The Cloud Above Us All: Data and Intellectual Property Issues in Cloud Computing

Thursday, February 25, 2016 | 1:00 PM Eastern

Sponsored by the ABA Section of Intellectual Property Law, Section of Science & Technology Law, Division for Public Services, Young Lawyers Division and the ABA Center for Professional Development
Faculty

David W. Tollen

Sycamore Legal, P.C.: attorney, trainer, expert witness

www.SycamoreLegal.com

Author of *THE TECH CONTRACTS HANDBOOK: Cloud Computing Agreements, Software Licenses, and Other IT Contracts for Lawyers and Businesspeople* (ABA Publishing 2016; IP Section)

www.TechContracts.com
Objectives

1. Understand the way cloud computing changes IT contracts
2. Avoid mistakes generated by using “software licensing playbook”
3. Avoid 5 common errors/misunderstandings
Outline

1. Cloud/SaaS Subscriptions
2. Data Security (including vs. NDA)
3. Indemnities in the Cloud
4. Warranty of Functionality vs. SLA
5. Financial & Technical Security
Resources

• Tollen, **THE TECH CONTRACTS HANDBOOK: Cloud Computing Agreements, Software Licenses, and Other IT Contracts for Lawyers and Businesspeople** (ABA Publishing 2015; IP Section)


• Training on IT contracts: info & signups at [www.TechContracts.com](http://www.TechContracts.com)
1. Cloud/SaaS Subscriptions

- Demystifying/defining cloud, SaaS, & software licensing
- Core/transactional clause: subscription, *not* IP license
- Implications for other clauses: maintenance, updates/upgrades, warranties, SLA, data management & security, data indemnities & warranties
2. Data Management & Security

• **Data Management** (most similar to NDA):
  1. General use restrictions
  2. Customer’s ownership/control
  3. E-discovery compliance
  4. Compliance w/ Law & Privacy Policies

• **Data Security**:
  1. Technical Security
  2. Testing & Audits: SSAE-16 & etc.; pen-testing
  3.Leaks
3. Indemnities in the Cloud

- **Why?**: one party creates particular outsized risk for the other
- **Who?**: usually the vendor, but in the cloud, often the customer too or instead
- **IP Indemnity**: technology indemnity from the vendor; content indemnity from the customer
- **Data Indemnity**: from either or just from one – either vendor *or* customer
4. Warranty of Functionality vs. SLA

- **Warranty**: broad functionality promises, limited remedies (repair, replace, or refund)
- **SLA**: narrow functionality promises, credit remedies

**SLA-Drafting:**
- “Uptime”: system functionality or just access?
- Error Definitions: too vague?
- Recapturing Warranty-Like Promises?

- **Both Warranty & SLA?**: what’s in it for the vendor?
5. Financial & Technical Security

- **SaaS Escrow**: rarely of any value
- **Cloud Services Pseudo-Escrow**: massive & complex but meaningful
- **Data Security Mechanisms**: SSAE-16, pen-testing, etc.
- **Financial Reporting & Requirements**: books/records review; insurance
- **Data Rescue**: self-help to preserve or destroy vulnerable data
Contact Information

David W. Tollen
Sycamore Legal, P.C.
555 Montgomery St., Suite 1650
San Francisco, CA 94111
www.SycamoreLegal.com
415-278-0950
david@SycamoreLegal.com
Questions?

All attendees can submit questions via the chat feature on the webinar interface.