September 11, 2019

Update: *hiQ Labs, Inc. v. LinkedIn Corp.*: A Federal Court Weighs in on Web Scraping, Free Speech Rights, and the Computer Fraud and Abuse Act

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Automated collection of publicly accessible data (or data 'scraping') is widely practiced, but operates under a cloud as the site terms of many on-line environments purport to prohibit the use of automated tools to scrape and various technical and legal means have been used to block the practice. The trial court's grant of preliminary injunctive relief preventing LinkedIn from denying hiQ access to publicly available member profiles was seen as a decision that moved the law in the direction of permitting the use of automated tools to read and access otherwise publicly available information. In light of District Court Judge Chen's discussion of the limited applicability of the Computer Fraud and Abuse Act (CFAA), the potential public interest in scraping publicly available information, and Judge Chen's speculations about possible free speech protections for such activity under California's state constitution, the Ninth Circuit appeal had been seen as an opportunity for a broad appellate ruling on scraping from the Circuit Court of Appeals most relevant to the technology community. Numerous amicus briefs were filed.

The Ninth Circuit's opinion is supportive of the trial court's ruling, but the appellate court did not fully take up the opportunity to offer broad or sweeping guidance. The appellate court held that hiQ carried its burden to establish both that the balance of hardships tipped in favor of granting an injunction and that its state law claims against LinkedIn raised serious potentially meritorious questions. The circuit panel went on to note that its view of the CFAA's prohibition of digital system access "without authorization" is aligned with a number of other (but not all) circuits, and requires not just violation of written terms or notices but "hacking" — the disabling or circumvention of password restricted access or equivalent protection. While the appellate opinion does note that the resulting free flow of information resulting from scraping of publicly accessible sites can serve a public interest, and is a sufficient public interest to support the trial court's ruling, the opinion also notes that bona fide protection of site security and private data may be equally compelling in other cases, and the Ninth Circuit made no mention of potential free speech protection under the California constitution. In a concurrence that operates as a final coda to the opinion, Justice Wallace noted his dissatisfaction with parties and briefing that seek broad substantive appellate rulings from mere preliminary trial court rulings.

The takeaways set forth in our September 2017 alert concerning the trial court's opinion still hold in the wake of the Ninth Circuit opinion. In particular, websites should continue to be aware of the potential limitations of terms and conditions of use as a means of preventing unauthorized access to information that is otherwise publicly available. At the same time, companies employing web scraping should be aware of the risks associated with accessing or obtaining information from websites where such information is not public on its face.

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For further information about this topic, please contact Ed Black or your regular Ropes & Gray attorney.