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Beware of Spyware

Litigants Sometimes Resort to Computer Snooping, But It Could Be a Crime

June 2005 Issue

By Jason Krause

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In most cases it's safe to assume that a court will frown on spying on other litigants and stealing documents or files. However, the state of the law regarding electronic snooping is so unsettled, some judges have been unable to punish defendants even after clear snooping on another person's computer.

"The state of the law is utter confusion," says Sharon Nelson, an attorney and president of Sensei Enterprises, a computer forensics firm in Fairfax, Va. "I know that here in Virginia, lawyers are very nervous."

Spyware--software used to spy on someone's computer activity--is often at issue. The most common spyware, also called adware, is generally little more than a nuisance, monitoring activity and installing advertisements on a PC.

But some spyware can be used to steal documents or keep track of everything typed or viewed by computer. This type of software can be used for keeping tabs on children or for industrial espionage.

Digital Subterfuge

Software that spies on a person's computer is easy to install and very difficult to detect. One Product called Spector Pro, costs \$90 and can be e mailed to an unsuspecting target. If someone opens the e-mail and clicks on the attachment, a program will automatically download that can monitor everything done on that computer and relay the information back to the sender of the e-mail.

According to attorneys and computer experts, spyware is increasingly used to snoop on parties in litigation, especially in domestic disputes.

"There have been a number of different times I've found out a soon to be former spouse has broken into the husband's or wife's e-mail," says Ronald W. Nelson (no relation to Sharon Nelson), Family Law Section liaison to the Section Officers Conference Technology Council. "We had one dial in and break into a woman's e-mail at work."

The patchwork of state and federal laws regulating computer crimes makes litigation regarding electronic snooping confusing. "At trial, sometimes the judge can't or won't do anything about it," the Overland Park, Kan., attorney says.

A few spyware cases have been tried under the federal Electronic Communications Privacy Act, but because of a big loophole in the law, many digital snoopers get away with it. That's because the act only applies to messages intercepted in transit.

In *U.S. v. Councilman*, 373 F.3d 197 (2004), a panel of the 1st U.S. Circuit Court of Appeals based in Boston ruled that Bradford C. Councilman did not violate criminal wiretap laws when he secretly copied and read his customers' private e-mail. The court said Councilman, who offered e-mail accounts through his bookselling Web site, intercepted and copied e-mail that came to customers from his competitor, Amazon.com.

But the court ruled for the defendant because he did not intercept the messages while they were in transit over wires. The court later vacated the ruling, however, and will rehear the matter en banc.

Hardware Surveillance

The problem isn't confined to software. KeyKatcher is a snooping device that plugs in between the computer and the keyboard connector. It's so small and innocuous, it looks like part of the keyboard PS2 connector, but is really a storage device that can capture and save everything that is typed. Once the device is retrieved, a copy of everything, even text that's been deleted, can be accessed.

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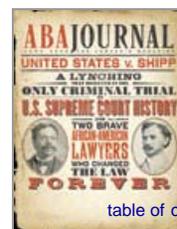
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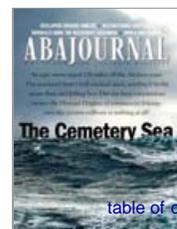
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In *U.S. v. Ropp*, 347 F. Supp. 2d 831 (2004), the U.S. District Court for the Central District of California issued a ruling that because the captured keystrokes were not transmitted by a system that affects interstate commerce, spying with the device did not violate the federal act.

However, different states have wiretapping and privacy laws that can come into play. Florida's Fifth District Court of Appeal issued a ruling recently stating that a wife who installed spyware on her husband's computer to record evidence of an extramarital affair had violated the state's wiretapping law, which was modeled after the federal act. The spyware took snapshots of the conversations while they were still on the screen and constituted intercepted electronic communications, the court said.

While the law did not require exclusion of the evidence, the appeals court said, a trial court did not abuse its discretion when it barred the wife from revealing the contents of the conversations or introducing the chat records as evidence in divorce proceedings. *O'Brien v. O'Brien*, No. 5D03-3484 (Feb. 11).

But Sharon Nelson says that even with this ruling, a trial court might find some spyware evidence admissible.

Measures Pending

There are several spyware bills pending at both state and federal levels. The measure most likely to pass--titled Securely Protect Yourself Against Cyber Trespass but known as the Spy Act--flew through the U.S. House but encountered resistance in the Senate. The act pertains primarily to adware, although it would prohibit some electronic snooping.

Despite the loopholes, experts say, lawyers should not use spyware themselves and should do everything in their power to dissuade overeager clients from using it. "Don't even look at it. Tell them to destroy it immediately," says Ronald Nelson. "If a client brings you evidence, ask a lot of questions; find out exactly how it was obtained."

The only time it is permissible for someone to access another computer under most laws is if it is done without breaking a password, without accessing the computer over the Internet, and only from a computer one owns or is authorized to use. Otherwise, a court order is needed to obtain computer records.

So what should lawyers do if they need computer evidence but are worried someone will destroy or hide it? Sharon Nelson recommends taking a forensic image of a computer. A forensic expert can make a digital copy of everything stored on a computer's hard drive and hold it until a court order can be obtained to analyze it. "I am unaware of any state where it is not OK to take a forensic image," she says.

Computer forensics specialists can find out what a person viewed on the Internet, read e-mail and financial transactions, and recover deleted documents. But even specialists say their services are probably needed only in cases where either the money involved is worth the expense or the evidence in question could be useful in resolving a custody battle. Data retrieval charges for even a small case can easily total \$5,000 to \$10,000 or more, Sharon Nelson says, and the cost may be based on a flat fee, hourly charges or both.

"A lot of people just want to know. They want closure. But in many domestic disputes, it's probably not worth the cost," she says. "We recommend to a lot of people that they don't hire us. It's probably too costly for very little return, especially if they can prove fault elsewhere."

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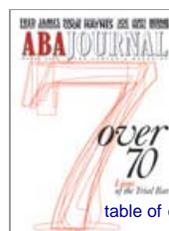
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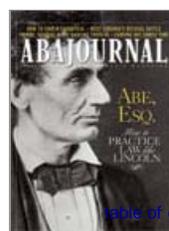
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