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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 - Specht v. Netscape, 306 F.3d 17 (2nd Cir. 2002)
  – 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?