

Hello Barbie: First They Will Monitor You, Then They Will Discriminate Against You. Perfectly.

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67 ALABAMA LAW REVIEW __ (forthcoming 2015)

Abstract

This Article argues that the evolution of software—and the looming age of the “Internet of Things”—will allow manufacturers of software and of consumer goods to make use of consumer monitoring technologies and restrictive software licenses to more perfectly price discriminate. A number of commentators are urging changes in the law to prevent monitoring and restrictive software licenses. This Article takes a novel and contrarian view by explaining that the current law surrounding software licensing, which will facilitate more perfect price discrimination as technology evolves, is mostly beneficial. Because the marginal cost of software distribution approaches zero, facilitating more perfect price discrimination is particularly valuable to society because it facilitates much more widespread distribution of software—especially to poorer consumers. Some commentators worry that as more and more consumer goods contain software, manufacturers will use restrictive software licenses in an attempt to control consumers’ abilities to use and resell consumer goods. This Article explains that this generally will not happen because it would be against the manufacturers’ financial interests. We show that in some cases, manufacturers will indeed restrict use of a product to facilitate their ability to engage in price discrimination. The Article argues that such price discrimination will likely be welfare enhancing and will definitely improve cross-subsidization from rich to poor so that poor consumers can get more products for lower prices. The Article also demonstrates that the traditional policy reasons to disallow restraints on personal property do not apply to software-enabled devices. We conclude that rather than discouraging the use of restrictive software licenses, the law should adapt to better facilitate such licenses and the more perfect price discrimination that goes with them.