

Moving Beyond Brick and Mortar: Clearing the Legal Hurdles for Doing Business on the Internet

David Snead

Attorney + Counselor

Legal Strategies for Internet Business

Larry Donahue

Attorney & Founder

Law 4 Small Business



How is an Internet business different from a traditional business?



Cloud computing, virtualization and on demand applications



Strategies for effective vendor and customer contracts



Mitigating risks: legal, financial and reputation

How Internet business differs from traditional business

- Compliance with more than one set of laws: Yours and your clients
- Greater potential for fraud
- Need to secure online transactions and data
- Publishing, repurposing or storing client files pose risks
- Placing your storefront (i.e. website) in someone else's care can pose risks

How Internet business differs from traditional business

- Compliance with more than one set of laws: Yours and your clients
 - You must adhere to the laws of the states:
 1. Where your company is registered
 2. Where your headquarters are located
 3. Where your customers are located (when you have an active [i.e. conducting commercial transactions], versus passive, website)
 - Matters with some subject matter: For example, gift certificates, some services (i.e. insurance, loans), some products (i.e. alcohol, tobacco)
 - Matters with some business processes: For example, interest on unpaid balances, refund policies, notice, disclosure, privacy
 - Taxation is becoming a bigger issue, and more states are enforcing

How Internet business differs from traditional business

- Recommendations:
 - Identify “at risk” business processes
 - Conduct a compliance audit, state-by-state for you subject matter
 - “General Compliance” versus “Specific Compliance”
 - Specific compliance for subject matter
 - General compliance for business processes
 - Minimize the need to monitor individual states’ laws

How Internet business differs from traditional business

- Online Fraud
 - Stolen CC's abound
 - You can't use a picture id to verify
 - Requiring card code can help, but those are stolen too
 - Consumers can issue chargeback up to 6 months from transaction
 - Identity theft of your business
 - Strong encryption and properly signed digital certs (i.e. SSL)
 - Strong password policies
 - Obfuscate session variables, and never expose variables for sensitive functionality
 - Bad: www.somewebsite.com/?myid=32123
 - Good: www.somewebsite.com/?session_id=1ea323c78d0daf09deac62309
 - Obfuscate email addresses

How Internet business differs from traditional business

- Securing Online Transactions and Data
 - PCI DSS Compliance
 - <https://www.pcisecuritystandards.org/>
 - Merchant vs. Service Provider
 - Your classification or risk level – Determines level of requirements for PCI DSS compliance
 - Smallest merchant (i.e. Level 4, <= 20,000 Visa transactions) – Annual self-assessment, quarterly network scan, follow acquirer's validation requirements
 - Shutdown of CC processing or worse, for lack of compliance
 - Low-volume sites becoming high-volume sites

How Internet business differs from traditional business

- Publishing, repurposing or storing client files pose risks
 - Communications Decency Act
 - Conduit: Provide or enables computer access
 - Understand and reinforce conduit status
 - DO NOT:
 - Edit, change or manipulate customer content
 - Review / audit customer content
 - Does not protect against Intellectual Property issues
 - Digital Millennium Copyright Act (DMCA)
 - Important to know, if customer content could infringe on another's copyright
 - Contains formalities to handle copyright complaints
 - Trademark issues: Contributory Infringement
 - (1) knowledge, (2) ability to control, (3) benefit from infringement

How Internet business differs from traditional business

- Placing your storefront (i.e. website) in someone else's care can pose risks
 - Independent Contractors: Own their work-product
 - Work Made for Hire Doctrine
 - PCI DSS Compliance
 - Disaster recovery and business continuity
 - What is the expectation of your customers? What is in your TOS?
 - Access logs: Availability and rollovers



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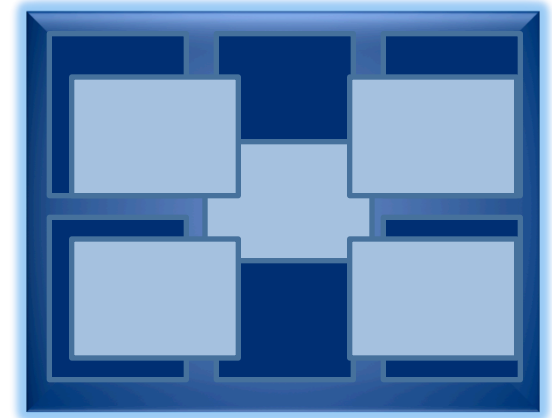
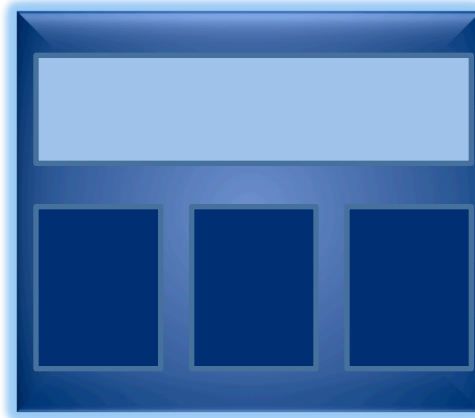


