Session 1: Controlling Information: Property and Contracts

We will start the course by reading four cases which address tools available to a firm to control valuable information. The first, *International News Service v. Associated Press*, is a U.S. property law and unfair competition law classic arising in the context of World War I. The second case, more than a century later, *hiQ v. LinkedIn*, raises parallel issues. We then switch to contracts and contract formation. *Nguyen v. Barnes & Noble Inc.* looks at contract formation on the internet, while *StubHub* looks at smartphones.

International News Service v. Associated Press

248 U.S. 215 (1918)

MR. JUSTICE PITNEY delivered the opinion of the Court: The parties are competitors in the gathering and distribution of news and its publication for profit in newspapers throughout the United States. The Associated Press, which was complainant in the District Court, is a co-operative organization, incorporated under the Membership Corporations Law of the state of New York, its members being individuals who are either proprietors or representatives of about 950 daily newspapers published in all parts of the United States. *** Complainant gathers in all parts of the world, by means of various instrumentalities of its own, by exchange with its members, and by other appropriate means, news and intelligence of current and recent events of interest to newspaper readers and distributes it daily to its members for publication in their newspapers. The cost of the service, amounting approximately to $3,500,000 per annum, is assessed upon the members and becomes a part of their costs of operation, to be recouped, presumably with profit, through the publication of their several newspapers. Under complainant's by-laws each member agrees upon assuming membership that news received through complainant's service is received exclusively for publication in a particular newspaper, language, and place specified in the certificate of membership, that no other use of it shall be permitted, and that no member shall furnish or permit any one in his employ or connected with his newspaper to furnish any of complainant's news in advance of publication to any person not a member. And each member is required to gather the local news of his district and supply it to the Associated Press and to no one else.

Defendant is a corporation organized under the laws of the state of New Jersey, whose business is the gathering and selling of news to its customers and clients, consisting of newspapers published throughout the United States, under contracts by which they pay certain amounts at stated times for defendant's service. It has widespread news-gathering agencies; the cost of its operations amounts, it is said, to more than $2,000,000 per annum; and it serves about 400 newspapers located in the various cities of the United States and abroad, a few of which are represented, also, in the membership of the Associated Press.

The parties are in the keenest competition between themselves in the distribution of news throughout the United States; and so, as a rule, are the newspapers that they serve, in their several districts. ***

The only matter that has been argued before us is whether defendant may lawfully be restrained from appropriating news taken from bulletins issued by complainant or any of

its members, or from newspapers published by them, for the purpose of selling it to defendant's clients. Complainant asserts that defendant's admitted course of conduct in this regard both violates complainant's property right in the news and constitutes unfair competition in business. And notwithstanding the case has proceeded only to the stage of a preliminary injunction, we have deemed it proper to consider the underlying questions, since they go to the very merits of the action and are presented upon facts that are not in dispute. As presented in argument, these questions are: (1) Whether there is any property in news; (2) Whether, if there be property in news collected for the purpose of being published, it survives the instant of its publication in the first newspaper to which it is communicated by the news-gatherer; and (3) whether defendant's admitted course of conduct in appropriating for commercial use matter taken from bulletins or early editions of Associated Press publications constitutes unfair competition in trade. ***

We need spend no time, however, upon the general question of property in news matter at common law, or the application of the copyright act, since it seems to us the case must turn upon the question of unfair competition in business. And, in our opinion, this does not depend upon any general right of property analogous to the common-law right of the proprietor of an unpublished work to prevent its publication without his consent; nor is it foreclosed by showing that the benefits of the copyright act have been waived. We are dealing here not with restrictions upon publication but with the very facilities and processes of publication. The peculiar value of news is in the spreading of it while it is fresh; and it is evident that a valuable property interest in the news, as news, cannot be maintained by keeping it secret. Besides, except for matters improperly disclosed, or published in breach of trust or confidence, or in violation of law, none of which is involved in this branch of the case, the news of current events may be regarded as common property. What we are concerned with is the business of making it known to the world, in which both parties to the present suit are engaged. *** The parties are competitors in this field; and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other.

Obviously, the question of what is unfair competition in business must be determined with particular reference to the character and circumstances of the business. The question here is not so much the rights of either party as against the public but their rights as between themselves. And, although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. ***

Board of Trade v. Christie Grain & Stock Co., 198 U.S. 236, 250, related to the distribution of quotations of prices on dealings upon a board of trade, which were collected by plaintiff and communicated on confidential terms to numerous persons under a contract not to make them public. This court held that, apart from certain special objections that were overruled, plaintiff's collection of quotations was entitled to the protection of the law; that, like a trade secret, plaintiff might keep to itself the work done at its expense, and did not lose its right by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public; and that strangers should be restrained from getting at the knowledge by inducing a breach of trust. * * *

Defendant insists that when, with the sanction and approval of complainant, and as the result of the use of its news for the very purpose for which it is distributed, a portion of complainant's members communicate it to the general public by posting it upon bulletin boards so that all may read, or by issuing it to newspapers and distributing it indiscriminately, complainant no longer has the right to control the use to be made of it; that when it thus reaches the light of day it becomes the common possession of all to whom it is accessible; and that any purchaser of a newspaper has the right to communicate the intelligence which it contains to anybody and for any purpose, even for the purpose of selling it for profit to newspapers published for profit in competition with complainant's members.

