

Van Buren

1. Talk to Peter Swire's Georgia Tech Class, 3/14/22

1.1. CFAA 101

- Originally enacted in 1984
 - "Hackers"
 - Wargames
- Typical prohibition: 18 USC 1030(a)(2)(C):
 - Whoever intentionally accesses
 - a computer
 - without authorization or exceeds authorized access,
 - and thereby obtains information from any protected computer
 - commits a misdemeanor

1.2. *"Without Authorization" and "Exceeds Authorized Access" before Van Buren*

- Most important phrase "exceeds authorized access," which the Cornell website helpfully points out is defined in (e)(6).
 - the term "exceeds authorized access" means
 - 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;
 - Boils down to **IS NOT ENTITLED SO**
- Fundamental Q: How should we draw the legal line between right and wrong?
 - Not ethical. Legal.
 - Start with website ToS.
 - Maybe raise web scraping.
- Three notorious cases:
 - Downloading academic articles from JSTOR (Aaron Swartz)

- Free to download to MIT students and faculty.
- Pretending to be a teen on Myspace in order to torment a high schooler who ends up committing suicide (Lori Drew)
- Much more common: Corporate espionage and faithless employees: Nosal
 - D resigns from executive search firm.
 - D entices three current employees to use their access to download a large volume of data from the firm in order to start a competitor with D.
 - CA9 en banc held that exceeds authorized access does not extend to violations of use restrictions.
- Orin Kerr's three modes of interpretation
 - Code-based
 - Contract-based
 - Norms-based

1.3. Van Buren and what it cleared up

- Facts
 - About 60 miles from here, in Cumming, Georgia
 - Nathan Van Buren was a sergeant in the Cumming Police Department.
 - As part of his duties, Van Buren had access to the Georgia Crime Information Center (GCIC) database, an official database maintained by the Georgia Bureau of Investigation, connected to the NCIC maintained by the FBI.
 - Van Buren was warned not to get mixed up with a local figure of low character
 - Wealthy guy who would hire prostitutes and then call the police to falsely accuse them of stealing from him.
 - Van Buren decided to hit him up for money.
 - Man of low character went to the FBI with a recording.
 - FBI set up a sting: tell him you're trying to find out if a particular person is an undercover police officer, and offer to pay him.
 - Van Buren, the officer, eventually enters a phony license plate number into Georgia Crime Information center (GCIC) database.

- He had permission to search it as part of his job.
- But he was trained that it was for LE use only. No personal uses allowed.
- He was charged and convicted of violating the CFAA
- Court of Appeals refused to overturn the conviction:
 - Earlier case in the 11th Circuit: Using a system for a nonbusiness reason when ordered not to do so satisfies "exceeds authorized access."
- Liability can no longer turn on your purpose alone.
 - You are not made a criminal solely by the thought in your head when you clicked the mouse.

1.4. What remains murky after Van Buren

- "Gates up or down"
 - You must erect a "gate" around an "area of a computer" if you want the CFAA to be available to you to help you enforce the prohibition.
 - Justice Barrett relied on technical dictionaries to come to this conclusion.
 - computers have "areas," akin to physical spaces, some of which you can enter and others of which are "off limits."
 - The owner of a shared computer delineates those spaces by using mechanisms (which remain unspecified) to exclude some users from certain "files, folders or databases."
 - An excluded user who nevertheless finds their way into an off-limits space exceeds authorized access and is thus subject to CFAA's criminal and civil prohibitions.
- Footnote 8
 - "For present purposes, we need not address whether this inquiry turns only on technological (or 'code-based') limitations on access, or instead also looks to limits contained in contracts or policies."
 - Huh?
- Specifically:
- Terms of Service?

- Parade of horrors about the ToS **everybody** ignore
 - In Van Buren: embellishing an online dating profile
- Employment purpose-based restriction?
 - Pretty clearly no longer sufficient.
- Cease-and-desist letters?
- IP address blocking?
- Hypo: "Term of service that says: you cannot access this URL!"
- How I Put it:
 - Van Buren does away with one of the horsemen of the CFAA apocalypse, purpose-based/circumstance-based restrictions.
 - It also gestures to the end of terms-of-service and employment-policy restrictions, two other persistent fears.
 - Journalists and researchers (and the lawyers who advise them) should feel more confident acting in ways that run afoul of purpose-based and other website restrictions.

1.5. Theme: CFAA as a tool to squelch competition

- hiQ facts:
 - hiQ Labs is a data analytics company that analyzes data it copies from the service LinkedIn, the professional networking website.
 - LinkedIn objects to hiQ's copying, although its motives are contested:
 - LinkedIn claims it is defending the privacy of its users;
 - hiQ claims that LinkedIn is acting anticompetitively, because it wants to be the sole source of analysis for LinkedIn data.

1.6. Theme: Interoperability as a tool for transparency

- Facebook's cease-and-desist to NYU Internet Observatory
- Aaron Swartz
- But Clearview AI:
 - a company that has scraped millions of photos from social media sites in order to build a powerful, global facial recognition system, which it sells to law enforcement agencies.

- Of course, the lines between heroism and anti-heroism can blur, and
 - some might celebrate the cold cases that Clearview's technology has helped solve,
 - just as others might decry the creepy data harvesting sometimes done in the name of academic research.

1.7. Theme: The appropriate role for law as a tool to shape technology

1.8. Theme: Computer Scientists need to study the law!

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