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LinkedIn Petitions Circuit Court for En Banc Review of hiQ Scraping Decision

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On October 11, 2019, LinkedIn Corp. ("LinkedIn") filed a petition for rehearing en banc of the Ninth Circuit's blockbuster decision in *hiQ Labs, Inc. v. LinkedIn Corp.*, No. 17-16783 (9th Cir. Sept. 9, 2019). The crucial question before the original panel concerned the scope of Computer Fraud and Abuse Act (CFAA) liability to unwanted web scraping of publicly available social media profile data and whether once hiQ Labs, Inc. ("hiQ"), a data analytics firm, received LinkedIn's cease-and-desist letter demanding it stop scraping public profiles, any further scraping of such data was "without authorization" within the meaning of the CFAA. The appeals court affirmed the lower court's order granting a preliminary injunction barring LinkedIn from blocking hiQ from accessing and scraping publicly available LinkedIn member profiles to create competing business analytic products. Most notably, the Ninth Circuit held that hiQ had shown a likelihood of success on the merits in its claim that when a computer network generally permits public access to its data, a user's accessing that publicly available data will not constitute access "without authorization" under the CFAA.

In its petition for en banc rehearing, LinkedIn advanced several arguments, including:

- The *hiQ* decision conflicts with the Ninth Circuit *Power Ventures* precedent, where the appeals court held that a commercial entity that accesses a website after permission has been explicitly revoked can, under certain circumstances, be civilly liable under the CFAA. *Power Ventures* involved Facebook user data protected by password (that users initially allowed a data aggregator permission to access). LinkedIn argued that the *hiQ* court's logic in distinguishing *Power Ventures* was flawed and that the manner in which a user classifies his or her profile data should have no bearing on a website owner's right to protect its physical servers from trespass.

> **_"Power Ventures_ thus holds that computer owners can deny authorization to access their physical servers within the meaning of the CFAA, even when users have authorized access to data stored on the owner's servers. […] Nothing about a data owner's decision to place her data on a website changes _LinkedIn's_ independent right to regulate who can access its website servers."**

- The language of the CFAA should not be read to allow for "authorization" to be assumed (and unable to be revoked) for publicly available website data, either under Ninth Circuit precedent or under the CFAA-related case law of other circuits.

> **"Nothing in the CFAA's text or the definition of 'authorization' that the panel employed—"[o]fficial permission to do something; sanction or warrant," suggests that enabling websites to be publicly viewable is not 'authorization' that can be revoked."**

- The privacy interests enunciated by LinkedIn on behalf of its users is "of exceptional importance," and the court discounted the fact that hiQ is "unaccountable" and has no contractual relationship with LinkedIn users, such that hiQ could conceivably share the scraped data or aggregate it with other data.

> **"Instead of recognizing that LinkedIn members share their information on LinkedIn with the expectation that it will be viewed by a particular audience (human beings) in a particular way (by visiting their pages)—and that it will be subject to LinkedIn's sophisticated technical measures designed to block automated requests—the panel assumed that LinkedIn members expect that their data will be 'accessed by others, including for commercial purposes,' even purposes antithetical to their privacy setting selections. That conclusion is fundamentally wrong.**

Both website operators and open internet advocates will be watching closely to see if the full Ninth Circuit decides to rehear the appeal, given the importance of the CFAA issue and the prevalence of data scraping of publicly available website content. We will keep a close watch on developments.

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