The fault in the reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves. The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant—which is what defendant has done and seeks to justify—is a very different matter. In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself and a court of equity ought not to hesitate long in characterizing it as unfair competition in business. ***

As to securing "tips" from a competing news agency the District Court (240 Fed. 991, 995), while not sanctioning the practice, found that both parties had adopted it in accordance with common business usage, in the belief that their conduct was technically lawful, and hence did not find in it any sufficient ground for attributing unclean hands to complainant. The Circuit Court of Appeals found that the tip habit, though discouraged by complainant, was "incurably journalistic," and that there was "no difficulty in discriminating between the utilization of tips and the bodily appropriation of another's labor in accumulating and stating information."

We are inclined to think a distinction may be drawn between the utilization of tips and the bodily appropriation of news matter, either in its original form or after rewriting and without independent investigation and verification; whatever may appear at the final hearing, the proofs as they now stand recognize such a distinction; both parties avowedly recognize the practice of taking tips, and neither party alleges it to be unlawful or to amount to unfair competition in business. ***

In the case before us, in the present state of the pleadings and proofs, we need go no further than to hold, as we do, that the admitted pursuit by complainant of the practice of

taking news items published by defendant's subscribers as tips to be investigated, and, if verified, the result of the investigation to be sold—the practice having been followed by defendant also, and by news agencies generally—is not shown to be such as to constitute an unconscientious or inequitable attitude towards its adversary so as to fix upon complainant the taint of unclean hands, and debar it on this ground from the relief to which it is otherwise entitled. ***

MR. JUSTICE HOLMES, dissenting: *** When it comes from one of the great news collecting agencies like the Associated Press, the source generally is indicated, plainly importing that credit; and that such a representation is implied may be inferred with some confidence from the unwillingness of the defendant to give the credit and tell the truth. If the plaintiff produces the news at the same time that the defendant does, the defendant's presentation impliedly denies to the plaintiff the credit of collecting the facts and assumes that credit to the defendant. If the plaintiff is later in Western cities it naturally will be supposed to have obtained its information from the defendant. The falsehood is a little more subtle, the injury, a little more indirect, than in ordinary cases of unfair trade, but I think that the principle that condemns the one condemns the other. It is a question of how strong an infusion of fraud is necessary to turn a flavor into a poison. The does seems to me strong enough here to need a remedy from the law. But as, in my view, the only ground of complaint that can be recognized without legislation is the implied misstatement, it can be corrected by stating the truth; and a suitable acknowledgment of the source is all that the plaintiff can require. I think that within the limits recognized by the decision of the Court the defendant should be enjoined from publishing news obtained from the Associated Press for hours after publication by the plaintiff unless it gives express credit to the Associated Press; the number of hours and the form of acknowledgment to be settled by the District Court.

MR. JUSTICE BRANDEIS, dissenting: *** That competition is not unfair in a legal sense, merely because the profits gained are unearned, even if made at the expense of a rival, is shown by many cases besides those referred to above. He who follows the pioneer into a new market, or who engages in the manufacture of an article newly introduced by another, seeks profits due largely to the labor and expense of the first adventurer; but the law sanctions, indeed encourages, the pursuit. ***

The means by which the International News Service obtains news gathered by the Associated Press is also clearly unobjectionable. It is taken from papers bought in the open market or from bulletins publicly posted. *** The manner of use is likewise unobjectionable. No reference is made by word or by act to the Associated Press, either in transmitting the news to subscribers or by them in publishing it in their papers. Neither the International News Service nor its subscribers is gaining or seeking to gain in its business a benefit from the reputation of the Associated Press. They are merely using its product without making compensation. That they have a legal right to do, because the product is not property, and they do not stand in any relation to the Associated Press, either of contract or of trust, which otherwise precludes such use. The argument is not advanced by characterizing such taking and use a misappropriation.

