



Trade Secrets and Noncompete Agreements: WHAT YOU NEED TO KNOW

**SPOTLIGHT: WIELDING THE POWER
OF THE FEDERAL COMPUTER
FRAUD AND ABUSE ACT**

Eileen R. Ridley – Partner
Co-Chair of Privacy Litigation
Task Force
eridley@foley.com

Chad R. Fuller – Partner
Co-Chair of Privacy Litigation
Task Force
cfuller@foley.com



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Eileen R. Ridley


Partner, Foley & Lardner LLP



- Managing Partner of San Francisco Office
- Vice-Chair of National Litigation Department
- Co-Chair of Privacy Litigation Task Force
- Member of various practice groups including Trade Secret & Noncompete Task Force.



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Chad R. Fuller
Partner, Foley & Lardner LLP



- Chair of Litigation Department, San Diego Office
- Co-Chair of Privacy Litigation Task Force
- Co-Chair of Class Action Specialty Group
- Member of various practice groups including Trade Secret & Noncompete Task Force.

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What Is The CFAA?

- Computer Fraud and Abuse Act (“CFAA”) (18 U.S.C.A. § 1030)
 - Purpose: To address increasing amount of computer crimes not covered under other laws
 - Application:
 - Competitive Conduct Cases (e.g., “scraping” websites)
 - Trade Secret Cases
 - Hacking/Worms/Trojan horses
 - Identity Theft/Privacy Issues
 - Noncompete Issues with Employees
 - Penalties: Civil and Criminal
 - Applies to both networks and individual computers

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What Is The CFAA?

- The Statute
 - Basis of Liability:
 - Intentional access to a computer without authorization/beyond the scope of authorization
 - Computer may be government owned or not
 - Involving interstate or foreign communication
 - Knowingly, with intent to defraud, access a protected computer
 - Without authorization/beyond authorization
 - Furthering a fraud
 - Item of value is obtained (if value > \$5,000/year)
 - Wages of employees used to fix problem may be included in \$5,000 calculation

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What Is The CFAA?

■ The Statute

- Basis of Liability (cont.)
 - Knowingly cause the transmission of any program, code or command that *intentionally*
 - Damages a protected computer
 - Accesses a protected computer and recklessly causes damage
 - Accesses a protected computer without authorization and causes resulting damage
- The Issue of Intent
 - Intent is required for liability for transmission of a program, code or command
 - Intent otherwise required is to improperly access the computer
 - No defense that acting in company's behalf to reveal security hole

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What Is The CFAA?

■ The Statute

- Basis of Liability (cont.)
 - Fraud
 - Not the same as common law fraud
 - CFAA Fraud = damage to property rights through dishonesty, schemes or other artifices
 - Knowledge
 - No knowledge of amount of value required (but value can determine issues such as misdemeanor or felony criminal liability)

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What Is The CFAA?

■ The Statute

– Basis of Liability (cont.)

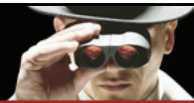
■ Damages

- Aggregated damage that exceeds \$5,000
- Potential modification or impairment of a medical diagnosis, examination, treatment, or care of one or more persons
- Physical injury (*i.e.*, to computers/systems)
- Threat to public health or safety
- Damage to a government computer that is used in furtherance of the administration of justice, national defense or national security
- Damaged party need not have ownership interest in computers which were accessed

- *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004)

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What Is The CFAA?

■ The Statute

– Basis of Liability (cont.)

■ Damages (cont.)

- Showing required: An act that violated the CFAA and that the plaintiff suffered damage (e.g., unauthorized access to data owned by plaintiff but stored on another's computer)
- Intangible property can constitute a thing of value under CFAA
- Party that obtains complete control of a network that contains data has been found to “possess” the data at that time whether copies were downloaded or not

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What Is The CFAA?

■ The Statute

– Basis of Liability (cont.)

■ Damages (cont.)

