

Pitfalls to Avoid in Adopting Cloud Solutions

Jim Burger
Dow Lohnes PLLC

The Technology

Public Cloud

Service Level Agreement

Private Cloud

Archiving

Infrastructure as a Service

Colocation

Threat Management Gateway

Recovery Point Objective

Software as a Service

Managed Service Provider

On-Premise Private Cloud

Data Center Tiers

Externally-Hosted Private Cloud

Hosted Applications

Recovery Time Objective

Encryption

Hybrid Cloud

Multi-Tenancy

High Availability

The “Data”

PII

email

Public Relations

Corporate Secrets

Contracts

Other Companies’ Secrets

Copyrighted Content

Pre-filing Invention Data

Plans

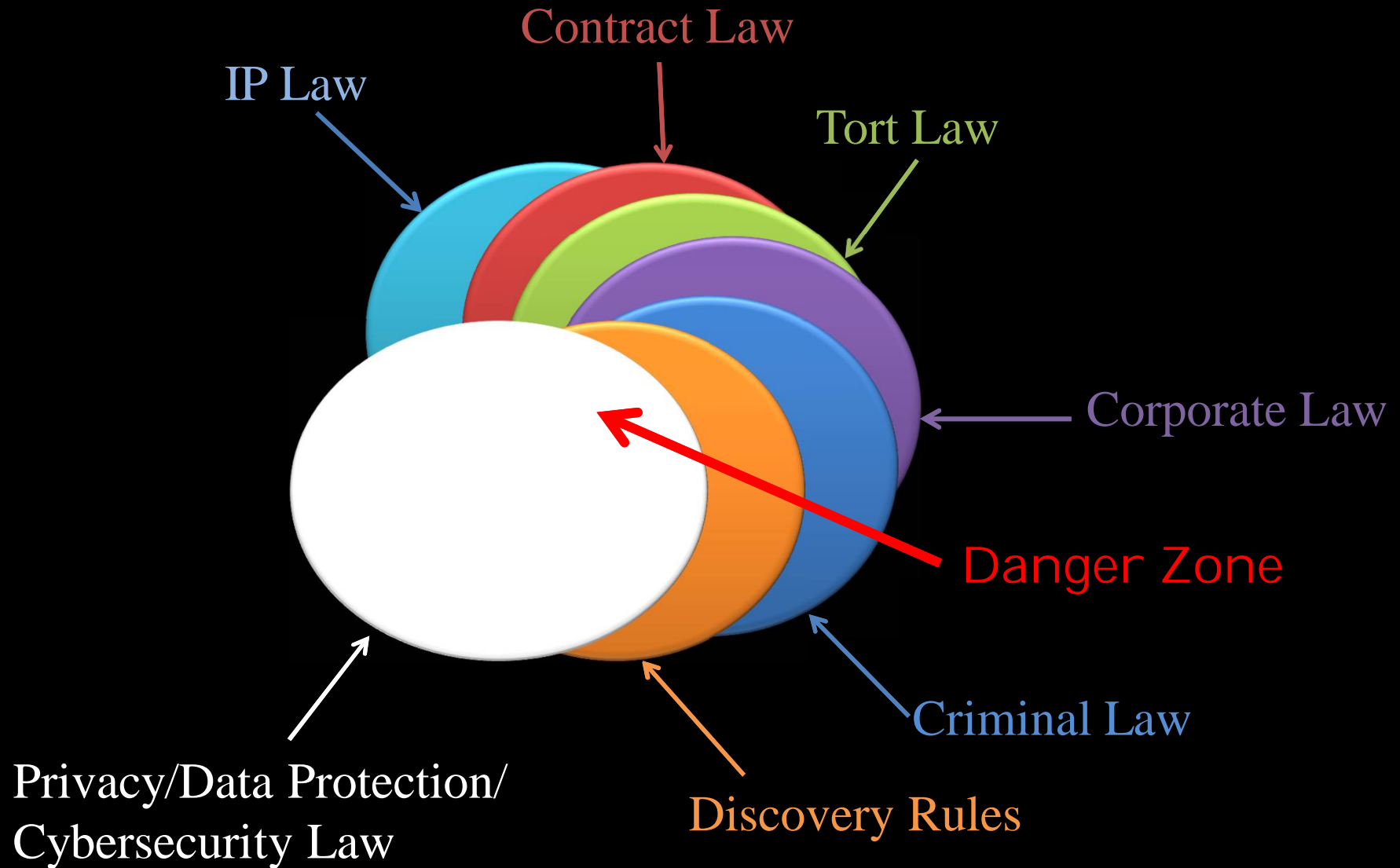
Employees Personal Data

Algorithms

Financial Data

Works in Progress

There Is No “Cloud Computer Law”



Jurisdiction

- Simple Definition: A Court's Authority to Judge Acts Committed in a Certain Territory
- Country? Countries?
 - There are no borders on the Internet
 - Where is your business?
 - Where are your customers?
 - Where are the cloud facilities?
- United States
 - Federal
 - State
- European Union – e.g., EU e-Privacy Directive (US-EU Safe Harbor Framework)

IP Law

- Copyright
- Patent
- Trademark
- Trade Secret

Copyright

- Private Cloud
 - *Texaco* (and BSA)
 - Employees Storing Entertainment Media
 - Illegal content
- Public Cloud
 - Direct Infringement & Safe Harbor
 - Secondary Liability
 - Criminal, DNS Blocking & Seizure
 - But...accessing your data ...

3rd Parties & Megaupload

- Goodwin (EFF) – allow users (password) to access
- Carpathia – pay or re-provision
- DOJ – we're done
- MPAA – don't let Megaupload access
- Defense – preserve and allow access
- 25 Petabytes (Petabyte =13.3 years of HDTV or 50 LOCs), 1,103 servers, 66 Million users
- In July: Judge – Parties figure work it out or I'll decide
- 10 Months After Indictment & Seizure

Patent, TM, Trade Secrets

- Patent
 - Pre-filing publication
- Trademark – passing off in public cloud*
- Trade Secrets
 - Liability for disclosure*