It is also suggested that the fact that defendant does not refer to the Associated Press as the source of the news may furnish a basis for the relief. But the defendant and its subscribers, unlike members of the Associated Press, were under no contractual obligation to

disclose the source of the news; and there is no rule of law requiring acknowledgment to be made where uncopyrighted matter is reproduced. ***

Nor is the use made by the International News Service of the information taken from papers or bulletins of Associated Press members legally objectionable by reason of the purpose for which it was employed. The acts here complained of were not done for the purpose of injuring the business of the Associated Press. Their purpose was not even to divert its trade, or to put it at a disadvantage by lessening defendant's necessary expenses. The purpose was merely to supply subscribers of the International News Service promptly with all available news. ***

Fifth. The great development of agencies now furnishing country-wide distribution of news, the vastness of our territory, and improvements in the means of transmitting intelligence, have made it possible for a news agency or newspapers to obtain, without paying compensation, the fruit of another's efforts and to use news so obtained gainfully in competition with the original collector. The injustice of such action is obvious. But to give relief against it would involve more than the application of existing rules of law to new facts. It would require the making of a new rule in analogy to existing ones. The unwritten law possesses capacity for growth; and has often satisfied new demands for justice by invoking analogies or by expanding a rule or principle. This process has been in the main wisely applied and should not be discontinued. Where the problem is relatively simple, as it is apt to be when private interests only are involved, it generally proves adequate. But with the increasing complexity of society, the public interest tends to become omnipresent; and the problems presented by new demands for justice cease to be simple. Then the creation or recognition by courts of a new private right may work serious injury to the general public, unless the boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment; and also to provide administrative machinery for enforcing the rules. It is largely for this reason that, in the effort to meet the many new demands for justice incident to a rapidly changing civilization, resort to legislation has latterly been had with increasing frequency.

The rule for which the plaintiff contends would effect an important extension of property rights and a corresponding curtailment of the free use of knowledge and of ideas; and the facts of this case admonish us of the danger involved in recognizing such a property right in news, without imposing upon news-gatherers corresponding obligations. A large majority of the newspapers and perhaps half the newspaper readers of the United States are dependent for their news of general interest upon agencies other than the Associated Press. The channel through which about 400 of these papers received, as the plaintiff alleges, "a large amount of news relating to the European war of the greatest importance and of intense interest to the newspaper reading public" was suddenly closed. The closing to the International News Service of these channels for foreign news (if they were closed) was due not to unwillingness on its part to pay the cost of collecting the news, but to the prohibitions imposed by foreign governments upon its securing news from their respective countries and from using cable or telegraph lines running therefrom. For aught that appears, this prohibition may have been wholly undeserved; and at all events the 400 papers and their readers may be assumed to have been innocent. For aught that appears, the International News Service may have sought then to secure temporarily by arrangement with

the Associated Press the latter's foreign news service. For aught that appears, all of the 400 subscribers of the International News Service would gladly have then become members of the Associated Press, if they could have secured election thereto. It is possible, also, that a large part of the readers of these papers were so situated that they could not secure prompt access to papers served by the Associated Press. The prohibition of the foreign governments might as well have been extended to the channels through which news was supplied to the more than a thousand other daily papers in the United States not served by the Associated Press; and a large part of their readers may also be so located that they cannot procure prompt access to papers served by the Associated Press.

A Legislature, urged to enact a law by which one news agency or newspaper may prevent appropriation of the fruits of its labors by another, would consider such facts and possibilities and others which appropriate inquiry might disclose. Legislators might conclude that it was impossible to put an end to the obvious injustice involved in such appropriation of news, without opening the door to other evils, greater than that sought to be remedied. Such appears to have been the opinion of our Senate which reported unfavorably a bill to give news a few hours' protection; and which ratified, on February 15, 1911, the convention adopted at the Fourth International American Conference; and such was evidently the view also of the signatories to the International Copyright Union of November 13, 1908, as both these conventions expressly exclude news from copyright protection. ***

Or legislators dealing with the subject might conclude, that the right to news values should be protected to the extent of permitting recovery of damages for any unauthorized use, but that protection by injunction should be denied, just as courts of equity ordinarily refuse (perhaps in the interest of free speech) to restrain actionable libels, and for other reasons decline to protect by injunction mere political rights; and as Congress has prohibited courts from enjoining the illegal assessment or collection of federal taxes. If a Legislature concluded to recognize property in published news to the extent of permitting recovery at law, it might, with a view to making the remedy more certain and adequate, provide a fixed measure of damages, as in the case of copyright infringement.

Or again, a Legislature might conclude that it was unwise to recognize even so limited a property right in published news as that above indicated; but that a news agency should, on some conditions, be given full protection of its business; and to that end a remedy by injunction as well as one for damages should be granted, where news collected by it is gainfully used without permission. If a Legislature concluded (as at least one court has held, *New York and Chicago Grain and Stock Exchange v. Board of Trade*, 19 N.E. 855) that under certain circumstances news-gathering is a business affected with a public interest; it might declare that, in such cases, news should be protected against appropriation, only if the gatherer assumed the obligation of supplying it at reasonable rates and without discrimination, to all papers which applied therefor. If legislators reached that conclusion, they would probably go further, and prescribe the conditions under which and the extent to which the protection should be afforded; and they might also provide the administrative machinery necessary for insuring to the public, the press, and the news agencies, full enjoyment of the rights so conferred.

Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be deemed affected with a

public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in the effort to redress a newly disclosed wrong, although the propriety of some remedy appears to be clear.

HiQ Labs, Inc. v. LinkedIn Corp.

31 F.4th 1180 (9th Cir. 2022)

BERZON, CIRCUIT JUDGE: We first issued an opinion in this case in September 2019, addressing the question whether LinkedIn, the professional networking website, could prevent a competitor, hiQ, from collecting and using information that LinkedIn users had shared on their public profiles, available for viewing by anyone with a web browser. *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985 (9th Cir. 2019). HiQ, a data analytics company, had obtained a preliminary injunction forbidding LinkedIn from denying hiQ access to publicly available LinkedIn member profiles. At the preliminary injunction stage, we did not resolve the companies' legal dispute definitively, nor did we address all the claims and defenses they had pleaded in the district court. Instead, we focused on whether hiQ had raised serious questions on the merits of the factual and legal issues presented to us, as well as on the other requisites for preliminary relief. We concluded that hiQ had done so, and we therefore upheld the preliminary injunction.

The Supreme Court granted LinkedIn's petition for writ of certiorari, vacated the judgment, and remanded this case for further consideration in light of *Van Buren v. United States*, 141 S. Ct. 1648 (2021). *LinkedIn Corp. v. hiQ Labs, Inc.*, 141 S. Ct. 2752 (2021). We ordered supplemental briefing and held oral argument on the effect of *Van Buren* on this appeal. Having concluded that *Van Buren* reinforces our determination that hiQ has raised serious questions about whether LinkedIn may invoke the Computer Fraud and Abuse Act ("CFAA") to preempt hiQ's possibly meritorious tortious interference claim, we once again affirm the preliminary injunction.

I.

Founded in 2002, LinkedIn is a professional networking website with over 500 million members.[1] Members post resumes and job listings and build professional "connections" with other members. LinkedIn specifically disclaims ownership of the information users post to their personal profiles: according to LinkedIn's User Agreement, members own the content and information they submit or post to LinkedIn and grant LinkedIn only a

[1] Our recitation of the facts reflects the record before us when this appeal was initially submitted in 2018. Given the speed at which the Internet evolves, we do not doubt that some of the facts presented here became obsolete while this case traveled to the Supreme Court and back. In addition, LinkedIn recently filed a motion in the district court to dissolve the preliminary injunction on the ground that hiQ is "out of business." Order Deferring Ruling on Defendant's Motion to Dissolve Preliminary Injunction, No. 17-cv-03301-EMC, at 2 (N.D. Cal. Oct. 5, 2021), ECF 224. HiQ responded that it remains an intact business entity and has been approached by "prospective business partners" interested in "its technology that allows for automated access of public profiles on LinkedIn's website." Id. The district court deferred ruling on the motion pending our decision in this appeal.

non-exclusive license to "use, copy, modify, distribute, publish, and process" that information.

LinkedIn allows its members to choose among various privacy settings. Members can specify which portions of their profile are visible to the general public (that is, to both LinkedIn members and nonmembers), and which portions are visible only to direct connections, to the member's "network" (consisting of LinkedIn members within three degrees of connectivity), or to all LinkedIn members.[2] This case deals only with profiles made visible to the general public.

LinkedIn also offers all members—whatever their profile privacy settings—a "Do Not Broadcast" option with respect to every change they make to their profiles. If a LinkedIn member selects this option, her connections will not be notified when she updates her profile information, although the updated information will still appear on her profile page (and thus be visible to anyone permitted to view her profile under her general privacy setting). More than 50 million LinkedIn members have, at some point, elected to employ the "Do Not Broadcast" feature, and approximately 20 percent of all active users who updated their profiles between July 2016 and July 2017—whatever their privacy setting—employed the "Do Not Broadcast" setting.

LinkedIn has taken steps to protect the data on its website from what it perceives as misuse or misappropriation. The instructions in LinkedIn's "robots.txt" file—a text file used by website owners to communicate with search engine crawlers and other web robots—prohibit access to LinkedIn servers via automated bots, except that certain entities, like the Google search engine, have express permission from LinkedIn for bot access.[3] LinkedIn also employs several technological systems to detect suspicious activity and restrict automated scraping.[4] For example, LinkedIn's Quicksand system detects non-human

---

[2] Direct connections (or first-degree connections) are people to whom a LinkedIn member is connected by virtue of having invited them to connect and had the invitation accepted, or of having accepted their invitation to connect. Second-degree connections are people connected to a member's first-degree connections. Third-degree connections are people connected to a member's second-degree connections. A LinkedIn member's network consists of the member's first-degree, second-degree, and third-degree connections, as well as fellow members of the same LinkedIn Groups (groups of members in the same industry or with similar interests that any member can request to join).

