

Haste Makes Waste: Charging for Cloud Computing

By Daniel B. Garrie and Anthony I. Giacobbe Jr.

Today, many business and technology stakeholders are steering their companies toward the fashionable realm of "cloud computing." Cloud computing is a general term for the delivery of hosting and other services over the Internet. Instead of storing data in-house, the data and data applications are stored remotely, with access to the data provided via the Internet (the "cloud" in "cloud computing").

FIRST IN A THREE PART SERIES

Switching to a cloud can save money by lowering information technology and data center support costs, improve performance and scalability, reduce storage costs and a number of other benefits. While cloud computing can make sound business sense, stakeholders and counsel should be cognizant that cloud computing presents various legal issues around control and custody of data, data preservation and collection, data review and production, and, of course, attorney-client privilege. Adjoining these legal issues is a host of operational issues regarding privacy, security, and the availability of data.

This article is divided into a three part series that examines business and legal issues for cloud computing.

Cloud computing creates a substantial dependency between the company and the cloud vendor. If data stored on the cloud becomes inaccessible, the company may be unable to conduct business. A company thus should consider the risks that can arise in the situation where the "cloud" is inaccessible, even if the loss of access is temporary, in order to develop a coordinated plan of attack in such situations and determine roles and responsibilities.

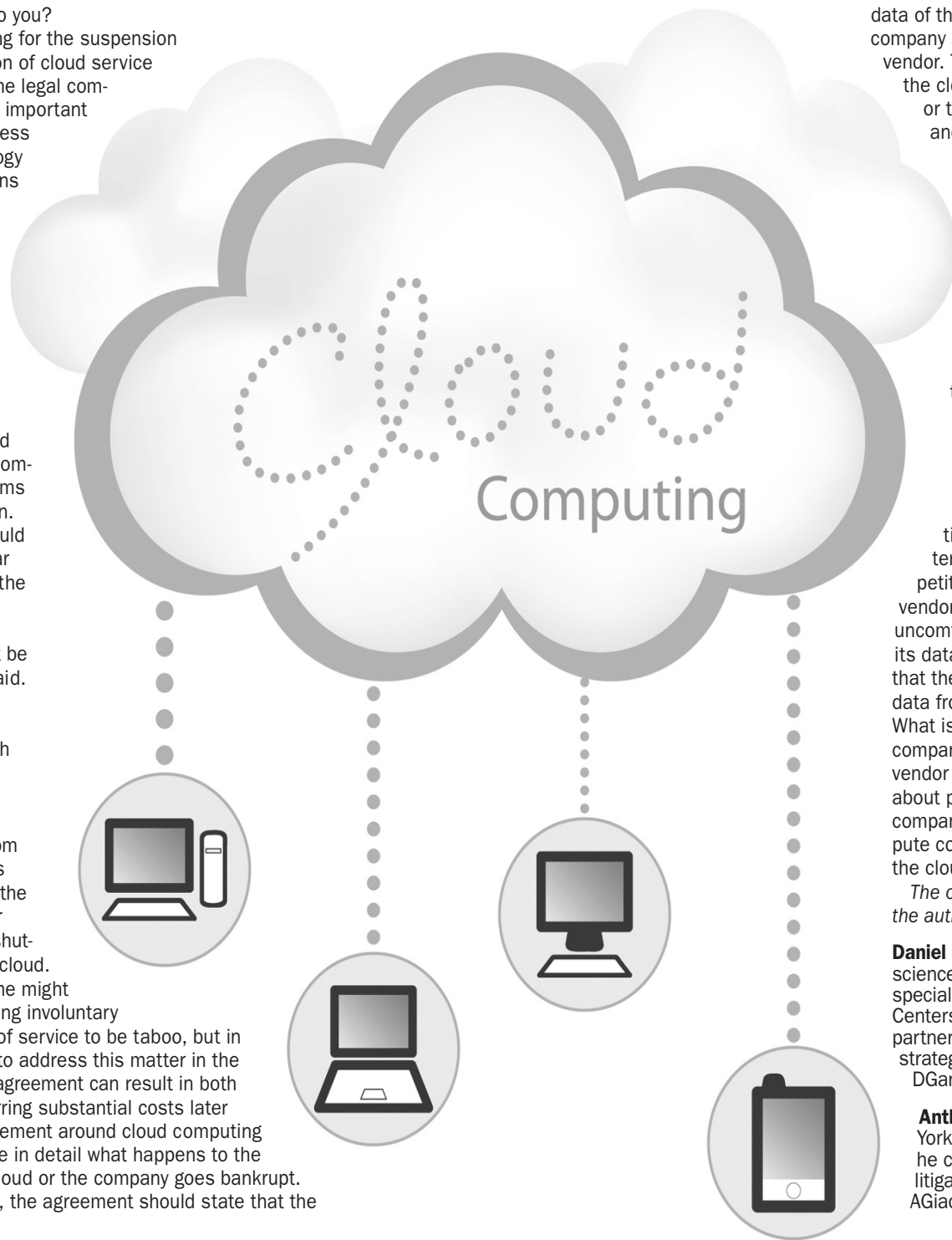
Before migrating to the cloud, a company should identify its critical systems and related data, and have such data readily accessible in the event its cloud-based data becomes inaccessible. Non-critical data should be backed up, while recognizing that it may take some time to get access to all backup data. If data is not backed up and the cloud is inaccessible, the company can lose the control of business. Accordingly, in choosing a cloud vendor, pay attention to mechanisms the vendor has in place regarding backup and data retrieval. How many servers does the host have? How often will your data be backed up? What is the cost and time involved in rendering backup data

accessible to you?

In preparing for the suspension or termination of cloud service scenarios, the legal component is as important as the business and technology considerations presented above.

Counsel must identify and designate the parties responsible for repairing the cloud and getting the company's systems running again. Counsel should pay particular attention to the terms under which such repairs must be made and paid.

Counsel should also identify which parties are responsible for covering the costs from the temporary or permanent shutdown of the cloud. Perhaps some might see discussing involuntary termination of service to be taboo, but in fact, failure to address this matter in the body of the agreement can result in both parties incurring substantial costs later on. Any agreement around cloud computing should define in detail what happens to the data if the cloud or the company goes bankrupt. For instance, the agreement should state that the



data of the company should be the property of the company alone and not the property of the cloud vendor. The agreement should expressly provide that the cloud vendor has no rights to hold the data or to refuse the company access to the data and, upon bankruptcy or any other termination of the cloud vendor's business, the data should be promptly be returned to the company. An agreement that does not spell out these details can result in a company losing access to its data, if creditors, for instance, successfully assert that the data is the property of the bankrupt cloud vendor. If an argument is made that the data is an asset of the bankrupt debtor, the Bankruptcy Court can take jurisdiction over that data and the data can be frozen until the court can decide who is entitled to the data. For obvious reasons, this could have a drastic effect on your company.

Another temporary suspension or termination of service issue involves the voluntary termination of service. For instance, a competitor of the company may acquire the "cloud" vendor and consequently, the company might be uncomfortable with the vendor continuing to host its data. Counsel for both parties should ensure that the agreement addresses how to retrieve the data from the cloud in such situations. Who pays? What is the appropriate timeline? Moreover, the company should address what happens if the cloud vendor withholds the company's data in a dispute about payment. It is prudent that counsel for the company include language specifying that no dispute concerning payment constitutes grounds for the cloud vendor to withhold data.

The opinions expressed herein are solely those of the authors.

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