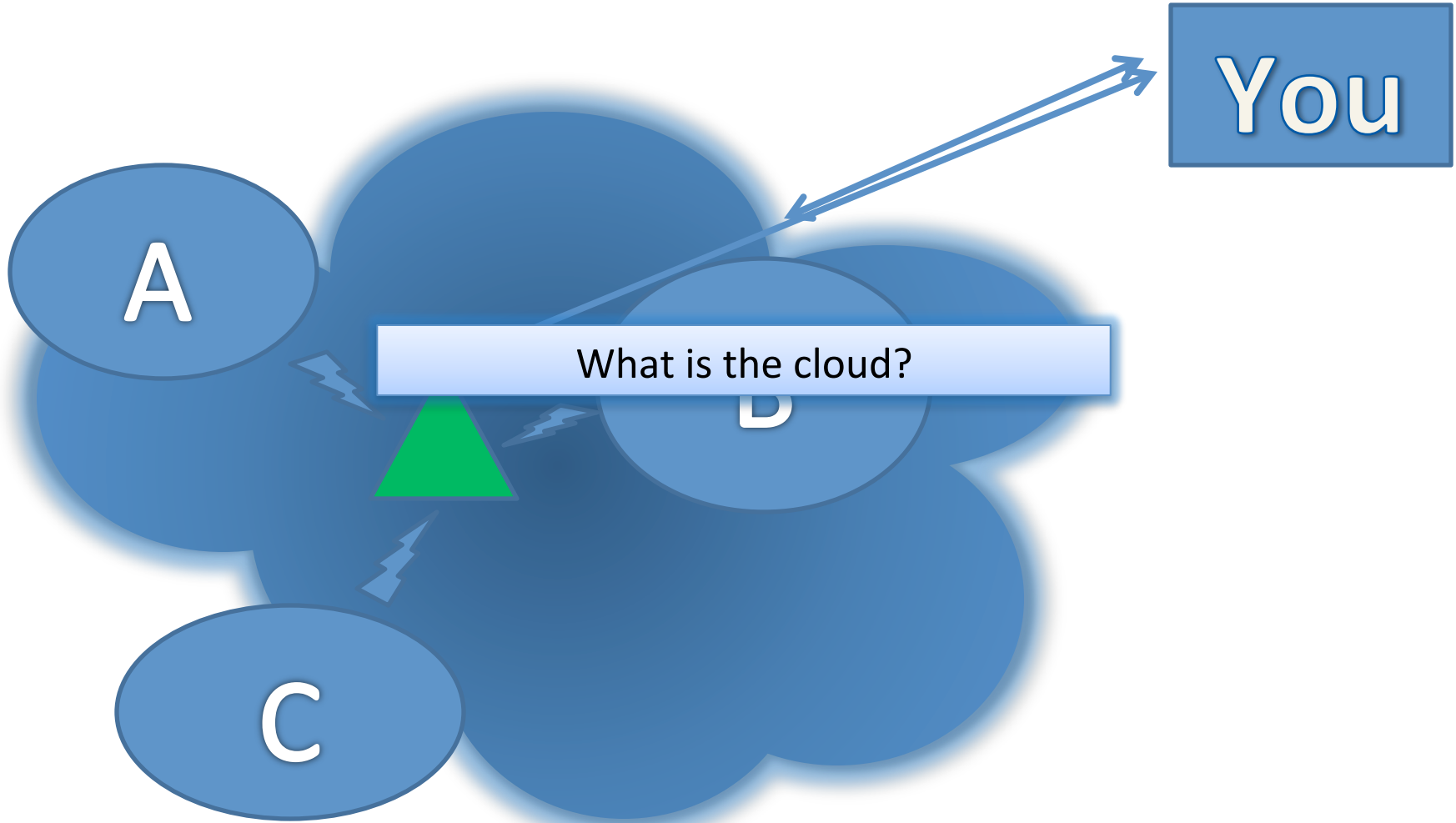
Mitigating risks: legal, financial and reputation