[3] A web robot (or "bot") is an application that performs automated tasks such as retrieving and analyzing information. See Definition of "bot," Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/bot (last visited March 15, 2022). A web crawler is one common type of bot that systematically searches the Internet and downloads copies of web pages, which can then be indexed by a search engine. Definition of "web crawler," Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/web%20crawler (last visited March 15, 2022). A robots.txt file, also known as the robots exclusion protocol, is a widely used standard for stating the rules that a web server has adopted to govern a bot's behavior on that server. See About/robots.txt, http://www.robotstxt.org/robotstxt.html (last visited March 15, 2022). For example, a robots.txt file might instruct specified robots to ignore certain files when crawling a site, so that the files do not appear in search engine results. Adherence to the rules in a robots.txt file is voluntary; malicious bots may deliberately choose not to honor robots.txt rules and may in turn be punished with a denial of access to the website in question. See Can I Block Just Bad Robots?, http://www.robotstxt.org/faq/blockjustbad.html (last visited March 15, 2022).

[4] Scraping involves extracting data from a website and copying it into a structured format, allowing for data manipulation or analysis. See, e.g., What Is a Screen Scraper?, WiseGeek, http://www.wisegeek.com/what-is-a-screen-scraper.htm (last visited March 15, 2022). Scraping can be done manually, but as in this case, it is typically done by a web robot or "bot." See supra note 3.

activity indicative of scraping; its Sentinel system throttles (slows or limits) or even blocks activity from suspicious IP addresses;[5] and its Org Block system generates a list of known "bad" IP addresses serving as large-scale scrapers. In total, LinkedIn blocks approximately 95 million automated attempts to scrape data every day, and has restricted over 11 million accounts suspected of violating its User Agreement,[6] including through scraping.

HiQ is a data analytics company founded in 2012. Using automated bots, it scrapes information that LinkedIn users have included on public LinkedIn profiles, including name, job title, work history, and skills. It then uses that information, along with a proprietary predictive algorithm, to yield "people analytics," which it sells to business clients.

HiQ offers two such analytics. The first, Keeper, purports to identify employees at the greatest risk of being recruited away. According to hiQ, the product enables employers to offer career development opportunities, retention bonuses, or other perks to retain valuable employees. The second, Skill Mapper, summarizes employees' skills in the aggregate. Among other things, the tool is supposed to help employers identify skill gaps in their workforces so that they can offer internal training in those areas, promoting internal mobility and reducing the expense of external recruitment.

HiQ regularly organizes "Elevate" conferences, during which participants discuss hiQ's business model and share best practices in the people analytics field. LinkedIn representatives participated in Elevate conferences beginning in October 2015. At least ten LinkedIn representatives attended the conferences. LinkedIn employees have also spoken at Elevate conferences. In 2016, a LinkedIn employee was awarded the Elevate "Impact Award." LinkedIn employees thus had an opportunity to learn about hiQ's products, including "that [one of] hiQ's product[s] used data from a variety of sources—internal and external—to predict employee attrition" and that hiQ "collected skills data from public professional profiles in order to provide hiQ's customers information about their employees' skill sets."

In recent years, LinkedIn has explored ways to capitalize on the vast amounts of data contained in LinkedIn profiles by marketing new products. In June 2017, LinkedIn's Chief Executive Officer ("CEO"), Jeff Weiner, appearing on CBS, explained that LinkedIn hoped to "leverage all this extraordinary data we've been able to collect by virtue of having 500 million people join the site." Weiner mentioned as possibilities providing employers with data-driven insights about what skills they will need to grow and where they can find employees with those skills. Since then, LinkedIn has announced a new product, Talent Insights, which analyzes LinkedIn data to provide companies with such data-driven information.

---

[5] "IP address" is an abbreviation for Internet protocol address, which is a numerical identifier for each computer or network connected to the Internet. See Definition of "IP Address," Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/IP%20address (last visited March 15, 2022).

[6] Section 8.2 of the LinkedIn User Agreement to which hiQ agreed states that users agree not to "[s]crape or copy profiles and information of others through any means (including crawlers, browser plugins and add-ons, and any other technology or manual work)," "[c]opy or use the information, content or data on LinkedIn in connection with a competitive service (as determined by LinkedIn)," "[u]se manual or automated software, devices, scripts robots, other means or processes to access, `scrape,' `crawl' or `spider' the Services or any related data or information," or "[u]se bots or other automated methods to access the Services." HiQ is no longer bound by the User Agreement, as LinkedIn has terminated hiQ's user status.

