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A legal fog

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Cloud computing is one of the current waves in information technology. Cloud computing allows the user to transfer many (if not all) of the user's computing functions done via personal computer applications, and the user's data, to a remote location maintained by the cloud computing service provider and accessible by the user through high-speed connections.

Essentially, cloud computing is the convergence of infrastructure as a service (IaaS), platform as a service (PaaS), and software as a service (SaaS), in a Web 2.0 environment. In this context the "cloud" is a metaphor for the Internet, but within that cloud is a complex web of technology and virtualization infrastructures, and significant legal risks.

Like new wine in an old bottle, cloud computing has some similarities to, as well as the advantages of, many computer time-sharing or service bureau arrangements that were common for some industries in the 1970s and 1980s.

There are, however, several notable exceptions to that analogy, such as connectivity — instead of a dedicated line between the customer and the time-sharing host, cloud-computing connectivity is typically through high-speed Internet connections. Internet connectivity can allow the user access to the cloud virtually anywhere the user has Internet access, whether it's the user's headquarters, an offsite clinic, store, factory, a remote warehouse, a doctor's office, or home.

Some companies will not venture into cloud computing because of the security issues and regulatory compliance issues. Legal issues, by way of example, include:

Privacy, both of the user's data and the user's customer's data: Who establishes, maintains, and audits the access to the user's data and applications in the cloud?

Jurisdiction: In case of a data breach, which law applies — that law where the customer is located, where the cloud services vendor is located, or that law governing the network or server farm where the data resides? Who has the legal obligation to prepare and send a notice of a data breach?

Licensing: If the user uses proprietary third-party applications, do the software license agreements allow for cloud computing usage? This would include not only the scope of use coverage, but other issues as well, including representations and warranties, software maintenance, and upgrade issues.

Limitations of liability: If the user signs up for the cloud-computing services through a click-wrap agreement, the terms and conditions are not negotiated. While the click-wrap agreement may be okay in some instances, the cloud-services user may have legal and/or business difficulties with some of the terms and conditions (the user may find the limitations of the vendor's liability an unacceptable business risk and desire to negotiate different levels and/or triggers of vendor liability).

Service level agreements: What are the appropriate service-level agreement terms and conditions? What metrics will be used to measure performance in the cloud?

Termination: What happens to the user's data if the cloud-services vendor goes out of business or is acquired by a competitor to the user? If the vendor simply goes out of business, the user could be without access to its business-critical data as well as the applications needed to process that data. Depending on the user's industry such a scenario could trigger numerous regulatory concerns.

E-discovery: What is the impact on evidentiary issues in litigation when the user's data is in the cloud?

Audits: How will the user audit the user's data stored in a cloud-computing environment? How will data quality and data integrity be audited and maintained while in the cloud?

Attorney-client privilege: What impact will storing client confidential materials in the cloud have on the attorney-client privilege? Will the attorney-client privilege be waived by placing such materials in a cloud-computing environment?

This is not an exhaustive list of all the legal issues, the analysis and determination of which will depend on many factors, including the applicable technology, as well as the business and legal environment for the user and the cloud-services vendor.

Privacy in cloud computing is an issue that must be properly addressed in a cloud-computing environment, and cannot be considered in the same light as when all of the computer hardware and software are located at a facility owned and/or operated by the user, and the hardware and software maintained by the user.

For instance, if the user is in the health care industry:

Will the cloud-computing vendor execute a business associate's agreement appropriate to the cloud-computing model? What are the risk allocations in the event of a data breach? How are access controls established and maintained?

Cloud computing offers many efficiencies and potential cost-savings for the business community, but must be approached cautiously lest the cloud become a fog in which the user loses his way and falls from the cloud into a legal quagmire. ■

Additional details about Mr. Wernick's practice, his published writings and public lectures are available at WWW.WERNICK.COM.