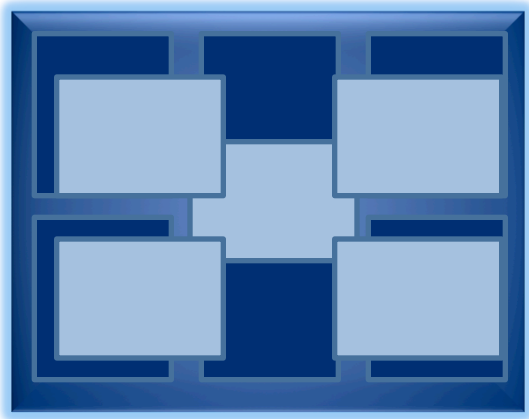
- Virtualization
- Server
- “Server”
- “Application”

- Grid
- Application
- Servers

- Cloud
- Applications
- Servers







For users

- Lack of transparency
- Service levels
- Reliability
- Security
- Privacy

For providers

- Control
- Stability
- Regulatory compliance
- Revenue models
- Cooperation

Analytical framework



In what country is the provider located?



Where is the provider's infrastructure?



Will other providers be used?

Analytical framework



Where will the data be physically located?



Should jurisdiction be split?



How will data be collected, processed, transferred?



What will happen to the data on termination?



Notification of breaches in security



Data transfer



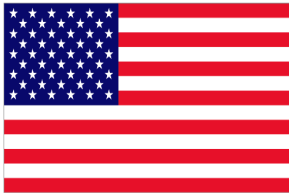
Disposition of data on termination



Change of control



Access to data



Sol Vidro is a company headquartered in Cologne. It seeks to outsource email, office applications, payroll and backbone to two cloud providers in the U.S. and U.K. who must act in a federated manner.



Security

- Define “breach”
- Determine when a breach happens
- Assume there will be data breach laws
- Review any laws that my currently exist
- Understand who will be responsible for security
- Create enforceable contract terms
- Remember post termination issues
- Understand that you may not be made whole

Vendor has provided Sol Vidro with a copy of its current security policy (Policy) as it applies to the services to be performed by Vendor pursuant to this Agreement. Vendor represents and warrants that this security policy represents best of breed security procedures in its industry. Vendor shall give Sol Vidro no less than sixty days prior written notices of any changes in the Policy that impact the services provided to Sol Vidro. Should Sol Vidro determine that these changes materially impact the security of the services, Sol Vidro shall have the right to terminate this Agreement. In such a case, Vendor shall provide reasonable assistance to Sol Vidro to transition its services to another provider.



Data Transfer

- How is the data transmitted?
- Understand concepts like: controller, processor, transfer and aggregation.
- Limit uses
- Require flow down and flow up contract terms
- Evaluate whether “Safe Harbor” is appropriate
- Create methods to address data leakage

Sol Vidro is providing payroll data to Vendor solely for the purpose of processing the data as set out in Exhibit A to this Agreement. Vendor may only provide access to this data to third parties upon written notice and receipt of Sol Vidro's express consent. Sol Vidro's consent may be withheld.



Disposition of data upon termination

- Review data retention laws
- Specify terms for deletion / transfer
- Set out obligations for security post termination

Upon termination or expiration of this Agreement, Vendor shall delete all data and provide Sol Vidro with written confirmation of this deletion. Vendor shall also instruct any entities who have had access to the data to also delete it and provide Vendor with written certification of this deletion. The security obligations set out in this Agreement relating to the data shall survive termination or expiration of this Agreement until such time as the data is completely deleted by Vendor and/or Vendor's suppliers. Vendor shall require this provision, or one similarly protective of Sol Vidro's rights in all its contracts with suppliers or other vendors who provide aspects of the Services.



General contract analysis.

- SLA
- Choice of Law

How does the cloud operate?

