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NP PRIVACY PARTNER | NIXON PEABODY LLP

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## What's trending on NP Privacy Partner

**The FTC settles first-of-its-kind stalker app case** and Ubisoft sues Dutch 17-year-old over video game cheats. Here's what's trending in data privacy and cybersecurity.

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### Consumer Privacy

#### *FTC settles first-of-its-kind stalker app case*

On October 22, 2019, the Federal Trade Commission ("FTC") settled its case against a Florida company, Retina-X Studios, LLC and its owner, James N. Johns, Jr. ("Johns"). The company sold "stalkerware" that allowed people to tap into others' phones and track their calls, texts, photos, physical movements, and browser history.

According to the FTC's complaint, Retina-X failed to ensure that its three applications ("apps") were being properly used by those who purchased them. The three apps – MobileSpy, PhoneSheriff, and TeenShield – were all marketed as apps that would allow the "purchaser to monitor, often surreptitiously, another person's activities on that person's mobile device or computer." For example, TeenShield was marketed as an app that would help parents monitor their children's activities.

The apps would allow the user to delete the apps' icons from the phone's home screen, allowing them to run in the background and preventing the phone's owner from knowing that his/her movements were being monitored. Additionally, installing the app software often required the user to "jailbreak" or "root" their phones – an action that would allow users to circumvent the operating system's security features and would likely invalidate the manufacturer's warranty. Once the app is installed, a purchaser could remotely monitor the owner's phone activity without having physical access to it.

All three apps claimed to keep its users' private information confidential. In reality, however, Retina-X failed to secure users' personal information and exposed their information to disclosure and improper use. In fact, in 2017 and in 2018, hackers were able to access unencrypted credentials on the TeenShield and PhoneSheriff apps. The hackers collected photos and other sensitive consumer data, including passwords, text messages, and GPS locations. According to the FTC, Retina-X's failure to properly secure this information when it claimed to protect users' personal information constituted an unfair or deceptive act in violation of the FTC Act, as well as the Children's Privacy Protection Rule.

Pursuant to the settlement agreement, Retina-X is now banned from selling monitoring products that require purchasers to bypass security protections on their devices. Retina-X and Johns must also require purchasers to state that they will only use the app to monitor a child or an employee, or another adult who has provided written consent. Additionally, the icon with the name of the app cannot be removed unless it is done by a parent or legal guardian who has installed the app on their minor child's phone.

Retina-X and Johns will be required to destroy all data that has already been collected from their monitoring services. The settlement also required Retina-X and Johns to establish and maintain a comprehensive information security program that protects the information they collect and addresses the security issues identified in the FTC's complaint. – *Jenny L. Holmes*

*Special thanks to Martha Medina for her contributions to this post.*

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## **Enforcement Litigation**

### ***Ubisoft sues Dutch 17-year-old over video game cheats***

In a [complaint filed in the Central District of California](#), video game publisher Ubisoft, Inc. (Ubisoft) claims Digital Millennium Copyright Act (DMCA) violations, interference in contractual relations, and unfair competition against a Dutch 17-year-old and his mother. The complaint alleges that the defendants produced and distributed “cheat” software for Ubisoft's online multiplayer game *Rainbow Six: Siege*. The lawsuit raises issues for copyright, contracts, and the growing [esports industry](#).

#### *The Cheat*

The defendants are alleged to have sold a single product, titled “Budget Edition Rainbow Six: Siege Cheat” (Cheat). *Rainbox Six: Siege* is a “first person shooter” game with both casual and competitive online multiplayer matches. The Cheat altered the game to the Cheat user's advantage by making enemies easier to detect and increasing the amount of damage Cheat users inflict. Ubisoft claims that fair gameplay is vital to the success of its game and that “thousands of hours” are spent to detect and thwart cheaters.

The defendants are alleged to have sold and distributed the software through the family's web design business in the Netherlands.

#### *Trafficking in circumvention devices*

The audiovisual elements and the computer program that run a video game are copyrightable. Ubisoft alleges that defendants' conduct is unlawful under a DMCA provision concerning bypassing technological safeguards to access a copyrighted work, [17 U.S.C. § 1201\(a\)\(2\)](#). Anyone found to be distributing a service or tool that is “primarily designed for the purpose of circumventing a technological measure that effectively controls access to a work” is liable under this provision. Ubisoft will argue that there are numerous technological safeguards in the code of the game to protect the copyrighted elements from being accessed and that the Cheat circumvents them.

#### *Intentional interference with contractual relations*

Ubisoft also claims that the defendants intentionally interfered with the contractual relationship between Ubisoft and the other players of the game. Each player must agree to Terms of Use, which include a prohibition on modification of the game. Ubisoft argues that they have suffered damages due to the defendants' inducement of others to violate the Terms of Use of the game.

### *Unfair competition*

Finally, Ubisoft alleges unlawful conduct by defendants under California's unfair competition laws. "Unfair" is not well defined under this law, allowing courts broad discretion in applying it to claims of fraud. Ubisoft will likely point to aspects of the Cheat that "trick" the game to avoid detection in order to satisfy its unfair competition claim. – *Jenny L. Holmes*

*Special thanks to Vincent Tennant for his contributions to this post.*

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 **NP PRIVACY PARTNER BLOG**

Staying ahead in a data-driven world: insights from our Data Privacy & Security team