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and technological self-defense
consumer protection, contract law
Spyware and Adware: Striking Legal Balance Among
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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