

# Spyware:

## The Latest Cyber-Regulatory Challenge

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# Contracting Spyware by Contract?

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# Contracting Spyware by Contract?

- Locate product along spectrum: Malware, Spyware, Adware, Sponsorware, others?
- US contract law contract formation requirements relaxed to facilitate adoption of new market channels
- Deceptive clickwrap interface is a deceptive trade practice, but is enforcement effort adequate?
- Contrast Bono Bill “Notice & Consent” standard with EU Unfair Contract Terms law: reproducing dysfunction of US information privacy law in US contract law?

# Spectrum of “Wares”

- Malware: already prohibited by computer crime laws – ECPA, CFAA, state laws
- Spyware: software that gathers and transmits information without end user’s knowledge or consent is deceptive and prohibited as fraud or deceptive trade practice
- Adware: one-to-one marketing that is perceived as invasive or annoying by end user but that is covered by license
- Sponsorware: business model trades access to proprietary content in return for one-to-one marketing that is accepted by end user

# Has a Contract Been Formed?

- Whether assent to contract has been manifested is fact specific inquiry
- Restatement (Second) of Contracts § 19, Conduct as Manifestation of Assent, provides:
  - the manifestation of assent by written or spoken words or by other acts or by failure to act;
  - No assent unless intentional conduct or reason to know conduct will be treated as assent by other party; and
  - If no assent, then contract may be voidable for fraud, duress, mistake or other invalidating cause
- Pay Now, Terms Later and Shrinkwrap binding unless result is unconscionable
- Clickwrap is binding unless result is unconscionable
  - 12 or more cases 1998-2004 say yes; 3 say no and margin is growing..
- But how can a contract be formed with “browsewrap”?
  - No - Ticketmaster Corporation v. Tickets.com, 2000 U.S. Dist. LEXIS 4533
  - No - Specht v. Netscape, 306 F.3d 17 (2nd Cir. 2002)
  - Maybe - Pollstar v. Gigmania, 170 F. Supp. 2d 974 (E.D. Cal. 2000)
  - Yes - Register.com, Inc. v. Verio, Inc., 126 F.Supp 2d 238 (S.D.N.Y. 2000)
  - Maybe - Ticketmaster Corp. v. Tickets.com, 2003 U.S. Dist. LEXIS 6483

# Why So Little Scrutiny?

- If it looks like a duck, walks like a duck, sounds like a duck, then it is a duck unless it is unmistakably a carnivorous predator
- Background assumptions about consumer preferences regarding marketing and risk
  - Are new marketing channels on balance desirable?
  - John D. Rockefeller: “I cheat my boys every chance I get, I want to make 'em sharp. I trade with the boys and skin 'em and I just beat 'em every time I can. I want to make 'em sharp...”
- Is it an inevitable part of a market economy to apply so little scrutiny to contract formation and terms?

# Fraud Is Not Contract, But...

- Fraud: Was reliance on false statement reasonable? What detriment was suffered?
- Federal Deceptive Trade Practices Law
  - Misleading in context can be deceptive even if technically not false
  - No private right of action
- State Deceptive Trade Practices Law
  - Similar standards for deceptive
  - Private causes of action
  - Jurisdictional issues; judgment proof defendants

# Bono Bill “Notice & Consent”

- Application to adware & sponsorware:
  - Unlawful to collect personally identifiable information without “notice & consent”
  - Does not apply if information collected if not personally identifiable
- Sectoral approach to contract law reform?
  - If it “really matters” then strict regulation, otherwise primordial struggle?
  - Is limited regulation of consumer standard form contracting feasible?
- But is notice & consent working in information privacy law?
  - Another example of disclosure bias in US law?
  - What about regulation of substance?

# Deny Enforcement to Unfair Contract Terms

- 1994 Directive & 1997 Member state Law -- If contract formed:
  - Using standard form prepared by merchant in advance
  - Offered to consumer on a take it or leave it basis
- Then review substantive fairness of terms; deny enforcement to any term that is unfair
- Appendix provides non-exclusive list of examples; database provides access to 10,000 cases
- Is this term in this context unfair?
  - Mandatory predispute arbitration agreements
  - Electronic funds transfer based on account number not name
  - Terms may change in future at merchant's discretion
  - Delivery should be within 4 days but no recourse unless more than 30 days



# Conclusion

- Assume some consumers willing to surrender personal information in return for access to something valued
- Can current US law contract law adequately police terms of that trade?
- Would legislation like Bono Bill adequately police terms of that trade?
- Is this yet another indication that the current trend in US contract law is cause for concern?