

First, Do No Harm: The Problem of Spyware

Susan Crawford

scrawford@scrawford.net

Refrain

- We're against it
- We can't describe it
- We need immunity networks
- We will never win

Is It New?

- Infectious disease?
- Surveillance camera?
- Blackmail?

Legislation

- Bad acts v. design and notice
- Unintended consequences
- Role of relatives
- Larger power struggle: constrain code

State Bills

- Bad acts
- Trademark concerns
- Notice
- Dormant commerce clause?

Federal Bills

- SPY ACT (HR 29)
 - Bad acts
 - Notice
 - defines “Information Collection Program”
 - includes software that collects information re accessed web pages and uses that information to prompt ads
 - provides for opt-in, detailed notice plus required functions
 - required statements
 - clearly distinct from any other information
 - functions include display of logos/trademarks

Computer

- "electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device....which is used in interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States." 18 U.S.C. Sec. 1030(e).

Federal Bills (cont.)

- I-SPY, HR 744
- SPY BLOCK (Software Principles Yielding Better Levels of Consumer Knowledge)
- **...the term "surreptitious information collection feature" means a feature of software that—**
- **(1) collects information about a user of a protected computer or the use of a protected computer by that user, and transmits such information to any other person --**
- **(A) [automatically]**
- **(B) [invisibly] and**
- **(C) for purposes other than - (i) facilitating the proper technical functioning of a capability, function, or service that an authorized user of the computer has knowingly used, executed, or enabled ...**
- **[and notice that "clearly and conspicuously discloses to an authorized user of the computer the type of information the software will collect and the types of ways the information may be used and distributed" has not been provided]**
- Adware labeling

Problems With Legislation

- Design mandates
 - functions
 - labels
 - notices
- Do users want visibility?
- Spying v. serving
- Hopelessly impoverished notice

Problems With Legislation II

- Shift in understanding of code – products liability?
 - failure to warn
 - but intangible
- Anti-spyware vendors looking for protection
- Efficacy
 - CAN-SPAM
 - No new funding
 - International dimension

Problems with Legislation III

- “Privacy” isn’t the issue – oppressive relationships (government?)
- Existing law covers the territory
 - CFAA
 - ECPA
 - FTC Act and state counterparts
 - Prima facie tort

Technical Response

- Spyware as a complex environment
- Immune system analogy
- Congress as an HMO
 - Approve/defer to treatments
 - Fund research
 - Regulate highly dangerous
 - Get out of the way

Immunity Networks

- Too complex for any of us to handle
- Cede control over PCs
- Condition of online access? More expensive access?
- Separation between networks?
- Not communism or democracy, but competing networks
- Legal implications?

Refrain

- We're against it (but not when used by governments)
- We can't describe it (but we'd like to subject software to products liability mandates)
- We need immunity networks (and we may need to defer to them in unaccustomed ways)
- We will never, ever win