

Spyware and Adware: Striking legal balance among consumer protection, contract law and technological self-defence

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Why is spyware a problem?

- ▶ Security: collective good
- v.
- ▶ Dominion: individual good, user control over own machines
 - Assumes user ability to contract away data
- ▶ Should users be operating a “black box” or are they capable of informed consent?

Tensions in Regulatory Models

- ▶ West Coast Code tension:
 - commercial benefit from datamining v. desire to take users out of the security equation and turning the machine into a “black box”
 - Nervous about getting sued for protecting consumers too much
 - Consumers mostly excluded from the equation as not capable of informed judgments
- ▶ East Coast Code tension (US): Additional disclosure v. criminal intrusion approach
 - Hinge on consumers’ ability to consent

What is legal consent?

- ▶ **Actual expression of agreement? NO.**
 - Williston, 1 The Law of Contracts (1920) § 20: Actual consent is not an element of contract, but merely the "expression" of consent
 - Intent is not a part of the law of contract; legal consideration cannot be determined by the intent of the parties.
- ▶ **Silence? NO.**
 - Corbin: "(i)t is an old maxim that silence gives consent, but this is not a rule of law."
 - ▶ Formation of an express contract requires that the terms of an offer be accepted, not merely that the offeree declined to reject them
 - ▶ Nonetheless, a party can accept an offer by silence or inaction -- Second Restatement of Contracts: "because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept."
- ▶ **Comprehension of terms? NO.**
 - Farnsworth § 4.26 (2d ed. 1990). : failure to read a contract does not vitiate consent.

Current Regulatory Approach

- ▶ Preexisting problems in internet contract law
 - Formation
 - Objective v. subjective consent
 - Adequate consideration – constructive fraud
- ▶ Current approach: laundry list of prohibited activities
 - Hard to enforce
 - Industry hesitant to facilitate

New Legislative Approach

- ▶ Need to balance encouraging experimentation with teaching prudent security decisions.
- ▶ Legislate time, place, manner of consent – an objective sliding scale of frequency linked to sensitivity of data and adequacy of consideration
 - E.g. following example of the Statute of Frauds
- ▶ Trusted tools (that do not collect data themselves) needed to test reality of data collection and assist users
 - e.g. virtual machines
 - Protection from suit for tortious interference with contract

Q & A

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