

FTC Halts Computer Spying

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Or so the Federal Trade Commission's (FTC's) September 25 press release proclaimed in announcing an enforcement settlement with a software business and seven companies that rent-to-own computers. The rent-to-own businesses face a continuing remedy problem where the renter stops paying in accordance with the rent-to-own contract and/or the computer is stolen. This proposed consent order, which is now subject to public comment, prohibits one approach to solving that problem.

The software company, DesignerWare, LLC, offered "PC Rental Agent," a computer program and service whose general purpose, in the FTC's view, was to assist rent-to-own stores in "tracking and recovering" rented computers. Through a "kill switch," the rental store can render the computer inoperable. The FTC's administrative complaint did not challenge that feature. The software also included a "Detective Mode" that when activated presented a "fake software registration screen" that enabled DesignWare to gather and transmit to the rent-to-own store personal contact information of the person filling it out. It also could log key strokes, capture screen shots and take photographs using a webcam in the computer. Furthermore, it collected data that permitted rent-to-own stores to track the location of the computer. These features were not disclosed to the persons renting or using the computers.

"Monitoring" Prohibited

The FTC's administrative complaints released with the proposed settlements allege that use of the fake registration form constituted an unlawful "deceptive act or practice" under Section 5 of the FTC Act. The other features of Detective Mode and DesignWare's providing such technology to the rent-to-own stores were alleged to be "unfair acts or practices" that are unlawful under Section 5.

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The burden associated with an FTC consent order often is measured in terms of the breadth of the practices prohibited, the scope of the products or services covered, and the length of time the order is effective. Here the proposed DesignWare order prohibits that firm (and specified persons) from using or selling “any monitoring technology to gather information or data from any computer rented to a consumer.” The rent-to-own businesses are enjoined from using monitoring technology for their purposes. DesignWare and the stores also are “enjoined from making or causing to be made any false representation or depiction” in any screen that “results in gathering information from or about a consumer.”

Location Tracking Restricted

DesignWare is not flatly prohibited from using “geophysical location tracking technology” in connection with a rent-to-own transaction, but its future use is severely restricted. DesignWare would be prohibited from collecting location data from any computer or providing technology to do so without “ensuring that the computer user is provided clear and prominent notice at the time the computer is rented and immediately prior to each use of the geophysical location tracking technology,” and that the “computer renter’s affirmative express consent is obtained at the time the computer is rented.” Comparable restrictions are placed on the rent-to-own business’s installation and use of such tracking technology. The term “clear and prominent notice” is elaborately defined and seeks to prevent giving the required notice through a “privacy policy,” “lease agreement” or “other similar document,” presumably meaning it cannot be part of some extensive boilerplate document. The “affirmative express consent” may not be given “as a default setting.”

The agreed order contemplates that notice at the time of use will be in the form of a “clear and prominent icon” disclosing five specified types of information concerning the tracking. The order does provide that such notice “may be suspended” where there is “a reasonable basis to believe” the computer has been stolen or where a police report has been filed. Thus, thieves need not be given notice that the computer is being tracked, but such icon notice must be given where the problem is merely overdue payment. The consent orders are intended to last 20 years.

Implications

These rules are limited in their application by the terms of the agreed orders to use “in connection with a covered rent-to-own transaction” (itself a defined term). That is a narrow segment of business, but unless the Commission sees some reason why the privacy rights of computer thieves and deadbeat computer renters merit unusually high protection priority, one should anticipate that similar rules may appear in other future FTC enforcement initiatives designed to protect consumers.