

Consenting to Computer Use

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A taxonomy of consent

Factual

Attitudinal – *S mentally acquiesces*

Expressive – *S manifests acquiescence*

Express

Implied

Legal

Prescriptive – *vitiated by force, mistake, or incapacity*

Imputed – *can be informed, hypothetical, or constructive*

Factual consent

Starbucks

S leaves her laptop open at a Starbucks while she uses the restroom. A browses through S's emails.

A does not have S's factual consent.

House Guest

S tells A, “You can use my computer.” A uses S’s computer to check his email.

A has S’s express factual consent.

Website

S creates a website that tells users whether to bring an umbrella. A visits the site.

A has S's implied factual consent.

U.S. v. Morris

S's computer has a program, Sendmail, that lets other computers deliver emails to it. A writes a "worm" program that causes Sendmail to install a copy of the worm program on S's computer.

A does not have S's factual consent, express or implied.

Security Audit

S's computer has a program, Sendmail, that lets other computers deliver emails to it. S pays A \$10,000 to conduct a security audit of the computer. A writes a "worm" program that causes Sendmail to install a copy of the worm program on S's computer.

A has S's express factual consent.

Legal consent

U.S. v. Nosal

S gives employees access to a database. A, an employee, copies information from the database and gives it to a competitor.

A has S's factual consent.

It is a policy question whether A's secret disloyalty should vitiate S's prescriptive legal consent.

Craigslist v. 3 Taps

A runs a program to scrape S's website. S sends A a cease-and-desist letter. A does not cease and desist.

A does not have S's factual consent.

It is a policy question whether S's use of a website means that S's legal consent should be imputed.

U.S. v. Swartz

S allows anyone on a campus network to download articles from its database. A downloads thousands of articles. S blocks the network address A used. A uses a different address and continues downloading.

It is indeterminate whether A has S's factual consent.

It is a policy question whether A has S's legal consent.

Lessons

“Authorization” is as much about computer owners as it is about computer users.

Consent is complicated and factually rich.

Different kinds of CFAA cases really are different.

“Authorization” requires construction and not just interpretation.

Discussion