

Chapter 98

The Legal Implications of Cloud Computing

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ABSTRACT

The purpose of this chapter is to examine the current legal environment of cloud computing. As the cloud platform continues to evolve, companies will find the need to address the business risks, particularly legal issues which will be of paramount concern. This chapter discusses the legal dimensions of cloud computing from the perspective of three L's: Location, Litigation, and Liability. Most of the current issues can be evaluated as part of one of these categories. Although the legal aspects of the cloud lag behind the business and technology side, prior case law is discussed as it applies to issues arising from various implementations of cloud computing applications. This discussion provides a road map for CIOs and other managers as they deal with emerging issues and legal ramifications of cloud computing. The chapter also provides direction for research in this realm.

INTRODUCTION

Cloud computing is the oft-lauded new wave in business. But few outside of the legal profession have stopped to consider the implications associated with what is, in reality, a quite complex network of players. A seamless transition to the cloud will require compliance with a “patchwork” of federal and state privacy laws that can confound even the most focused researcher (Mills, 2009).

No responsible CIO should rush to jump on the cloud computing bandwagon without first analyzing and assessing the risks involved.

The goal of this chapter is to provide an awareness of the types of issues that might arise in interactions with a cloud service provider, and to suggest questions that might be appropriate for a CIO to consider. While the aim of this chapter is to illuminate the most common issues a firm might face in its efforts to employ a cloud service

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provider, it is not possible for every issue to be addressed. To help the reader remember the kinds of issues involved, the chapter is separated into three major sections that are referred to as the “three L’s:” Location, Litigation, and Liability. This chapter will address each “L” in turn, and hopefully leave the reader more cognizant of potential dangers lurking in the shadows of this new trend.

The chapter is intended to provide a synthesis of the legal issues companies should be aware of as they deal with the various aspects of cloud computing. It should be noted, however, that this chapter does not constitute legal advice, and is intended for informational purposes only. Legal pitfalls in this area of technology abound, and every contract is different. As such, consultation with legal counsel when negotiating contracts always is recommended.

LITERATURE REVIEW

Very little academic work in the business and information technology (IT) literature has addressed issues related to cloud computing. This is due partly to the relatively short time in which cloud computing has been an issue for companies to consider. Some of the early work has addressed high-level issues related to emerging cloud technology as a platform for business operations (e.g.; Hayes, 2008). Fingar (2009) published one of the first books that addresses the business implications of cloud technologies. Some consulting firms have published work that addresses risks and legal implications of cloud computing (e.g.; Logan, 2009; Plummer, 2010; Bittman, 2011; Casper, 2011).

A massive amount of literature has emerged from the business and IT trade publications related to cloud computing in general. Cloud computing is a high-priority issue on the radar screen of most CIOs today. Most of the current popular press focuses on cost savings of cloud

implementations, selection criteria for cloud vendors, and implications of cloud computing for the organization. Security also has been a significant issue that has been covered extensively in blogs, presentations, and publications. Only recently has this discussion turned to the legal aspects that should be considered (e.g., Nash, 2010; Golden, 2009). This is likely due to the lack of awareness and understanding of the potential legal impacts. More emphasis on the legal aspects are likely to emerge as the issues become more relevant and the technology develops.

The legal research on cloud computing is also in its infancy. Some research has appeared recently in the academic literature (e.g., Couillard, 2009; Forsheit, 2010; Robison, 2010; Ryan & Loeffler, 2010). As with the business and IT literature, much of the legal discussion is in the trade publications, blogs and presentations (e.g.; Mills, 2009; Pinguelo & Muller, 2011; Jaeger, Lin, Grimes & Simmons, 2009). Journal articles only recently have begun to shift from broad, overarching analyses of privacy issues to addressing more esoteric issues such as cloud computing’s interplay with Fifth Amendment law, the law of contracts, and copyright enforcement (Colarusso, 2011; Eisner & Oram, 2010; Melzer, 2011). Most journals still recognize cloud computing as a new and emerging technology, using terms such as “a coming storm” and “a new era,” and recognize that “the law cannot keep up with the pace of change in computer networking” (Robison, 2010; Tsilas, 2010). In short, legal research in this area has yet to reach the level of nuance and sophistication seen in some other areas.

LEGAL DIMENSIONS OF CLOUD COMPUTING

The following sections provide a discussion of the current state of legal issues related to cloud computing. The layers of complexity make it difficult to get a thorough understanding of the

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