

CLOUD COMPUTING: Security Issues When the Winds Blow South

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September 24, 2011

Overview

- ✦ Who are the players?
- ✦ Potential Problem Scenarios
- ✦ What to Look For in an Agreement
- ✦ Cases

Setting the Stage

- What is it?
- Who are the players?
 - The unit of measure is “bits”
 - Who owns the bits?
 - Who regulates access to those bits (can be multiple)?
 - Who owns the hardware where the bits are stored?
 - Are any data brokers or middlemen involved?
 - The government may surveil or intervene

Potential Scenarios

- ✦ Breach of Contract
- ✦ Bankruptcy
- ✦ Government Intervention (ICE Cases)
- ✦ Third-Party Intentional Torts (hacking)
- ✦ Force Majeur

The Aftermath

- ✦ Some things can be solved via contractual terms
 - ✦ But may not be privy to all contracts in a stack
- ✦ Generally, not all things are covered in the contract
 - ✦ Players have unequal power
 - ✦ Provider may not be able to accommodate special provisions
 - ✦ Important to find a provider whose business model fits your own or your client's

The Aftermath

- ✦ Potential Theories
 - ✦ Breach of Contract
 - ✦ Art. 1 Collateral Debt
 - ✦ Bailment for hire
 - ✦ Landlord / Tenant
 - ✦ Debtor in Possession
 - ✦ Art. 2A Equipment Lease
 - ✦ Mechanics Lien
 - ✦ Escrow clauses?

The Aftermath

- ✦ Data Breach/Notification Laws
- ✦ Stored Communications Act
- ✦ Electronic Communications Privacy Act
- ✦ Social Security Numbers
- ✦ Tax Returns / Divorce Decrees
- ✦ GLBA

Complications

- ✦ Are payments in subrogation possible?
- ✦ Privity / specific performance
- ✦ Multiple Parties -- Intervention & Joinder
- ✦ Reps and Warranties
- ✦ Loss of software license because of bankruptcy
 - ✦ Does bankruptcy trigger some escrow clause?

Complications

- ✦ Conversion
- ✦ SCA
- ✦ ECPA
- ✦ Copyrights
- ✦ Trade Secrets
- ✦ Injunction
- ✦ Jurisdiction
- ✦ Conflicts of Law

Cases

- Dropbox litigation
 - Complaint filed in June
 - Allegation that defendant failed to secure private data or notify about data breach
 - Class action status sought
 - California unfair competition law (failure to inform constituted a fraudulent act), invasion of privacy, negligence, breach of express and implied warranty
- This is in addition to the FTC complaint filed in May, 2011 (based on making false claims of security of customer data).

Cases

- ✦ Amazon Outage Case
 - ✦ Outage occurred in April, 2011
 - ✦ Affected hundreds of businesses for several days

Things to Consider...

- Service Level Agreements (SLA's)
- Data Security Breach Notification
- Legal Process Notification
- Use of Customer Data
- Compliance with EU Data Protection law
- Limitation of Liability
- Loopholes that enable authorization to circumvent the CFAA
- Indemnity clause
- Representations and Warranties
- Termination (Assistance)
- Insurance
- Audit Rights / Regulatory Audit
- Confidentiality
- Broker/Money Transmitter
- Termination on Data Breach
- Data Formatting
- Secure destruction of data upon termination (including backup data)

Best Protection

- ✦ Encryption is your friend!
- ✦ Keep Backups

Questions?