In May 2017, LinkedIn sent hiQ a cease-and-desist letter, asserting that hiQ was in violation of LinkedIn's User Agreement and demanding that hiQ stop accessing and copying data from LinkedIn's server. The letter stated that if hiQ accessed LinkedIn's data in the future, it would be violating state and federal law, including the CFAA, the Digital Millennium Copyright Act ("DMCA"), California Penal Code § 502(c), and the California common law of trespass. The letter further stated that LinkedIn had "implemented technical measures to prevent hiQ from accessing, and assisting others to access, LinkedIn's site, through systems that detect, monitor, and block scraping activity."

HiQ's response was to demand that LinkedIn recognize hiQ's right to access LinkedIn's public pages and to threaten to seek an injunction if LinkedIn refused. A week later, hiQ filed an action, seeking injunctive relief based on California law and a declaratory judgment that LinkedIn could not lawfully invoke the CFAA, the DMCA, California Penal Code § 502(c), or the common law of trespass against it. HiQ also filed a request for a temporary restraining order, which the parties subsequently agreed to convert into a motion for a preliminary injunction.

The district court granted hiQ's motion. It ordered LinkedIn to withdraw its cease-and-desist letter, to remove any existing technical barriers to hiQ's access to public profiles, and to refrain from putting in place any legal or technical measures with the effect of blocking hiQ's access to public profiles. LinkedIn timely appealed.

II.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). *** Applying that sliding scale approach, the district court granted hiQ a preliminary injunction, concluding that the balance of hardships tips sharply in hiQ's favor and that hiQ raised serious questions on the merits. We review the district court's decision to grant a preliminary injunction for abuse of discretion. The grant of a preliminary injunction constitutes an abuse of discretion if the district court's evaluation or balancing of the pertinent factors is "illogical, implausible, or without support in the record." Doe v. Kelly, 878 F.3d 710, 713 (9th Cir. 2017).

A. Irreparable Harm

We begin with the likelihood of irreparable injury to hiQ if preliminary relief were not granted. "[M]onetary injury is not normally considered irreparable." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980). Nonetheless, "[t]he threat of being driven out of business is sufficient to establish irreparable harm." *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985). *** The district court found credible hiQ's assertion that the survival of its business is threatened absent a preliminary injunction. The record provides ample support for that finding.

According to hiQ's CEO, "hiQ's entire business depends on being able to access public LinkedIn member profiles," as "there is no current viable alternative to LinkedIn's member database to obtain data for hiQ's Keeper and Skill Mapper services." Without access to LinkedIn public profile data, the CEO averred, hiQ will likely be forced to breach its existing contracts with clients such as eBay, Capital One, and GoDaddy, and to pass up

pending deals with prospective clients. The harm hiQ faces absent a preliminary injunction is not purely hypothetical. HiQ was in the middle of a financing round when it received LinkedIn's cease-and-desist letter. The CEO reported that, in light of the uncertainty about the future viability of hiQ's business, that financing round stalled, and several employees left the company. If LinkedIn prevails, hiQ's CEO further asserted, hiQ would have to "lay off most if not all its employees, and shutter its operations."

LinkedIn maintains that hiQ's business model does not depend on access to LinkedIn data. It insists that alternatives to LinkedIn data exist, and points in particular to the professional data some users post on Facebook. But hiQ's model depends on access to publicly available data from people who choose to share their information with the world. Facebook data, by contrast, is not generally accessible and therefore is not an equivalent alternative source of data.

LinkedIn also urges that even if there is no adequate alternative database, hiQ could collect its own data through employee surveys. But hiQ is a data analytics company, not a data collection company. Suggesting that hiQ could fundamentally change the nature of its business, not simply the manner in which it conducts its current business, is a recognition that hiQ's current business could not survive without access to LinkedIn public profile data. Creating a data collection system would undoubtedly require a considerable amount of time and expense. That hiQ could feasibly remain in business with no products to sell while raising the required capital and devising and implementing an entirely new data collection system is at least highly dubious.

In short, the district court did not abuse its discretion in concluding on the preliminary injunction record that hiQ currently has no viable way to remain in business other than using LinkedIn public profile data for its Keeper and Skill Mapper services, and that HiQ therefore has demonstrated a likelihood of irreparable harm absent a preliminary injunction.

B. Balance of the Equities

Next, the district court "balance[d] the interests of all parties and weigh[ed] the damage to each in determining the balance of the equities." *CTIA—The Wireless Ass'n v. City of Berkeley, Calif.*, 928 F.3d 832, 852 (9th Cir. 2019) (internal quotation marks and citation omitted). Again, it did not abuse its discretion in doing so.

