



# Negotiating Software License Transactions and Disputes with Microsoft

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# Speaker Robert J. Scott



IT 24<sup>th</sup> Annual  
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# Agenda

- **Licensing Models**
  - Perpetual vs. Subscription
  - User vs. Device
- **Agreement Types**
  - Microsoft Business and Services Agreement
  - Online Subscription Agreement
  - Enterprise Agreement and Enrollments
  - MPSA
- **Key Legal Issues**
  - Transitioning to Office 365
  - Limitations of Liability
  - Indemnifications
  - Audit Rights
  - Regulatory Compliance
  - Price Protection



# Perpetual vs. Subscription

- Ability to use after payments end
- Adjustments for changes in workforce or use
- Data storage and ownership of the hardware
- Business continuity
- Accounting treatment: capital and operating expenses



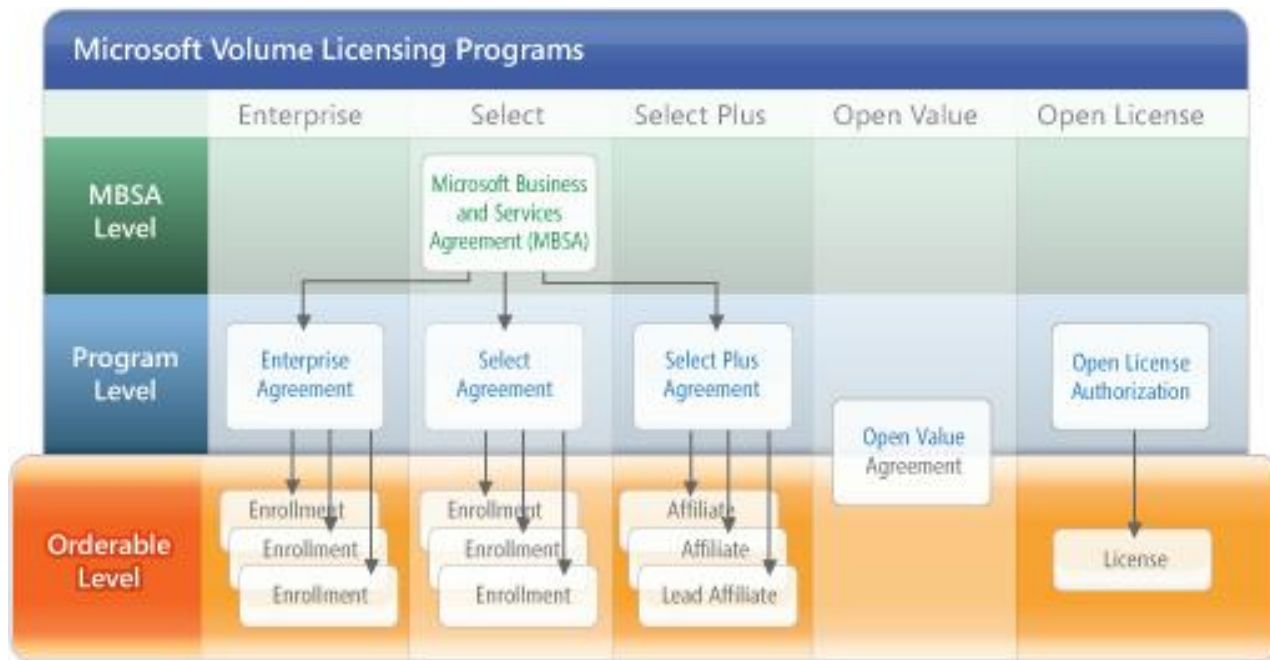
## User vs. Device

- Multiple users per device
- Multiple devices per user
- Difficulty identifying number of users or devices
- Product specific requirements



# Microsoft Business and Services Agreement

Master Agreement between Microsoft and its customers





# Online Subscription Agreement

- Online services terms
- Acceptable use policy
- Security commitments



# Enterprise Enrollments

- Perpetual-License Enterprise Products
  - Per device/hybrid
  - Office suites, CALs and CAL suites, Windows upgrades
- Enterprise Cloud Suite
  - Per user
  - Office 365 Enterprise E3, Enterprise Mobility Suite, Windows SA per User
- Server and Cloud Enrollment
  - License server and cloud products across the enterprise





# Microsoft Products and Services Agreement (MPSA)

- Formerly Select Agreements
- Based on points system
  - No minimum at outset but must purchase a minimum of 500 points or cloud services for at least 250 users within each active product pool in order to maintain purchasing eligibility at Level A
- Lack of standardization across the corporation
- No payment commitment
- Allows purchase of Microsoft Online Services
- Allows work with multiple resellers under a single account



# Transitioning to Office 365

- Lower priced or transition SKUs
- Delayed payment dates
- Data privacy and protection concerns



# Limitation of Liability

- Calculating maximum liability
  - How to calculate damages for probable claims
  - Carve-outs - certain claims are not subject to the cap
- Liability risks related to security incidents



# Indemnification

- What indemnification is Microsoft offering?
- How do proposed terms compare to vendor contracting policies and procedures?
- Customers often use insurance to cover risks that would normally be addressed in indemnification provisions



# Audit Rights

- What are Microsoft's audit rights?
- Auditors interpret contractual provisions in the light most favorable to Microsoft
- Calculating percentage of compliance
- Penalties for non-compliance



# Regulatory Compliance

- Financial considerations under GLBA
- Health and privacy considerations under HIPAA
- Large corporations are considering migration to hosted offerings
- GTPR



# Price Protection

- Especially for products licensed on a subscription basis, future pricing changes represent a significant risk, because subscriptions typically do not convey any perpetual usage rights - a company can find itself dependent on a technology that it no longer can afford.
- We recommend negotiating for a cap on pricing increases at least for the first renewal term.



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# Questions?





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