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Terms of Service: A Litigator's Perspective

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Introduction

In the dual wake of the United States Supreme Court decision in *Van Buren v. U.S.* and the Ninth Circuit's affirmation of *hiQ v. LinkedIn*, the extent to which a site's terms of service can protect a site from intrusion or misuse, provide remedies in the event of a breach, and provide protection in the face of an affirmative claim is receiving renewed attention.

This paper examines the impact of *Van Buren*'s gates-up-or-down framework on the Computer Fraud and Abuse Act and the extent to which a site's terms of service are capable of putting the gates "up" for CFAA purposes. Particular attention is paid to the questions left open by *Van Buren*, including the interplay between terms of service, technological authentication measures, the otherwise public nature of an outward-facing website, and the categorical restriction of access as compared to purpose-based restrictions. The power and limits of cease-and-desist notices, as well as the use of false information to obtain valid login credentials and the authorization of access by other users despite a site's terms of service, are also discussed.

In light of the new limitations and uncertainty associated with the CFAA, this paper also explores the state of the law on the use of clickwrap and browsewrap terms of service to create enforceable contractual obligations on users, including the role of actual notice and the degree of prominence needed to put a user on "inquiry notice" of browsewrap terms.

I. The Computer Fraud and Abuse Act

A. Overview

In 1984, Congress enacted the Computer Fraud and Abuse Act ("CFAA") to address the growing problem of computer hacking. S.Rep. No. 99–432, at 9 (1986), 1986 U.S.C.C.A.N. 2479, 2487 (Conf. Rep.). The CFAA is a primarily criminal statute, although it also allows for a civil claim under certain circumstances. 18 U.S.C. § 1030(g). Potential remedies include compensatory damages, injunctive relief, and other equitable relief. *Id*.

Setting aside violations involving federal computer networks, national defense or foreign relations matters, viruses, password trafficking, financial institutions, and certain other situations, an individual violates the CFAA if the individual "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains … information from any protected computer." 18 U.S.C. § 1030(a)(2)(C).

The CFAA defines a "computer" to mean "an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device." 18 U.S.C. § 1030(e); *see also U.S. v. Kramer*, 631 F.3d 900, 902 (8th Cir. 2011) (a cell phone is a "computer" for purposes of the CFAA). The CFAA defines a "protected computer" as any computer "used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States." 18 U.S.C. § 1030(e)(2)(B).

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Although "without authorization" is left undefined, the CFAA defines "exceeds authorized access" to mean "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." 18 U.S.C. § 1030(e)(6). As noted below, this phrase has been the subject of considerable litigation, culminating in the 2021 United States Supreme Court decision in *Van Buren v. U.S.*, 141 S. Ct. 1648 (2021).

A person who suffers "damage or loss" as a result of a CFAA violation may bring a civil action against the violator, if the violation involves: loss to one or more persons during any one-year period aggregating to at least $5,000 in value; the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of one or more individuals; physical injury to any person; a threat to public health or safety; or damage affecting a computer used by or for an entity of the United States Government in furtherance of the administration of justice, national defense, or national security. 18 U.S.C. § 1030(c)(4)(A), (g).

The CFAA defines "damage" as "any impairment to the integrity or availability of data, a program, a system, or information." 18 U.S.C. § 1030(e)(8). By contrast, the CFAA defines "loss"—which determines the availability of a civil claim under the CFAA in many corporate situations—as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." 18 U.S.C. § 1030(e)(11).

It bears repeating that the CFAA "is primarily a criminal statute." *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1134 (9th Cir. 2009). As a result, even when a CFAA claim arises in a civil context, the interpretation of the CFAA must be interpreted with an eye toward its criminal implications. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n. 8 (2004) (where a statute "has both criminal and noncriminal applications," courts should interpret the statute consistently in both criminal and noncriminal contexts); *LVRC*, 581 F.3d at 1134 (applying Leocal to CFAA civil claims). One consequence of this is the application of the rule of lenity, which requires ambiguous provisions with criminal implications to be interpreted in favor of the defendant subject to them. *U.S. v. Santos*, 553 U.S. 507, 514 (2020). As Chief Justice Marshall explained more than 200 years ago,

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded ... on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime and ordain its punishment.

United States v. Wiltberger, 18 U.S. 76, 95 (1820).

B. Terms of Service and the CFAA

1. Van Buren v. U.S.

In 2021, the United States Supreme Court decided *Van Buren v. U.S.* and resolved a circuit split regarding the meaning of "exceeds authorized access." 141 S. Ct. 1648 (2021). Prior to *Van Buren*, the First, Fifth, Seventh, and Eleventh Circuits held "exceeds authorized access" includes situations where an individual accesses a computer he or she was permitted to access but does so

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