 - Loss of protection

*(see Contract)

Contract Law – With Cloud Provider

- Obligations to protect privacy/provide security
- Risk of breach allocation
- Third party access
- Reliability (SLA)
 - Acceptable service levels
 - Alternative/backup during downtime
- Exit scenario: provider's obligations

Contract Law – With Others

- What are your obligations to protect data provided to you by others
 - Non-disclosure agreements
 - Confidentiality provisions
 - Will limitation of liability clauses protect you?

Tort (Negligence) Law

- State law (unless Federal steps in and pre-empts)
- PII (e.g., employees payroll, customers information, etc.)
- Negligent handling
- Will EULA or Contract provisions protect you?
 - Willful

Corporate Law

- Fiduciary duty
 - Directors and Officers are expected to display a high standard of care, skill or diligence
- Keep company confidential information confidential
- Note Patent & Trade Secrets above

Criminal Law – Search & Seizure

- Search & Seizure – 4th Amendment
 - Expectation of privacy
 - Constitution: reasonable S&S (warrant)
 - Stored Communication Act permits mere subpoena
 - *US v. Warshak* – warrantless search of email service unconstitutional
 - Subscriber Agreement doesn't defeat

Other Criminal Law

- Illicit content (above)
- Megaupload criminal copyright

Discovery Rules

- What has to be shown in a lawsuit
- Locate data that supports your case
- Court rules about how produced, retained, etc.
- Each party wants to find out other's information
- Failure to comply – loss of data in case

Data Protection/Privacy/ Cybersecurity Law

- Relatively new (and developing law) laws
- Almost all 50 states have data breach notification requirements
- Many US laws: Gramm-Leach-Bliley, FTC red flags, HIPAA, US Patriot Act
- Many countries laws and regulations: EU Data Privacy Directive, Canada, Australia, etc.
- Where you keep it, what you do with it, how long you keep it
- Controls cross-border transportation of data



Thank You

Jim Burger