

REVIEW



**Cloud the issue –
the legal pitfalls of
e-storage**



back home forward



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April 2013

Advocates, Solicitors & Attorneys
an incorporated legal practice

april 2013

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Introduction

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Advocate Nadine Roberts reviews ...

... Some of the tricky legal issues that can come with storage of information on the ether.

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Cloud the issue – the legal pitfalls of e-storage

Advocate Nadine Roberts of M&P Legal analyses some of the tricky legal issues that can come with storage of information in the ether.

The emergence of Cloud technology has revolutionised the way in which a growing number of businesses and individuals manage and share their electronic data. Over the last decade we have become more reliant on the internet as a way to carry out our daily tasks and conduct our businesses. This in turn has meant that we have become more reliant on our computer systems and the need for electronic storage space.

Both individuals and businesses find themselves having to regularly upgrade their computer systems to store their accumulating data. There is also the added problem of keeping up to date with the latest software developments which, not only take up valuable storage space but evolve at an ever increasing rate and lead to regular costly upgrades.

This is where Cloud technology comes in. Cloud technology provides a costs effective way to increase your storage capacity by providing you with the opportunity to access online storage space from server providers via the internet. Unlike typical outsourcing where you would pay for a third party to store your extra data on a specific server, the Cloud environment involves a large network of interlinking servers that can offer vast quantities of data storage. As a result,

the Cloud storage suppliers can provide you with cheaper storage due to the economies of scale involved.

The Cloud can provide you with the amount of storage required for your specific needs at any given time, allowing you to better manage running costs. There is also an abundance of software available online in a 'Cloud' format which will usually give you access to the latest versions for a monthly subscription fee. It is therefore no surprise that many individuals and businesses are turning to the Cloud and putting to rest the idea of storing their data 'onsite'. However, the rapidly evolving market space for Cloud based products and services brings with it a number of legal conundrums.

Where is your data?

A large percentage of Cloud providers will use a network of servers, scattered all over the world. This means that your data is not confined to any specific server as was traditionally the case. It can be spread out over a number of servers making it difficult to 'locate' your data. Further, some Cloud service providers trade storage with other providers, which can lead to further confusion as to who has your data and where it can be found.

The jurisdiction question

One of the key issues which the Cloud raises, is which country or countries' laws will govern the data storage. This question

Cloud the issue – the legal pitfalls of e-storage

can have wide reaching implications, including but not limited to:

- Which countries have a right to access to your data
- The effect on human rights, in particular the right to privacy
- Security and protection from cyber crime

By way of an example, consider that you are an Isle of Man based business with European or worldwide client contracts which cover the storage of data involving your client. You choose to store data in the Cloud with a provider who has servers in a number of jurisdictions across the world. Which law or laws will impact on the storage of that data?

Who has access to your data?

A number of developing countries have been keen to enter in to the market place for Cloud services. Cloud service providers are also keen to develop business in these areas as they tend to have lower running costs. However, it cannot be ignored that some developing countries are open to corruption and Cloud users may not have considered the potential risk of their data being 'interfered with' or being subject to surveillance by corrupt governments.

Further, it is not only in developing countries where there is a risk of surveillance of your data. Recently there has been some discussion on the USA's Foreign Intelligence

Surveillance Act Amendment Act (FISAAA) which, "expressly permits purely political surveillance" of the Cloud. Under the Act, any US Cloud providers can be compelled to release data despite the data being uploaded to the Cloud by someone outside of the USA.

It is important to keep this potential risk in perspective as, due to the nature of the way the Cloud operates, it is difficult for a person or individual to pinpoint your specific data within the Cloud. Further, in jurisdictions such as the USA, the surveillance is limited to specific purposes and is likely to only occur in rare circumstances.

However some may take the view that surveillance of any kind is a direct threat to a person's right to privacy.

The right to privacy

28 January was Data Protection Day and, this year, the European Parliament used the day to raise awareness on your privacy in the Cloud. A study published by the European Parliament commented,

"The challenge of privacy in cloud computing is underestimated, if not ignored. The main concern arising from the growing reliance on cloud computing is less the possible increase in cyber fraud or crime than the loss of control over individual identity and data."

Cloud the issue – the legal pitfalls of e-storage

The European Parliament is currently developing a number of reforms on data protection to better take into account the new technological landscape. However, if you are a business storing client data, it is worth giving some thought to the protection you are offering clients with regard to their privacy and the security of their data.

Security and Protection from Cyber Crime

As the technologies linked to internet services develop, unfortunately so do the skills of those involved in cyber crime. One of the drawbacks of handling large volumes of data which can be stored over a number of servers is that it becomes difficult to monitor potential cyber crime threats. Also, if your Cloud service provider is 'trading space' with other providers, it is difficult to know whether the third party provider has the same security controls in place as the provider who you believe you have contracted with.

In turn, this means that if you are a business storing client data, it is difficult for you to make guarantees to your client regarding the protection of their data.

If there is a breach of security or important data is lost in the cloud, who will be responsible for the loss suffered by your client?

Further if your data is stored in another country, that country's laws may differ on rules surrounding cyber security and data protection.

Traceability of Data

The European Parliament's study also commented on the importance of a person's right 'to be forgotten' and the need for consent when using or transferring personal data. This is again, made more difficult in the Cloud.

As previously mentioned, your data could be spread out over a number of servers making it difficult to trace. Further multiple copies of the same data may be found on a variety of servers. This will cause difficulties for those who wish to ensure that all personal data is eradicated from every source.

The Cloud also poses an interesting question with regard to disclosure requirements in cases which come before the courts. To what extent are parties expected to search for data which may or may not be stored on the Cloud?

Navigating Potential Storm Clouds

If you are a business or individual using or thinking about using Cloud services and wish to address some of the points raised in this article, the following checklist may help limit some of the potential risks:

Cloud the issue – the legal pitfalls of e-storage

1. Consider the type of data being stored and whether there is any potential risk that the data will be subject to 'surveillance' if stored in another jurisdiction;
2. Check to see if your contract with the Cloud provider has an 'applicable law' clause;
3. If not already stated in the contract, make enquiries as to where the Cloud supplier stores their data and in which countries they have servers;
4. If not already stated in the contract, make enquiries as to whether or not the Cloud supplier has a trade agreement with other storage providers;
5. Review the contract to see what guarantees are made with regard to security and protection of the data and whether the Cloud provider and any subcontractors follow best practices.

And if you are a business storing client data:

6. Note the location of your client and their country's laws regarding the storage of personal data;
7. Ensure that your client contract limits, so far as possible in law, your exposure to potential claims for loss of data or security breaches within the Cloud.

Although there is currently some level of uncertainty regarding the laws surrounding the use of Cloud services, they do provide cost effective and practical solutions to the issue of data storage. The benefits are hard to ignore and will continue to be embraced by both individuals and businesses. However, being alert to the potential problems can only help improve the user experience.

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