Click Here to Cloud: End User Issues in Cloud Computing Terms of Service Agreements

Tomas A. Lipinski

School of Library and Information Science, Kent State University,
314 Library, 1125 Risman Drive,
Kent, Ohio 44242-001
tlipins1@kent.edu

Abstract. Four Terms of Service (TOS) agreements offered by commercial providers of cloud computing services are reviewed in order to identify those provisions that are problematic from the perspective of the end user. The following services were reviewed: iCloud, OpenDrive, Dropbox and Amazon Cloud Drive. The legality of the mass-market licenses is assessed. Specific provisions are reviewed with the goal of understanding the consequences on the user/consumer of cloud computing services; particularly those provisions that may result in unintended or detrimental consequences for users/consumers are identified. The effect of the law of contract (license) is contrasted with the law of copyright. Recommendations are made throughout the discussion to improve TOS provisions for the end user. Developments in the law of contract are surveyed to determine the enforceability of specific provisions as well as the potential avenues of challenge to problematic clauses discussing whether such clauses might be unconscionable.

Keywords: Contract law, copyright law, license terms and conditions, unintended consequences, public policy, unconscionability.

1 Introduction

Cloud computing services agreements are governed by contract law as the cloud computing service is licensed to the user. A license is simply a form of legal permission. The consequences for cloud computing users are significant. These agreements are often referred to as Terms of Service (TOS) or End User Licensing Agreements (EULAs). Through these agreements the user is obtaining permission to access and use “the cloud.” The user is not obtaining a physical object such as a book, rather is acquiring use of a service. Unlike a purchase, where the buyer may come to own the product such as DVD, licensees do not possess ownership rights in the cloud service nor is such service perpetual. As there is no transfer of a physical item, the license of cloud services means that contract law governs the acquisition of the service and its subsequent use. Using contract law allows a service provider to ignore in a sense the default of rules of copyright that would otherwise apply to the use of content protected by copyright such as literary works (a book or a computer program)
or an audiovisual work (a motion picture on a DVD). In the cloud computing environment the cloud operating software, the content a cloud service provider makes available to users and most important to the cloud user, as well as content stored by a user in the cloud fall often within the subject matter of copyright protection. However, other provisions in the TOS may take away use rights that would otherwise be available if the copyright law alone applied. In this way, contract law trumps copyright law.

The cloud TOS also establish other operating rules governing use of the service, including the obligations and responsibilities of each party. Moreover cloud license provisions can further elaborate how disputes will be settled, limit damages and otherwise reallocate risk among the parties. Often providers of web based services including cloud space disavow any responsibility for loss of user content or accuracy of content the provider might make available. The legal concept involved here is a waiver of warranty. A license therefore allows the service provider to shift legal risk entirely onto the user. Requiring users to indemnify the service provider further accomplishes this objective, often with unintended consequences or results for the user. Cloud computing services are not subject to negotiation and so there the user is faced with a take-it-or-leave-it scenario of either accepting the provisions of the license in total or foregoing use of the service. This paper analyzes the text of four common cloud computing TOS: iCloud, OpenDrive, Dropbox and Amazon Cloud Drive. The version of each agreement used in this assessment is that version available to the author on Sunday May 19, 2013. Each license was analyzed in detail, provision by provision. That analysis is too lengthy to include here but a summary table of the most significant license variables reflected in the TOS provisions is presented at the end of the discussion. If readers are interested in the provision-by-provision commentary the author is able to provide that assessment upon contact.

Several questions are posed in the context of United States copyright law and general notions of U.S. contract law. What mechanisms make such TOS binding upon the user? Are there other unintended consequences for users such as a limitation on other rights or imposition of burdensome obligations? Are there particular provisions that take away rights that users would otherwise have in the absence of the TOS, i.e., that users would have if the transaction was subject to the copyright law? Finally, is legal challenge to these consequences ever possible?

2 Legality: Contract Formation Issues

In the world of web site access, “use” equates with “agreement” or in contract parlance “assent” to the terms that govern the space the same as if the user placed their signature on a legal document. In Register.com, Inc. v. Verio, Inc., the court concluded that use of the Register.com search service constituted the requisite legal assent to form a valid contract: “by proceeding to submit a WHOIS query, Verio manifested its assent to be bound by Register.com’s terms of use and a contract was formed and subsequently breached” [1]. While web based contracts are then in theory valid there should be an opportunity to read the TOS prior to agreement and a clear