Media, Entertainment and First Amendment Newsletter, October 2019

By Lee F. Johnston, Thomas J. Williams | November 13, 2019

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The Ninth Circuit Rejects LinkedIn's Efforts to Block Web-Scraping of Member Public Profiles

Social media companies ("SMC's") are constantly working to leverage data they gather from customers to develop new, innovative products and effective advertising strategies to market those products. At the same time, SMC's face threats from competitors seeking to harvest and exploit the publicly-available customer data hosted on SMC servers. On the technology side, SMC's employ increasingly sophisticated artificial intelligence (AI)-based software to prevent automated bots and web crawlers from accessing and scraping customer data from SMC websites. And, under the auspices of enforcing their own proprietary rights and their customers' privacy rights, SMC's have asserted a variety of legal claims – ranging from common law trespass and breach of contract theories to federal copyright and Computer Fraud and Abuse Action (CFAA) claims -- in an effort to shut down, or at least deter, their competitors' efforts to access and "scrape" SMC customer data.

As judges have gained a better understanding of the technology and legal issues in these cases, the viability of some of these claims has been circumscribed. Nevertheless, SMC's have largely been on the offensive in this battle, primarily due to their ability to outspend their competitors, which are often start-ups lacking the resources for extended legal battles. The Ninth Circuit's September 9, 2019 decision in *hiQ Labs, Inc. v. LinkedIn Corporation*, however, suggests a more favorable future for web scraping in general, and specifically highlights the effectiveness of smaller competitors' strategy of "taking the battle" to larger SMCs rather than waiting to be sued.
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Survey of Federal Courts of Appeals Cases Addressing Applicability of Anti-SLAPP Statutes in Federal Court

As more and more states adopt anti-SLAPP statutes, one question frequently facing litigants is whether, in a case brought in federal court in which jurisdiction is based on diversity of citizenship, the state anti-SLAPP statute applies. With seven of the twelve U.S. Courts of Appeals having now addressed the question, the answer seems clear: it depends. For practitioners trying to determine the applicability of an as-yet untested state statute, the analysis will require a careful reading of the specific state statute in question.

The starting point of the analysis, of course, is the *Erie* doctrine and the long-recognized principle that federal courts sitting in diversity "apply state substantive law and federal procedural law." *Hanna v. Plumer*, 380 U.S. 460, 465 (1965). But, as the Fifth Circuit recently noted in holding that the Texas statute, at least as it was written prior to September 1, 2019, is not applicable in federal

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court, “[d]etermining whether the state law is procedural or substantive may prove elusive.” *Klocke v. Watson*, 936 F.3d 240, 244 (5th Cir. 2019). A summary of the Courts of Appeals decisions to date illustrates the difficulty in answering that “elusive” question.
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