Canadian Consumer Initiative | L'Initiative canadienne des consommateurs

Parliamentary Briefing Note

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Canadian Perspectives on Cloud Computing and Consumers

Cloud computing is ever more present in the everyday life of consumers

Cloud computing purportedly uses the Internet as a place where computer calculation or data storage is made available to the public. Certain cloud computing services are currently major players on the Internet: social networks such as Facebook; messaging services such as Hotmail, Gmail, Yahoo!Mail; photo storage services such as Flickr, etc. Access to data stored "in the cloud" is available any time, or almost, and data storage capability is now independent of the "at home" hard disk drive capacity.

Any problems?

Do consumer laws apply to cloud computing services? Do cloud computing service contracts fully comply with Canadian consumer protection provisions?

Access to storage is facilitated, but is the stored data as safe (or safer) in the cloud as what is stored on one's own computer? Is there any guarantee that this material or the access won't suddenly just disappear? Are consumers actually aware of the risks?

Cloud computing services notably enable consumers to create, save and share documents (drawings, photos, etc.). Do the cloud computing application contracts recognize and respect the copyrights?

Does personal information have the same legal protection in the cloud as on firm ground?

Findings

CONTRACTS

Our study concludes that cloud computing service agreements should be considered as consumer remote contracts for successive and future performance provided at a distance, and be protected by consumer laws. The user's provision of personal information, which will often be used by the application provider for profit, will however need to be considered as being a price that a user pays for the service to make sure the contract qualifies as a consumer contract.

Many of the protections offered by consumer laws are totally ignored by some providers of the services: waivers of liability clauses, warranty exclusion clauses, arbitration clauses, clauses submitting the contract to foreign laws or jurisdiction, unilateral alteration, automatic subscription renewal clauses, and termination clauses abound. Many clauses might also be considered abusive or unconscionable.

THE CANADIAN CONSUMER INITIATIVE is a coalition of four major Canadian consumer organizations: Consumers Council of Canada, Option consommateurs, Public Interest Advocacy Centre and Union des consommateurs.

L'INITIATIVE CANADIENNE DES CONSOMMATEURS est une coalition formée des plus importantes associations de consommateurs au Canada, soit le Conseil des consommateurs, le Centre pour la défense de l'intérêt public, Option consommateurs et l'Union des consommateurs.

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COPYRIGHT ACT

The licences that users automatically grant many of the cloud service providers by simply using the service might seem excessive, even abusive, with regard to the Copyright Act. Licences are at the same time not very detailed and hard to understand from a consumer standpoint.

PRIVACY ACTS

Privacy legislation has a double purpose, and rests on a balance between the two needs it is intended to meet: the circulation and exchange of information, and the protection of the right to privacy.

Cloud computing companies require users to provide their personal information in consideration for the service that might be monetarily free. The user's provision of personal information is essential for most of the companies: they will use it, notably, for profiling and advertising purposes. However, the companies are no less subject to obligations regarding this collection and use of users' personal information.

Companies must obtain consent before collecting personal data, but must also inform individuals of the use they are going to make of that data. A reasonable effort must be made to ensure that the individual is advised of the purposes for which the information will be used. The purposes must be stated in such a manner that the individual can reasonably understand how the information will be used or disclosed.

Most of the contracts we examined did not meet these conditions. Moreover, "opt-out" is used in most cases. When information might be available, it is unclear or lost in a labyrinth of related links.

A consumer who is not satisfied by the company's treatment of a complaint relating to privacy may file his complaint with the Privacy Commissioner of Canada. The latter, if the complaint is receivable, will investigate and, if the Commissioner decides that the complaint is well founded, a draft report including recommendations will be sent to the company; the company will be responsible for explaining to the Commissioner how it plans to implement the recommendations. Only the Federal Court can enforce the implementation of those recommendations and award damages.

Conclusions

At this time, few laws have considered this new phenomenon of cloud computing services. Current legislation however often provides tools that already protect consumers; a strict application and the assurance that cloud computing does not escape their application could often suffice.

Abusive or unconscionable contract terms could certainly be treated more harshly in Canada. France, for example, can impose standard contracts for some services, which automatically eliminate unfair terms. A consumer association may also preventively initiate an action for discontinuance of an unfair contract clause. The Code de la consommation even provides for criminal sanctions for delinquent merchants.

Cloud computing services often clash, in terms of personal information protection, with certain principles established by the PIPEDA (Personal Information Protection and Electronic Documents Act). European Union Digital Agenda Commissioner Neelie Kroes has undertaken the development of a European strategy regarding cloud computing. One of the subjects of this strategy is the legal framework, since she estimates that the latter alone cannot, by means of voluntary codes, protect users of this technology.

However, the European regulatory framework already includes certain interesting measures, notably those regarding standard contractual clauses concerning the transfer of personal information, and notification to the authorities and the users if confidentiality is violated.

Sixty-eight per cent of users of at least one cloud computing application say they are very concerned by the fact that the company providing the services can analyze their personal information and then target advertisements to them.

In the United States, the Federal Trade Commission established, in December 2010 following a consultation process, certain measures focusing on targeted advertising, integrating the concept of "Privacy by Design" developed by the Privacy Commissioner of Ontario. The European Data Protection Supervisor has also promoted "Privacy by Design."

Companies should also simplify the choices offered to consumers regarding the protection of personal information, notably by giving this choice on a timely basis when the consumer will be most able to understand the implications of that choice.

Moreover, privacy policies should be more easily understandable. Standardization would make it possible to compare different privacy policies more easily.

The FTC promotes a new approach, called "Do Not Track," which would likely involve the placement of a persistent setting, similar to a "cookie," on the consumer's browser, signalling the consumer's choices about being tracked and receiving targeted ads.

Many of these proposals could be integrated into Canadian law to consumers' advantage. They could also serve as a basis for the development of optimal privacy protection standards.

Recommendations

WITH REGARD TO PRIVACY

Mandate the Privacy Commissioner of Canada to conduct a thorough investigation of cloud company practices, in view of establishing a uniform framework for the collection and use of Canadians' personal information by cloud computing companies.

Amend the Privacy Act to

- impose a "Do Not Track" mechanism for targeted advertising;
- incorporate the concept of "Privacy by Design" into that mechanism.

WITH REGARD TO COPYRIGHT

Clarify copyright assignment or licence clauses, notably regarding the scope of the rights assigned or licensed and the scope of such assignment.

WITH REGARD TO CONSUMER PROTECTION

Mandate the Consumer Measures Committee to harmonize provincial laws:

- to include a provision clearly indicating that all consumer contracts are subject to consumer protection laws whenever consideration is required of the consumer;
- to impose on merchants the obligation to indicate clearly and explicitly, if applicable, that contractual clauses that are inapplicable under the province's consumer protection act will be void against consumers in that province;
- to strictly regulate merchants' use of unilateral contract amendment clauses; and
- to study the possibility and relevance of tightening the regulation of unfair clauses, by using as an example the measures adopted in Europe.

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