

# Memorandum

## Ninth Circuit Supports Company's Right to Scrape Public Data From Third-Party Website

September 23, 2019

On September 9, 2019, the Ninth Circuit affirmed a preliminary injunction for data analytics company hiQ Labs against LinkedIn, ruling that LinkedIn could not rely on federal anti-computer hacking laws to block hiQ from scraping data from LinkedIn users' public profiles to use in two of hiQ's products.<sup>1</sup>

### Lessons From the Case

The case underscores that social media sites do not have full control over publicly posted user data, particularly when their users retain ownership. The opinion noted that hiQ took its data only from LinkedIn users' public profiles and did not break any LinkedIn privacy controls. Further, LinkedIn had expressly disclaimed ownership of its users' data in its User Agreement.

The specific facts of this case may limit its applicability to other scraping disputes.

- First, the court noted in its injunction analysis—balancing the parties' relative harms—that hiQ's entire business model relied on its ability to scrape LinkedIn. This is an unlikely posture for many companies who scrape data from third-party websites.
- Second, LinkedIn had sent a "cease and desist" letter to hiQ to object to the scraping, and hiQ sued to challenge LinkedIn's right to object. Many companies would likely stop scraping after receiving such a letter, mooting the dispute.
- Third, the court noted that LinkedIn had likely learned of hiQ's scraping practices more than a year before sending the "cease and desist" letter, which it apparently sent soon before launching a similar product. A more prompt objection would likely be viewed differently by a court.
- Fourth, the court noted that LinkedIn had disclaimed ownership of its users' data and did not keep all user data behind password control. Social media sites who exercise more legal and/or technical

<sup>1</sup> *hiQ Labs, Inc. v. LinkedIn Corp.*, No. 17-16783, 2019 WL 4251889 (9th Cir. Sept. 9, 2019), *aff'g*, *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d 1099, 1103 (N.D. Cal. 2017).

control over their users' data would have a stronger argument against third-party scraping, although, as the court noted, this would be unpopular with users.

- Fifth, the appeal was limited to LinkedIn's claim that hiQ violated the U.S. Computer Fraud & Abuse Act ("CFAA"), which prohibits access "without authorization" to third-party computers. The court noted that scraped websites can also sue for trespass, copyright infringement, breach of contract and on other theories—the court's CFAA holding here would not be relevant to those claims.
- Sixth, the court noted a circuit split in applying the CFAA to certain types of scraping claims,<sup>2</sup> and this decision may prompt forum-shopping for a more plaintiff-friendly result.

## Case Details

hiQ used bots to scrape data from LinkedIn users' public profiles to create two products based on employee-related data. After apparently being aware of hiQ's actions for more than a year, LinkedIn sent a "cease and desist" letter to hiQ, stating that hiQ had no right to access the LinkedIn data and threatening hiQ with liability under the CFAA and other laws. hiQ sought a preliminary injunction to prevent LinkedIn from blocking its access to public user data, which the district court granted in 2017. This appeal followed.

The Ninth Circuit applied standard analysis for a preliminary injunction claim, considering and weighing (i) the likelihood of irreparable harm to the plaintiff; (ii) the balance of the parties' interests; (iii) the plaintiff's likelihood of success on the merits; and (iv) the public interest.

On irreparable harm, the Ninth Circuit affirmed the district court's finding that denying hiQ access to public data on LinkedIn could cause hiQ both to go out of business and to breach major customer contracts. The court rejected LinkedIn's arguments that hiQ could obtain the data elsewhere. As for the parties' interest, the court balanced hiQ's survival against the privacy interests of LinkedIn users relating to their public profiles. The court noted that LinkedIn's users do not expect their public data to be subject to unlimited use by LinkedIn or by others, and that LinkedIn has a legitimate interest in preventing "free riders" on its website, but ultimately found that LinkedIn's interests were outweighed by hiQ's.

On likelihood of success, the court found that hiQ had made a sufficient showing of its claim that LinkedIn had interfered with hiQ's customer contracts, under which hiQ provided products using public LinkedIn data. The court held that hiQ had raised serious doubts about LinkedIn's argument that the CFAA preempted this interference claim, stating that the CFAA is an "anti-intrusion" law and not a "misappropriation" law, and was designed to address disputes about hacking, which had not occurred here. The court further noted that, while previous Ninth Circuit opinions (see *Facebook* and *Nosal* in note 2)

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<sup>2</sup> *United States v. Nosal*, 844 F.3d 1024 (9th Cir. 2016) and *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058 (9th Cir. 2016) noted that the CFAA is not violated by breach of a website contract or defendant's policies, and *EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577, 583–84 (1st Cir. 2001) and *United States v. Rodriguez*, 628 F.3d 1258, 1263 (11th Cir. 2010) hold the opposite.

supported a CFAA claim after a person received a “cease and desist” letter from a third party, those cases involved a protected computer system, and not scraping of data available to the public. And because the data was public, it was doubtful, the court held, that hiQ’s scraping was “without authorization” in violation of the CFAA. On the public interest factor, the court also leaned in favor of hiQ, noting that LinkedIn did not own the data at issue, it was already publicly available, and web scraping is a common activity on the Internet.

The court noted that LinkedIn had also raised objections in its cease and desist letter based on trespass, the Digital Millennium Copyright Act and California penal law. The appeal did not address these legal theories, and the court stated that a trespass claim might be viable if LinkedIn had suffered harm from hiQ’s conduct.

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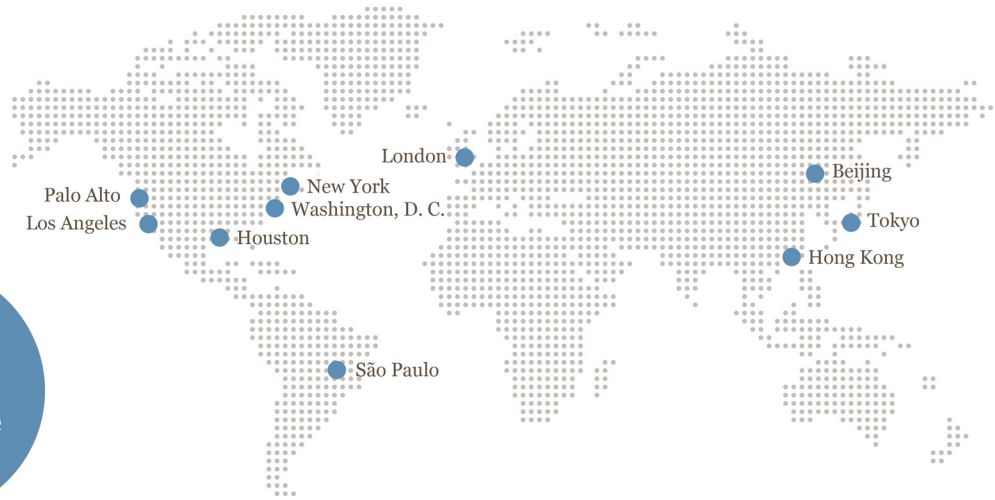
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