- **Split of authority**: as to whether lost revenue, security checks and similar expenditures will count toward the damage requirement if there is no showing that there was an *actual compromise* of the network, data, or programs on the network

- Does not count: *Moulton v. VC3*, 2001-1 Trade Cas. (CCH) P. 73202, 2000 WL 33310901 (N.D. Ga. 2000) and *Nexans Wires S.A. v. Sark-USA, Inc.*, 319 F. Supp.2d 468 (S.D. N.Y. 2004)
- Does count: *EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577 (1st Cir. 2001); *Creative Computing v. Getloaded.com LLC*, 386 F.3d 930 (9th Cir. 2004) (lost wages and consultant costs are counted even if no physical damage)

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What Is The CFAA?

■ The Statute

– Basis of Liability (cont.)

■ Damages (Cont.)

- Attorneys' fees to bring a CFAA action do not count toward the loss requirement
- Any "natural and foreseeable" expenses are part of damage amounts to be considered (*U.S. v. Middleton*, 231 F.3d 1207 (9th Cir. 2000))
 - Impairments to the system
 - Loss or re-creation of data
 - Creation of more secure network
 - Forensic costs related to identifying an anonymous user who misappropriated information (*Successfactors, Inc. v. Softscape, Inc.*, 544 F.Supp.2d 975, 981 (N.D. Cal. 2008))
- While economic losses are recoverable, emotional distress or punitive damages are not recoverable

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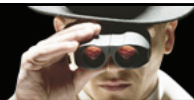


What Is The CFAA?

- The Statute
 - Basis of Liability (cont.)
 - Damages (cont.)
 - **Split of Authority:** must damages include proof of system interruption?
 - **Yes:** *Spangler, Jennings & Dougherty, P.C. v. Mysliwy*, 2:05-cv-00108-JTM-APR (N.D. Ind. March 31, 2006) [Attorney who took client lists, e-data files before departure to start competing firm]
 - **No:** *Therapeutic Research Faculty v. NBTY*, 488 F. Supp.2d 991 (E.D. Cal. Jan. 25, 2007) [exceeded authorized use of password and obtained access to licensed products]

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What Is The CFAA?

- The Statute
 - Basis of Liability (cont.)
 - What is “Loss” for Civil Liability
 - **Split of Authority:** whether or not “loss” requires interruption of service
 - *No Interruption of Service required* – any “reasonable costs to any victim” (including cost of responding, damage assessment, restoration of computer, data and/or system, etc.) and any revenue and/or consequential loss.

(P.C. of Yonkers, Inc. v. Celebrations! The Party and Seasonal Superstore, L.L.C., 2007 WL 708978 (D. N.J. 2007))

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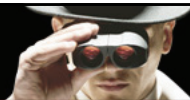


What is the CFAA?

- The Statute
 - Basis of Liability (cont.)
 - What is “Loss” for Civil Liability (Cont.)
 - **Split of Authority:** whether or not “loss” requires interruption of service (Cont.)
 - **Interruption of Service Required** – plaintiff must allege either damage to a computer or an interruption of service to show loss (i.e., mere theft of trade secrets/confidential information is not loss under CFAA without damage to computer or interruption of service)
(L-3 Communications Westwood Corp. v. Robichaux, 2007 WL 756528 (E.D. La. 2007))

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What is the CFAA?

- The Statute
 - Basis of Liability (cont.)
 - Does Deletion of Data (“Wiping”) Constitute a Violation of CFAA:
 - There must be evidence of confidential information or use of passwords and therefore deletions themselves did not prove improper access
 - *Maxpower Corp. v. Abraham, 2008 WL 1925138 (W.D. Wis. 2008)*

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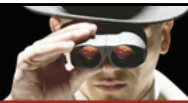


What is the CFAA?

- The Statute
 - Basis of Liability (cont.)
 - Employee Breaches As CFAA Violations (breach of employee loyalty) (*International Airport Centers, L.L. C. v. Citrin*, 440 F.3d 418 (7th Cir. 2006))
 - Employee Departure Known Yet Access to Computers
 - Current/former employees or users of websites going beyond authority to obtain information to which they are not entitled
 - Attempts to obtain trade secrets for competitor
 - Deletion of Files with Knowledge That Employee Will Be Departing (for competitor)

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What is the CFAA?

