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Spyware Legislation

- A Comparative Study -

Takato NATSUI

Professor, Meiji University Faculty of Law, Tokyo, Japan

Practicing Lawyer, Asuka Kyowa Law Firm, Tokyo, Japan

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Overview

- Introduction
- The USA
 - Utah Spyware Control Act (HB0323, S04)
- Japan
 - Penal Code Amendment Bill
- Comparative Study
 - Scope of application
 - Provider Liability

Utah Spyware Control Act (extract)

- Section 13-39-102. Definitions
 - (4) Except as provided in Subsection (5), "spyware" means software residing on a computer that:
 - (a) monitors the computer's usage;
 - (b)
 - (i) sends information about the computer's usage to a remote computer or server; or
 - (ii) displays or causes to be displayed an advertisement in response to the computer's usage if the advertisement:
 - (c) does not:
 - (i) obtain the consent of the user, AT THE TIME OF, OR after installation of the software but before the software does any of the actions described in Subsection (4)(b);
 - (ii) provide a method:
 - (A) by which a user may quickly and easily disable and remove the software from the user's computer;
 - (B) that does not have other effects on the non-affiliated parts of the user's computer; and
 - (C) that uses obvious, standard, usual, and ordinary methods for removal of computer software.

Utah Act (Cont.)

- (5) Notwithstanding Subsection (4), "spyware" does not include:
 - (a) software designed and installed solely to diagnose or resolve technical difficulties;
 - (b) software or data that solely report to an Internet website information previously stored by the Internet website on the user's computer, including:
 - (i) cookies;
 - (ii) HTML code; or
 - (iii) Java Scripts; or
 - (c) an operating system.

Utah Act (Cont.)

- Section 13-39-201. Prohibited conduct.
 - (1) A person may not:
 - (a) install spyware on another person's computer;
 - (b) cause spyware to be installed on another person's computer; or
 - (c) use a context based triggering mechanism to display an advertisement that partially or wholly covers or obscures paid advertising or other content on an Internet website in a way that interferes with a user's ability to view the Internet website.
 - (2) It is not a defense to a violation of this section that a user may remove or hide an advertisement.

Utah Act (Cont.)

- 13-39-302. Limitations on actions.
 - (1) A person may not bring an action for a violation of this chapter against **an Internet service provider** for the routine transmission of:
 - (a) security information; or
 - (b) information that contains an advertisement violating this chapter.
 - (2) A person may not bring a class action under this chapter.

Utah Act (Cont.)

- **Section 13-39-301. Private action.**
 - (1) An action for a violation of this chapter may be brought:
 - (a) against a person who:
 - (i) violates this chapter; or
 - (ii) causes a violation of this chapter; and
 - (b) by any of the following who are adversely affected by a violation of this chapter:
 - (i) an Internet website owner or registrant;
 - (ii) a trademark or copyright owner; or
 - (iii) an authorized advertiser on an Internet website.
 - (2) In an action under Subsection (1), a person may:
 - (a) obtain an injunction against committing any further violation of this chapter; and
 - (b) recover the greater of:
 - (i) actual damages; or
 - (ii) \$10,000 for each separate violation of this chapter.
 - (3) In an action under Subsection (1), a court may:
 - (a) increase the damages up to three times the damages allowed by Subsection (2) if the court finds the defendant willfully or knowingly violated this chapter; and
 - (b) award costs and reasonable attorney fees to a prevailing party.
 - (4) For purposes of this section, a separate violation occurs for each individual occurrence that results in the display of an advertisement described in Subsection 13-39-102(4)(b)(ii).

Penal Code Amendment Bill 2004 (extract)

● Art. 168bis

- 1. A person who has, for the purpose of use for computer systems of another person, **produced or provided an electromagnetic record or other records** as follows shall be punished with penal servitude for not more than three years or a fine not more than five hundred thousand yen;
 - (1) an electromagnetic record which gives a wrongful instruction to the electronic computer systems of another person by making them not to act to be fit for the purpose of proper use or making them to act contrary to the purpose of proper use;
 - (2) in addition to those provided for in the preceding subparagraph, an electromagnetic record or other records in which the wrongful instruction under said subparagraph has been recorded.
- 2. The same shall also apply to a person who has **used the electromagnetic record** under paragraph 1 for computer systems of another person.
- 3. **Attempts** of paragraph 2 shall be punished.

Penal Code Amendment Bill (Cont.)

- Art 168ter
 - A person who has, for the purpose of paragraph 1 of the preceding Article, **obtained or retained the electromagnetic record or other records** under subparagraphs of the said paragraph shall be punished with penal servitude for not more than two years or a fine not more than three hundred thousand yen.

Interpretation

- “**Electromagnetic record or other records**” under the Article 168bis and 168ter of the Penal Code Amendment Bill 2004
 - is relatively an ambiguous term or conception
 - can involve every illegal computer software and program
- Spyware is a kind of illegal computer software or program
- Thus
 - Electromagnetic record of other records **can involve every Spyware**

Criminal Punishment and Civil Liability in Japanese Law

- Punishable behaviour under Penal Code can be **a cause of civil action** based on the Article 709 (**tort**) of Civil Code
- **False behaviour** shall be regarded as same as **intentional infringement** of rights of another person under the Article 709 of Civil Code
- If **ISPs** retain an electromagnetic record or other records provided for in the Penal Code Amendment Bill on their computer systems, even if the retention is not intentional, then such retention can be a possible **false behaviour** under the Article 709 of Civil Code

Comparative Study

- Scope of application
 - Utah Act
 - Detailed Definitions and Exceptions
 - Japan Bill
 - No Definition and Exception
- Provider Liability
 - Utah Act
 - Reasonable Limitation of Action
 - Japan Bill
 - No Limitation