

“ACCESS GRANTED: The Necessity of a Presumption of Public Access under the CFAA and Beyond.”

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Recently, there has been a significant increase in attempts to use the Computer Fraud and Abuse Act (“CFAA”) to improperly control legitimate competition and innovation. The CFAA has once again come under intense scrutiny at both the judicial and legislative level due to a number of factors. Among them, is publicity surrounding the website Craigslist and its controversial decision to file numerous lawsuits against entities that accessed and utilized the non-copyrightable factual data contained within ads posted by users to the site.

One of the central issues in these types of cases has been whether the CFAA should apply when the owner of a publicly accessible website tries to restrict access to particular entities. This often turns in part on whether breach of the terms of use (“TOU”) on a publicly accessible website should even be the basis for a CFAA claim. TOUs are ubiquitous on websites today and come in many different forms such as browsewrap and clickwrap licenses. Particularly in light of the fact that the CFAA provides for not only civil liability but criminal liability as well, the unrestricted ability of a website owner to unilaterally dictate the terms regarding access and use of material on a publicly accessible website is quite concerning. This is an area in which there is a split among federal circuits at the moment. While the 9th Circuit recently ruled that violation of a TOU cannot constitute a violation of the CFAA, it is clearly the outlier regarding this matter as most other circuits, including the 5th, 7th, and 11th have taken the opposite position.

Nonetheless, even if the CFAA were amended to provide that a TOU cannot be the basis for a claim under the CFAA itself, the issue of contract liability separate and apart from the CFAA still potentially remains. This is an area of contract law that is extremely problematic, as with very few exceptions, courts have given the owners of publicly available websites complete freedom to decide who or what may view and utilize the information contained on the site, as well as how such restrictions are communicated to the user. This is particularly concerning when the terms are clearly drafted in such a way to prohibit legitimate competition

and accordingly could negatively impact innovation. This paper and presentation will explore how the criteria for evaluating the enforceability of restrictive covenants in the employment context provides a more appropriate and nuanced framework to analyze whether a TOU should likewise be enforced as drafted. Such an approach will more readily ensure that sufficient attention is given to the potential negative impacts on technological advancement and innovation.