

Identifying Information

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Paper Information

Title:	Privateers in Cyberspace
Abstract:	<p>Shot: “[T]here are only two types of companies: Those that have been hacked and those that will be hacked.” Chaser: “There are only two types of companies: Those that have been hacked and those that don’t know they have been hacked.”</p> <p>1. Problem. In the United States, computer fraud and abuse are illegal. There is a vast patchwork of laws providing substantial criminal and civil penalties for violating the confidentiality, integrity, and availability of information in cyberspace. And yet piracy in cyberspace is rampant, to the extent that we have come to treat this casual outlawry rather like the weather. In respect of ubiquitous piracy, society has done something oddly worse than useless. We are holding one set of victims (data custodians who suffer a breach) liable as hostages for another set of victims (the data holders who suffer the effects of the breach) and we impose upon them wasteful consequences that do not solve the problem. Rather than penalizing once set of victims and passing the costs to other victims in a continuous loop, it would be better to design incentives aimed at identifying, penalizing, and deterring the pirates, and to prevent piracy. And yet current laws and developing norms seem to be reinforcing the existing loop.</p> <p>2. Solution. I propose a two-step solution designed to change existing norms, markets, architecture (and code) by deliberately reframing existing law. The first step is to create significant, explicit liability for data custodians and other providers of neo-tech goods and services, but simultaneously creating a safe harbor contingent upon their taking reasonable technological measures to identify the pirate after an exploit. The temporal perspective of this safe harbor assumes, of course, that the custodian has taken reasonable steps prior to the exploit, but simply recognizes the apparent futility of predictively preventing breaches by determined and skilled adversaries. More realistically, this safe harbor focuses on what the provider does after the exploit to find the pirate, and how the provider might have set things up before-hand to make later apprehension more likely. I refer to this as “post-secondary analogous liability” to suggest that it is somewhat similar to, but significantly different not only from the current regime of secondary liability but also from the various current attempts at direct, or analogous, liability already extending to data custodians. The second step is to permit privacy trade-offs, and the use of authorized third-party surrogates as part of the reasonable technological measures to secure the safe harbor. Privacy trade-offs might include measures by custodians to verify identity and location of, and the plain text of communications from those users who voluntarily decide they want to enter or store data in a relatively safe domain in cyberspace—thereby better exposing unidentified or cloaked entrants as pirates. These and other measures might create a competitive market for the development of widely used and therefore effective norms of “front-door” decryption, white-listed subspaces inside of cyberspace, and permitted “hacking back” upon clear and convincing evidence of the offense and the offender. The use of authorized third-party surrogates might support the specialized talents and resources necessary to create non-governmental, commercially available anti-piracy technology and delivery. Perhaps the ability to farm out the “reasonable technological measures” to authorized surrogates would lead to a revival of</p>

	<p>something like letters of marque and reprisal granted to certain qualified private parties authorizing them to act on behalf of data custodians to satisfy the custodians' newly incentivized need to take reasonable technological measures. We can imagine the realistic possibility of privateers in cyberspace to deal with freely roving pirates who violate the laws of nations just as if on the high seas and outside the effective jurisdiction of any nation-state.</p>
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