On one side of the scale is the harm to hiQ just discussed: the likelihood that, without an injunction, it will go out of business. On the other side, LinkedIn asserts that the injunction threatens its members' privacy and therefore puts at risk the goodwill LinkedIn has developed with its members. As the district court observed, "the fact that a user has set his profile to public does not imply that he wants any third parties to collect and use that data for all purposes." LinkedIn points in particular to the more than 50 million members who have used the "Do Not Broadcast" feature to ensure that other users are not notified when the member makes a profile change. According to LinkedIn, the popularity of the "Do Not Broadcast" feature indicates that many members—including members who choose to share their information publicly—do not want their employers to know they may be searching for a new job. An employer who learns that an employee may be planning to leave will not necessarily reward that employee with a retention bonus. Instead,

the employer could decide to limit the employee's access to sensitive information or even to terminate the employee.

There is support in the record for the district court's connected conclusions that (1) LinkedIn's assertions have some merit; and (2) there are reasons to discount them to some extent. First, there is little evidence that LinkedIn users who choose to make their profiles public actually maintain an expectation of privacy with respect to the information that they post publicly, and it is doubtful that they do. LinkedIn's privacy policy clearly states that "[a]ny information you put on your profile and any content you post on LinkedIn may be seen by others" and instructs users not to "post or add personal data to your profile that you would not want to be public."

Second, there is no evidence in the record to suggest that most people who select the "Do Not Broadcast" option do so to prevent their employers from being alerted to profile changes made in anticipation of a job search. As the district court stated, there are other reasons why users may choose that option—most notably, many users may simply wish to avoid sending their connections annoying notifications each time there is a profile change. In any event, employers can always directly consult the profiles of users who chose to make their profiles public to see if any recent changes have been made. Employees intent on keeping such information from their employers can do so by rejecting public exposure of their profiles and eliminating their employers as contacts.

Finally, LinkedIn's own actions undercut its argument that users have an expectation of privacy in public profiles. LinkedIn's "Recruiter" product enables recruiters to "follow" prospects, get "alert[ed] when prospects make changes to their profiles," and "use those [alerts] as signals to reach out at just the right moment," without the prospect's knowledge. And subscribers to LinkedIn's "talent recruiting, marketing and sales solutions" can export data from members' public profiles, such as "name, headline, current company, current title, and location."

In short, even if some users retain some privacy interests in their information notwithstanding their decision to make their profiles public, we cannot, on the record before us, conclude that those interests—or more specifically, LinkedIn's interest in preventing hiQ from scraping those profiles—are significant enough to outweigh hiQ's interest in continuing its business, which depends on accessing, analyzing, and communicating information derived from public LinkedIn profiles.

Nor do the other harms asserted by LinkedIn tip the balance of harms with regard to preliminary relief. LinkedIn invokes an interest in preventing "free riders" from using profiles posted on its platform. But LinkedIn has no protected property interest in the data contributed by its users, as the users retain ownership over their profiles. And as to the publicly available profiles, the users quite evidently intend them to be accessed by others, including for commercial purposes—for example, by employers seeking to hire individuals with certain credentials. Of course, LinkedIn could satisfy its "free rider" concern by eliminating the public access option, albeit at a cost to the preferences of many users and, possibly, to its own bottom line.

We conclude that the district court's determination that the balance of hardships tips sharply in hiQ's favor is not "illogical, implausible, or without support in the record." *Kelly*, 878 F.3d at 713.

C. Likelihood of Success

Because hiQ has established that the balance of hardships tips decidedly in its favor, the likelihood-of-success prong of the preliminary injunction inquiry focuses on whether hiQ has raised "serious questions going to the merits." *Alliance for the Wild Rockies*, 632 F.3d at 1131. It has.

As usual, we consider only the claims and defenses that the parties press on appeal. We recognize that the companies have invoked additional claims and defenses in the district court, and we express no opinion as to whether any of those claims or defenses might ultimately prove meritorious. Thus, while hiQ advanced several affirmative claims in support of its request for preliminary injunctive relief, here we consider only whether hiQ has raised serious questions on the merits of its claims either for intentional interference with contract or unfair competition, under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. Likewise, while LinkedIn has asserted that it has "claims under the Digital Millennium Copyright Act and under trespass and misappropriation doctrines," it has chosen for present purposes to focus on a defense based on the CFAA, so that is the sole defense to hiQ's claims that we address here.

1. Tortious Interference with Contract

HiQ alleges that LinkedIn intentionally interfered with hiQ's contracts with third parties. "The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126 (1990).

HiQ has shown a sufficient likelihood of establishing each of these elements. First, LinkedIn does not contest hiQ's evidence that contracts exist between hiQ and some customers, including eBay, Capital One, and GoDaddy.