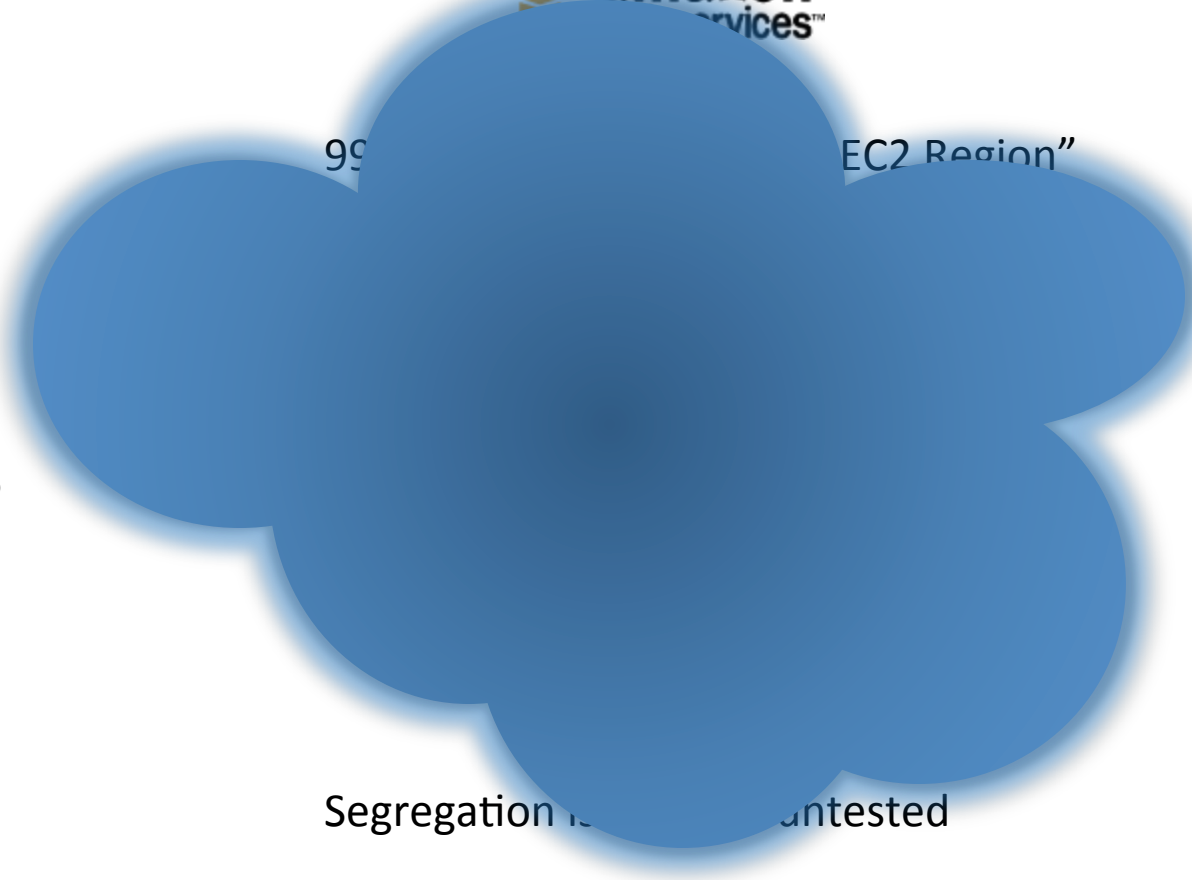
- Contract
- Scalability

What is the level of automation?

- Possibility of human error

How do users affect the cloud?

- Destabilization



99

EC2 Region"

Segregation is contested



Determine how services will be used



Evaluate cloud structure



Understand data collection, processing and transfer



Security breach notification



High risk regulatory areas



Disposition of data on termination



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Mitigating risks: legal, financial and reputation

Contracting Lifecycle

- **“Lifecycle”**

- RFP Phase (competition over terms)
- Security, Privacy and Compliance due diligence
- Contract drafting (see below)
- Contract negotiation
- Contract enforcement
- Contract review and renegotiation

Contracting – Key Contract Terms

- Definitions
- Preventative Contract Terms
- Audit and Enforcement Terms
- Incident Response Contract Terms
- Risk of Loss Contract Terms
- Warranties
- Indemnities
- Flow down
- Product specific

What is important to success?

Price?	Expertise?	Support?
Service Level Agreement (SLA)?	Reputation?	Technical Fit?
Cultural Fit?	Measurability?	Flexibility?
Vaporware or Reality?	Migration to Something Else?	In-House Capabilities?
Current Corporate Focus?	Time to Market?	Strategic Advantage?

