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Posted To: spywareworkshop2004
Conversation: Spyware Workshop - Comment, P044509
Subject: Spyware Workshop - Comment, P044509

March 19, 2004

Re: Spyware Workshop - Comment, P044509

I am a concerned private citizen and an Internet security professional. The following comment represents my views and not those of my employer or its sources of funding.

In the past few years, spyware and other forms of privacy-compromising software have been a rising problem. The problem, however, is **not** merely one of protecting consumers' personal information. It is, rather, one of private property rights; the right of the computer owner to use and enjoy his own property without interference by others -- and the right not to be swindled out of the enjoyment of this ownership.

My colleagues in PC technical support regularly deal with computers infested with dozens upon scores of individual pieces of spyware, the result being that the computer's performance grinds to a crawl. Users bring in computers that are "slow", and are invariably shocked to discover that the reason is the accumulation of spyware and adware programs. It does not take many to make the experience of using the Internet entirely unbearable, with constant pop-up windows and every Web page taking minutes to load as dozens of pieces of spyware interrupt the loading to report the user's behavior to the unethical "marketer".

Those responsible for the spyware plague claim, invariably, that users consent to the installation of this harmful software. This claim is bunkum. There is no sense in which inexperienced users, uninformed and systematically misled by the spyware swindler, can be said to have truly consented. Who in his right mind would consent to have his computer rendered unusable?

The "license agreements" which spyware-masters lean upon have become the online equivalent of the fast-talking baffle-gab of the snake-oil salesman: they are designed for obfuscation, to trick the user into notionally signing away the right to peaceably enjoy his property. As such, they should be regarded as unconscionable contracts, fraudulent and unenforceable.

The definition of an unconscionable contract is one which "no man in his senses, not under delusion, would make, on the one hand; and which no fair and honest man would accept, on the other" [1] -- one which is unfair "due to hidden or obscure language, or [...] due to a lack of

bargaining power. Its terms suggest that one party took unfair advantage over the other one when they negotiated it." [2] It would be difficult to better describe the language of the so-called "agreements" under which spyware-masters claim the right to do palpable harms to users.

[1] <http://www.lectlaw.com/def2/u055.htm>

[2] http://public.findlaw.com/newcontent/consumerlaw/chp3_h.html

Once the spurious "agreement" is dismissed, the fact of the spyware matter emerges: the spyware-master is responsible for the damage done by his software. He has interfered willfully with the computer owner's use and enjoyment of his property. He has surreptitiously caused harm to a protected computer resource. He has damaged property. Commercial motive does not excuse him any more than it would excuse the seller of glass windows who throws bricks through storefront windows with advertisement flyers wrapped around them. Ultimately, the spyware-master is no different from the spreader of computer viruses or the Web-site vandal, and should be held responsible for his actions on the same basis.

Thank you for your consideration.

Respectfully submitted,

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