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## CivilLITIGATION

### Split over unauthorized use remains

The Computer Fraud and Abuse Act, 18 U.S.C. §1030, was enacted nearly 25 years ago for the initial purpose of protecting government computers from hacking crimes, and thereafter was amended to provide a private cause of action and civil remedies, including compensatory damages and injunctive relief.

Generally, the CFAA prohibits access to protected computers without authorization, or in excess of authorization, which results in an aggregate loss in the amount of at least \$5,000 per year. Recently, parties and their attorneys have attempted to use the CFAA as a tool to obtain federal jurisdiction in prosecuting non-compete and trade secret cases against former employees. Aside from obtaining federal jurisdiction, the CFAA also is an attractive means to pursue former employees in non-compete or trade secret litigation because employers do not have to show the existence of an employment agreement, or that the disputed information is confidential. Although a growing number of federal courts — most recently the U.S. Court of Appeals for the Ninth Circuit — are substantially limiting the scope of what constitutes unauthorized access under the CFAA, federal courts overall are split on the issue.

In *LVRC Holdings LLC v. Brekka, et al.*, 581 F3d 1127 (Ninth Cir. Sept. 15), the Ninth Circuit affirmed the district court's summary judgment award in favor of the defendant, a former employee, on the plaintiff employer's CFAA claim. The defendant e-mailed sensitive company information from his work computer to his personal computer prior to leaving to compete. The Ninth Circuit refused to apply the CFAA to the theft of information, holding that employees are not acting without authorization in that context because the employer gave permission to use the company computer. The decision is contrary to the Seventh Circuit's decision in *International Airport Centers LLC v. Citrin*, 440 F3d 418 (Seventh Cir. 2006) and the 11th Circuit's decision in *U.S. v. Salum*, 257 Fed. App'x 225 (11th Cir. 2007), which both interpreted "without authorization" to apply where an employee's accessing of information was in violation of the duty of loyalty or for an improper purpose. Likewise, in *EF Cultural Travel BV v. Explorica Inc.*, 274 F3d 577 (First Cir. 2001), the First Circuit reasoned that since a broad confidentiality agreement existed between the parties, the defendant's misuse of information it oth-

erwise was authorized to access constituted "exceeding authorized access" under the CFAA.

The Ninth Circuit parted ways with the reasoning of the First, Seventh and 11th Circuits, indicating the defendant employee's purpose for accessing the information did not violate the plain language of the CFAA, which does not prohibit the misuse or misappropriation of information accessed lawfully.

So far, Second Circuit decisions analyzing the CFAA in the employment context have dealt only with whether the plaintiff employer sufficiently established the CFAA's jurisdictional threshold of "loss." No holdings with respect to what constitutes unauthorized, or exceeding authorized, access to information under the CFAA have been rendered. At least two Second Circuit district courts, however, are split. The Southern District of New York adopted the more expansive view in *Calyon v. Mizuho Sec. USA Inc.*, 2007 U.S. Dist. LEXIS 66051 (S.D.N.Y. 2007). In *Calyon*, the district court held that employees who copied their employer's proprietary electronic documents before their termination must have known doing so contravened the interests of their employer and, therefore, exceeded the scope of their authorized

access under the CFAA. The Eastern District of New York, however, recently adopted the narrow application of authorized use under the CFAA in *Jet One Group Inc. v. Halycon Jet Holdings Inc.*, 2009 U.S. Dist. LEXIS 72579 (E.D.N.Y. 2009). In *Jet One Group Inc.*, the district court dismissed the plaintiff's CFAA claims under the same reasoning adopted by the Ninth Circuit in *LVRC Holdings*, finding misuse of otherwise lawfully accessed information does not violate the plain language of the CFAA.

Employers considering claims against disloyal former employees should carefully consider whether pleading a claim under the CFAA will achieve their objectives, unless or until the split on the meaning of "authorized use" and "exceeding authorized use" under the CFAA prompts the U.S. Supreme Court to interpret and clarify these provisions of the CFAA for the first time in its 25 year history.

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