Vendors

- Term
- Warranties
- Intellectual property protection
- Fees
- Flow down provisions
- Assignability

Customers

- Can you provide service during term?
- Carefully consider warranties
- IP is your most important asset
- Can vendor raise fees?
- Create integrated contract
- Keep in mind your exit

Terms of Service

SLA

AUP

Privacy Policy

DMCA / IP

SPAM

Resources

Customer Info

Contracting – Key Contract Terms

Example: Bandwidth overages

- What does your vendor contract say?
- How have you monitored?
- What do your termination provisions say?
- Are you required to give a refund?
- What liability do you have to your customer's customers?

Contracting – Key Contract Terms

✓	Issue	Discussion
	Term	<ul style="list-style-type: none"> - Short. - Defined. - Controlled. - Foreseeable: "circuit can route Internet packets."
	Early Termination	<ul style="list-style-type: none"> - Minimum commitments. - Penalties. Low. Never for cause. - Vendor must meet your criteria for success. - SLAs - Milestones - Insolvency - Change of terms

Contracting – Key Contract Terms

✓	Issue	Discussion
	Price	<ul style="list-style-type: none">- All costs / increases should be spelled out.- <i>"No other fees, costs or charges shall be assessed than is otherwise herein provided this Agreement."</i>- Most favored customer.- Pricing options.
	Billing Disputes	<ul style="list-style-type: none">- Specific provisions.- Monitor bills.- Pay over time.

Contracting – Key Contract Terms

✓	Issue	Discussion
	Notice	<ul style="list-style-type: none"> - Common sense. - Equal among partners. - Avoid electronic or email notice.
	Renewal Options	<ul style="list-style-type: none"> - Options – not requirements - Evergreen clause
	Resell or Redist. Rights	<ul style="list-style-type: none"> - Up front discussion. - Scrutinize Bandwidth contracts - No restrictions on peering.
	Unique Environment	<ul style="list-style-type: none"> - Put the following in the contract: <i>"Vendor is aware of Customer's unique operating environment, and has been afforded an opportunity to ask questions and guarantees to Customer that no other fees are required for Customer to utilize Vendor's services, as stated herein."</i>

Contracting – Key Contract Terms

✓	Issue	Discussion
	Specific Requirements	<ul style="list-style-type: none"> - One size fits all? - Your business environment - Your deal / your contract - Vendor "skin in the game"
	Telecom Specific	<ul style="list-style-type: none"> - <u>Latency</u>. Don't simply agree to a general latency time. Make sure the latency (and/or ping times) are associated with a specific destination into and out of the network. Your monitoring counts! - <u>Quality Assurance</u>. Right to terminate entire contract for lack of meeting SLA's, even for one circuit on a multi-circuit contract. - <u>Access Points</u>. Specifically pick an access point you know and trust.

Contracting – Key Contract Terms

✓	Issue	Discussion
	No Special Equipment / Service	<ul style="list-style-type: none">- Generic / White box equipment.- Unlimited license following termination
	Basic Rule: Quid Pro Quo	<ul style="list-style-type: none">- Something for something.- Partners are equals.- An equal exchange or substitution.

Concentrate on:

- What are you required to do?
- What are you selling – giving up?
- What are your long term obligations?
- Who owns the technology when the deal ends?





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Mitigating Risks: Legal, financial and reputation

- Legal Risks:
 - Response to subpoenas and warrants
 - Review, verify, schedule and comply
 - Contrast to Patriot Act subpoenas
 - Contrast to Attorney discovery requests
 - Privacy
 - DMCA
 - Terms of Service
 - Mitigate against abusive behavior
 - Follow standard procedures for termination, refunds, penalties, etc
 - Legal Compliance (General versus Specific Compliance)
 - The Way Back Machine (www.archive.org)

Mitigating Risks: Legal, financial and reputation

- Financial Risks:
 - Credit card processing
 - Contingent liability explained
 - Change in your PCI DSS classification or risk level
 - Chasing Intellectual Property after the fact
 - Vendors hired without “Work Made for Hire”
 - Fixing failures
 - Privacy breaches
 - Security breaches
 - Defending against lawsuits
 - Improper “conduit status”
 - Failure to qualify for DMCA safe harbor

Mitigating Risks: Legal, financial and reputation

- Risks to Reputation:
 - Interruption in Service
 - Inability to process CC's
 - Loss of service or data
 - Lawsuits
 - Failure to follow Terms of Service
 - Compliance failures

Questions & Answers