



Cloud Computing

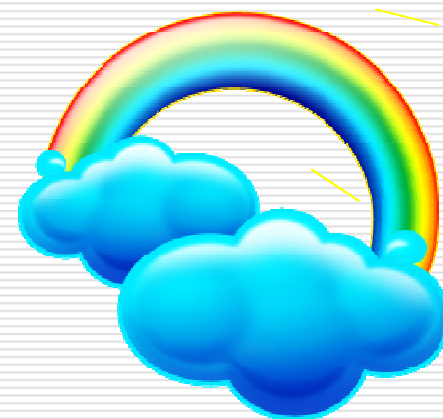
Contractual and Legal Implications

IT Law Section – 2009 Annual Meeting

Hyatt Regency Hotel, Dearborn

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“Never trust a computer you can't throw out a window.”

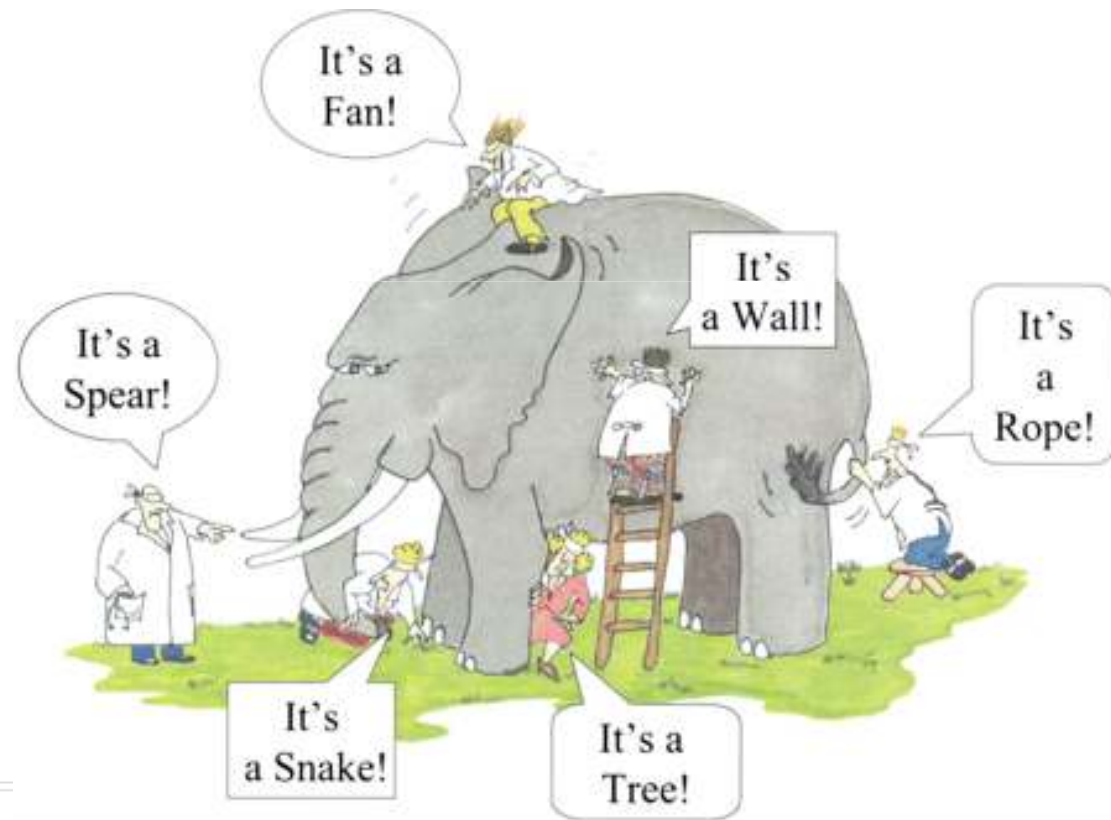
Steve Wozniak, Co-Founder of Apple

Overview

- ❑ Questions for the client
 - ❑ Third party issues
 - ❑ Liability implications
 - ❑ Negotiation considerations
 - ❑ Parting thoughts
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Questions for the client

- ❑ Go beyond the label of “cloud computing”



Questions for the client

□ Identify the specific parameters

- Single function application?
 - ❖ Ex: Google Mail, Quicken Online, Evoice Receptionist, Salesforce.com
- Application infrastructure?
 - ❖ Ex: Google App Engine, Ruby on Rails, Joyent
- Raw computing resources?
 - ❖ Ex: GoGrid, Amazon's Elastic Cloud
- Private/Public/Hybrid?
- Data/Data flow?

Questions for the client

- Identify the specific parameters
 - Processes/Applications?
 - Third Party Licenses/Contracts?
 - How do you extricate yourself from the relationship if there is a dispute?
 - **What happens to your data after termination?**
 - **What (if any) assistance would be required to obtain your data?**
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Third Party Issues

- ❑ Cloud computing can add contractual complexity because it can increase the number of parties
 - ❑ Indirect relationship between user and support personnel
 - ❑ Hypothetical scenario #1 – moving existing applications:
 - Party 1: Licensee who wants to move to cloud architecture
 - Party 2: Licensor of proprietary software
 - Party 3: Provider of cloud infrastructure
 - ❑ Hypothetical scenario #2 – develop new applications:
 - Party 1: Licensee
 - Party 2: Software developer
 - Party 3: Provider of cloud infrastructure and potentially development infrastructure
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Third Party Issues

- ❑ License agreements may preclude
 - moving licensed software to a cloud
 - allowing third parties to access or host software
 - ❑ When problems occur, is it possible to identify the responsible party?
 - ❑ Inter-cloud data exchanges
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Liability Implications

- ❑ Privacy/Confidentiality
 - Extra layer of non-disclosure agreements required to preserve confidentiality
 - Adequate security in context of public clouds?
 - HIPAA regulations- need a business associate agreement with everyone
 - ❑ Sarbanes-Oxley
 - Audit and accountability requirements
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Liability Implications

- Patent infringement?
 - U.S. Patents 6,714,968, 6,735,623, and 6,952,724 have been asserted to cover “remote storage servers”
 - Apple and Softlayer Technologies were sued in 2009
 - Every reason to believe that more lawsuits are on the way
 - Similar situation to the Linux SCO?
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Liability Implications

- ❑ Jurisdiction – location of the cloud?
 - What if jurisdictional laws/regulations conflict?
 - Export regulations
 - ❑ Insurance coverage – which party?
 - ❑ Disaster Recovery Planning /Responsibility
 - ❑ E-Discovery – responsibility without control?
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Liability Implications

- ❑ Warranties/Service Level Agreements
 - Identify useful and objective metrics
 - Manageable and useful financial incentives
 - Automated reports
 - Access to cloud management data
 - Licensee may decide to rely on termination leverage in lieu of detailed SLAs
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Negotiation Considerations

- Subscription model provides vendor with greater negotiation options:
 - Easier to argue for bare bones warranties and simpler contracts if provided termination for convenience
 - Easier for licensees to accept “clickwrap” agreements in context of subscriptions that cost less than \$100/month/user
 - See www.salesforce.com
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Parting Thoughts

- ❑ “Cloud computing” is the biggest development in the IT industry since open source/Linux
 - There is a lot of hype, but the trend is real
- ❑ Even IT professionals disagree as to exactly what “cloud computing” is
- ❑ Proactively anticipate the natural extensions of cloud computing; assume everyone uses subcontractors
- ❑ Be specific in addressing post-termination data issues

QUESTIONS?

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