to software via the Internet); however, in the ASP model the provider mostly acts as a reseller of third-party software, while in the SaaS model the provider of this service is also a developer of the software, having relevant rights and expertise for its modification and development. There are other views however on the correlation between ASP and SaaS models. Renzo Marchini considers that the ASP is simply a term from the late 90s and early 2000s that has somewhat fallen out of fashion, but in essence is simply SaaS.[3]

The "SaaS" concept is itself under "attack" by the new expression: "cloud computing". Since much SaaS-related material, both technical and legal are covered under the names "Cloud computing"[4], it is necessary to say a few words about the correlation between these terms. According to the traditional definition of Cloud computing provided by NIST, SaaS is considered to be one of the service models of cloud computing together with Infrastructure as a service (IaaS) and Platform as a Service (PaaS) models.[5] Thus Software as a service relations sometimes are hidden behind the label "cloud computing", although it forms the core of the solutions provided in this sphere. However, for the purposes of this article, the term "SaaS" will be used. As Richard Stallman remarks, "cloud computing" is so nebulous that it could refer to almost any use of the Internet. It includes SaaS, and it includes nearly everything else. The term only lends itself to uselessly broad statements.[6]

Software as a service (SaaS) worldwide revenue is forecast to reach $22.1 billion by 2015.[7] 83.0% of all companies expect to adopt SaaS technology.[8] The Russian market for SaaS is still evolving, but the dynamics are rather high (around 30–50% of increase per year[9]) and seem to be very promising for SaaS model as well, according to expert estimations.[10] Major software vendors make their bets on the SaaS model emerging: IBM, SAP, Oracle, Microsoft. SaaS offerings include a wide range of software: collaboration software, accounting software, enterprise software (e.g. CRM, ERP). The SaaS model has much to offer in the consumer segment of the market (e-mail applications, productivity applications such as office-suite programs etc.). In other words, the SaaS market is very promising and encourages further investigations regarding its legal status and applicable legal framework.

The SaaS model has multiple features, which are usually reflected in materials for IT and marketing staff and are mostly irrelevant for legal analysis (e.g. such features as scalability, staff savings, short-term fee savings, etc.). While admitting the importance of these features for the understanding of the SaaS model in general and for justification of its choice for decision-makers, for the purposes of this article it is necessary to outline those features of SaaS which have direct legal implications and may influence the contractual model used for deployment.

These features are:

1) no copies of software are distributed. The client does not receive access to source or binary code. Software is installed in the provider's data center and remains under its full control;
2) the client does not have any necessity to update the software: all necessary updates, fixes and enhancements are deployed in a centralized way by the SaaS-provider itself;
3) client's data relating to the use of SaaS is processed remotely and stored in the provider's premises;

[2] See comparison of ASP and SaaS models in: Difference between the ASP model and the SaaS model. Luit Infotech. http://www.luitinfotech.com/kc/saas-asp-difference.pdf.

[3] *Renzo Marchini*. Cloud Computing: A Practical Introduction to the Legal Issues. BSI: London. 2010. P. 10.

[4] http://www.cnews.ru/reviews/index.shtml?2011/12/12/468597_3.

[5] Cloud computing is a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g. networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. See: The NIST Definition of Cloud Computing. Special publication 800-145. September 2011. http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf.

[6] *Richard M. Stallman*. What Does That Server Really Serve? // Boston Review. 18.03.2010. http://bostonreview.net/richard-stallman-free-software-DRM.

[7] *Pettey C.* Gartner Says Worldwide Software-as-a-Service Revenue to Reach $14.5 Billion in 2012 http://www.gartner.com/newsroom/id/1963815.

[8] SaaS Report. Summer 2013. Siemer and Associates. http://www.siemer.com/reports/SaaS2013.pdf.

[9] *Prozorov A., Ivanov D., Lavrinov G.* Analysis of SaaS/B2B market potential in Russia. 17.04.2013. http://www.slideshare.net/AlexandreProzoroff/saasb2b-17042013.

[10] See e.g. *Renzo Marchini*. Op. Cit.; *Cloud Computing Law / ed. by Christopher Millard. Oxford University Press. 2013.*