- The Statute
 - Employers and the CFAA
 - Employers need to create policies/technical systems whereby access to confidential information is limited (important for trade secret law as well)
 - Owners/Operators of networks, websites or ISPs should limit access via policies which are available on website as part of terms of service or user agreement

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What is the CFAA?

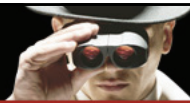
■ The Statute

- Employers and the CFAA
 - Non-protectable information under the CFAA may including pricing data (esp. if subject to variances due to fluctuating costs)

HUB Group, Inc. v. Clancy, 2006 WL 208684 (E.D. Penn. January 25, 2006) [information becomes obsolete and/or would be gained by employee through years of experience]

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What is the CFAA?

■ The Statute

- Employers and the CFAA
 - Vicarious liability: no liability unless
 - (1) furthers employer's interests and/or
 - (2) employer directed activity

Butera & Andrews v. International Business Machines Corp., 456 F.Supp.2d 104 (D.D.C. 2006) and
Calence, LLC v. Dimension Data Holdings, 2007 WL 1549491 (W.D. Wash. May 24, 2007)

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What is the CFAA?

- Examples of CFAA Violations
 - Use of a “scraper” program to obtain confidential information from website (including pricing info)
 - Harvesting of email addresses from other AOL customers (because sending large numbers of emails damaged AOL)
 - Diversion of customers/harvesting of customers lists (use of knowledge of company’s proprietary software and access codes to re-route customers from one website to another)

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What is the CFAA?

- Examples of CFAA Violations
 - Defective software (microcode) causing damage to data on computers constitute transmission of programs (e.g., disk controller software, “time bomb” codes)
 - Intentional placement of cookies, action tags and re-routing users through servers (violation of web privacy)
 - Exceeding scope of authority (former employees/malignant programs such as worms)

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What is the CFAA?

- Examples of CFAA Violations
 - Illegal Subpoenas – improper requests for information from ISPs (e.g., request for emails without limitation of time or subject matter)
 - Review of Information – no violation (even if unauthorized) if nothing of value obtained [e.g., IRS employee viewing tax payer's files]

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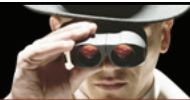


What is the CFAA?

- Examples of CFAA Violations
 - Internet advertising – improper access and copying of data storage forms (damages included costs for assessment and corrective actions)
 - Login pages – if password access is used without authority could be violation of CFAA
 - Downloading in violation of license agreements may not be CFAA violation if authorization can be proven

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What is the CFAA?

- Available Relief from CFAA
 - Prison terms from 1-20 years
 - Civil Relief Available
 - Compensatory damages
 - Injunctive relief
 - Equitable relief
 - If claim is civil and only economic harm – available damages are limited to economic damages

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What Is the Power of the CFAA

- Using the CFAA Offensively:
 - Response to Unfair Competition
 - Response to Misappropriation of Trade Secrets
 - Response to Improper Use of Equipment and/or Websites
 - Response to Damaging Actions Against Systems and Websites

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What Is the Power of the CFAA

- Use of CFAA Defensively:
 - Response to Unfair Competition Claim
 - Response to Employee Claims
 - Response to Officer/Director Claims
 - Protection of Confidential/Proprietary Information
 - Need for Confidentiality and Use Restriction Policies By Employers

- See, *LVRC Holdings LLC v. Brekka*, ___ F.3d ___, 2009 WL 2928952 (9th Cir., September 15, 2009)



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- **10/15/09:** *Do You Know It When You See It? Trade Secret Audits to Identify the Company's Protectable Confidential Information*
- **11/12/09:** *Are the Crown Jewels in an Unlocked Safe? Best Practices for Ensuring That Trade Secrets are Not Readily Ascertainable By Proper Means or Departing Employees*
- **12/10/09:** *Can the Toothpaste Be Put Back in the Tube? Preliminary Injunctions and Other Methods of Stopping Trade Secret Misappropriation and Violation of Noncompetes*
- **1/21/10:** *Enforcing and Litigating Across Borders, Including ADR*

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