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Current Developments in Adware and Spyware

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Definitions

- Spyware/adware are "elastic and vague" terms [FTC]
  - "Spyware is an emotionally charged word, and often means different things to different people." [PestPatrol]
- Spyware
  - "Any product that employs a user's Internet connection in the background without their knowledge, and gathers/transmits info on the user or their behavior" [PestPatrol]
- Adware
  - "Any software application in which advertising banners are displayed while the program is running" [Whatis]
  - "Software that brings targeted ads to your computer, after you provide initial consent for this task" [PestPatrol]
- How should we characterize Claria (GAIN), WhenU (SaveNow), KaZaA, RealPlayer?

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Laws That Already Apply

- Computer Fraud & Abuse Act
  - 18 U.S.C. § 1030(a)(2)—unauthorized access to obtain information
- Electronic Communications Privacy Act
- Contract Law
- Trademark Law
  - **We will explore this topic Sunday afternoon, 2:30-4:30, Grand Ballroom D**

Laws That Already Apply

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- FTC Act
  - FTC held a workshop April 19 and concluded that it had adequate legal tools
    - It also had problems with definitions and fears new legislation will not adequately distinguish legitimate and illegitimate activities
  - Congress did not respond well to the FTC's laissez-faire attitude
    - "You like this stuff? You're the only person in this country that wants spyware" (Barton)
    - Help draft a new law "instead of trying to defend something that's indefensible" (Barton)
    - Belief that we don't need a new law is "absolutely astounding" (Inslee)

Utah Spyware Control Act

Utah Code §§ 13-39-101 to 401 (March 2004)

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- Law restricts:
  - Installation of "spyware"
  - Use of a "context based triggering mechanism" to display pop-up advertising
- Spyware defined as software that monitors usage & either reports back or displays an ad
  - Excludes software getting user consent meeting specified requirements
- "Context based triggering mechanism" refers to software that infers keywords from context
  - User consent is not a defense

Utah Spyware Control Act

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- Law supposed to take effect May 3
  - WhenU filed constitutional challenge April 12
  - On April 23, the state entered a stipulated order to defer enactment pending WhenU's motions
  - In mid-May, Overstock brought a claim against a competitor (SmartBargains.com) despite the stipulated order
- Preliminary injunction granted June 22
  - Notice/consent requirements probably constitutional
    - Utah has requested reconsideration of this point
  - Context-based trigger mechanism restrictions probably not

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Proposed Federal Laws

- Securely Protect Yourself Against Cyber Trespass Act ("SPY Act") (HR 2929, Bono)
  (initially introduced as Safeguard Against Privacy Invasions Act)
  - Restricts taking control of a computer, modifying Internet settings, keystroke logging, bad installation procedures, obtaining PII through misrepresentation, disabling protective software
  - Defines user consent standards for "information collection program"
  - FTC has sole enforcement power
  - Preempts state laws (including Utah's)
  - Passed House Committee on Energy and Commerce June 24 (vote: 45-5)

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Proposed Federal Laws

- SPYBLOCK Act (S.2145, Burns/Wyden)
  - Restricts downloading software onto a computer unless it meets standards for disclosure
    - Also, specific requirements for uninstalling software
  - Hearings held March 2004
- Controlling Invasive and Unauthorized Software Act (S.2131, Burns)
  - Introduced in February but appears to have been rolled into SPYBLOCK Act

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Proposed Federal Laws

- Computer Software Privacy and Control Act (HR 4255, Inslee)
  - Restricts collecting/transmitting PII, monitoring web activity, changing default settings, using software to display ads, and transmitting software based on misleading notices
  - Specifies standards for getting user consent
  - Bill introduced in April

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Proposed Federal Laws

- Internet Spyware (I-SPY) Prevention Act of 2004 (HR 4661, Goodlatte)
  - Criminal penalties for unauthorized loading of software onto a computer and then transmission of personal data for bad purposes
  - Introduced June 23, 2004

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Proposed State Laws

- California
  - SB 1436. No spyware without consent meeting prescribed standards
    - Passed Senate May 18
    - Assembly amendments propose absolute bans on certain activities
  - AB 2787: Prohibits "hijacking" a computer
    - Passed Assembly May 25
    - BNA says it is dead for this year
  - SB 1530. "Statement of intent" to legislatively address spyware

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Proposed State Laws

- Iowa SF 2200 – criminalizes disclosure of personal info from a computer
  - Dead for this year
- Michigan SB 1315 & 1316 – criminalizes installation of spyware/adware without specified types of disclosures and consent
- NY S.7141 – crime of disseminating spyware and expanded definition of eavesdropping; prescribes standards for user consent
  - Passed Senate June 17

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Proposed State Laws

- Pennsylvania HB 2788 – criminalizes distributing spyware/adware without specified types of disclosures and consent, and running ads in illegal adware
- Virginia HB 1304 – public bodies must consider effects of regulating technology
  - Rolled over to 2005

Pending Lawsuits

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- Claria cases
  - Lawsuits against Claria consolidated into multidistrict litigation in ND Georgia
  - On May 17, LL Bean sued four Claria customers
    - Two cases settled June 22
- WhenU cases
  - WhenU won district court rulings in U-Haul and Wells Fargo TM/CR cases in 2003
  - WhenU lost district court TM ruling in 1800 Contacts case
    - Case is on appeal to the Second Circuit

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Predictions

- More states will pass poorly-worded anti-spyware laws
- Congress will pass an anti-spyware law soon
  - It will preempt state laws
  - It will require enhanced consumer disclosures
- Consequences of new laws
  - As usual, attempts to regulate technology will fail
  - Many software vendors will spend $$$ on compliance
  - Plaintiffs will celebrate any law creating a private cause of action
  - Consumers will be bombarded with unhelpful poorly-drafted disclosures that they mindlessly click through
    - And will continue to lose faith in all clickthrough agreements
  - Constitutional challenges will plague any law for years, and many laws (especially state laws) will ultimately be found unconstitutional