Second, hiQ will likely be able to establish that LinkedIn knew of hiQ's scraping activity and products for some time. LinkedIn began sending representatives to hiQ's Elevate conferences in October 2015. At those conferences, hiQ discussed its business model, including its use of data from external sources to predict employee attrition. LinkedIn's director of business operations and analytics, who attended several Elevate conferences, specifically "recall[s] someone from hiQ stating [at the April 2017 conference] that they collected skills data from public professional profiles in order to provide hiQ's customers information about their employees' skill sets." Additionally, LinkedIn acknowledged in its cease-and-desist letter that "hiQ has stated during marketing presentations that its Skill Mapper product is built on profile data from LinkedIn." Finally, at a minimum, LinkedIn knew of hiQ's contracts as of May 31, 2017, when hiQ responded to LinkedIn's cease-and-desist letter and identified both current and prospective hiQ clients.

Third, LinkedIn's threats to invoke the CFAA and implementation of technical measures selectively to ban hiQ bots could well constitute "intentional acts designed to induce a breach or disruption" of hiQ's contractual relationships with third parties. *Pac. Gas & Elec. Co.*, 50 Cal. 3d at 1126; cf. *Winchester Mystery House, LLC v. Global Asylum, Inc.*, 210 Cal. App. 4th 579, 597 (2012) (indicating that "cease-and-desist letters . . . refer[ring] to a[]

contractual or other economic relationship between plaintiff and any third party" could "establish . . . the . . . intent element[] of the interference claim[]").

Fourth, the contractual relationships between hiQ and third parties have been disrupted and "now hang[] in the balance." Without access to LinkedIn data, hiQ will likely be unable to deliver its services to its existing customers as promised. Last, hiQ is harmed by the disruption to its existing contracts and interference with its pending contracts. Without the revenue from sale of its products, hiQ will likely go out of business. LinkedIn does not specifically challenge hiQ's ability to make out any of these elements of a tortious interference claim. Instead, LinkedIn maintains that it has a "legitimate business purpose" defense to any such claim. That contention is an affirmative justification defense for which LinkedIn bears the burden of proof.

Under California law, a legitimate business purpose can indeed justify interference with contract, but not just any such purpose suffices. Where a contractual relationship exists, the societal interest in "contractual stability is generally accepted as of greater importance than competitive freedom." *Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33, 36 (1941). Emphasizing the "distinction between claims for the tortious disruption of an existing contract and claims that a prospective contractual or economic relationship has been interfered with by the defendant," the California Supreme Court instructs that we must "bring[] a greater solicitude to those relationships that have ripened into agreements." *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 392 (1995). Thus, interference with an existing contract is not justified simply because a competitor "seeks to further his own economic advantage at the expense of another." *Imperial Ice*, 18 Cal. 2d at 36. Rather, interference with contract is justified only when the party alleged to have interfered acted "to protect an interest that has greater social value than insuring the stability of the contract" interfered with.

Accordingly, California courts apply a balancing test to determine whether the interests advanced by interference with contract outweigh the societal interest in contractual stability:

> Whether an intentional interference by a third party is justifiable depends upon a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all circumstances including the nature of the actor's conduct and the relationship between the parties.

Herron v. State Farm Mut. Ins. Co., 56 Cal. 2d 202, 206 (1961). Considerations include whether "the means of interference involve no more than recognized trade practices," Buxbom v. Smith, 23 Cal. 2d 535, 546 (1944), and whether the conduct is "within the realm of fair competition," *Inst. of Veterinary Pathology, Inc. v. Cal. Health Labs., Inc.*, 116 Cal. App. 3d 111, 127 (Cal. Ct. App. 1981). The "determinative question" is whether the business interest is pretextual or "asserted in good faith." *Richardson v. La Rancherita*, 98 Cal. App. 3d 73, 81 (Cal. Ct. App. 1979).

Balancing the interest in contractual stability and the specific interests interfered with against the interests advanced by the interference, we agree with the district court that hiQ has at least raised a serious question on the merits of LinkedIn's affirmative justification defense. First, hiQ has a strong commercial interest in fulfilling its contractual obligations

to large clients like eBay and Capital One. Those companies benefit from hiQ's ability to access, aggregate, and analyze data from LinkedIn profiles.

Second, LinkedIn's means of interference is likely not a "recognized trade practice" as California courts have understood that term. "Recognized trade practices" include such activities as "advertising," "price-cutting," and "hir[ing] the employees of another for use in the hirer's business," *Buxbom*, 23 Cal. 2d at 546-47—all practices which may indirectly interfere with a competitor's contracts but do not fundamentally undermine a competitor's basic business model. LinkedIn's proactive technical measures to selectively block hiQ's access to the data on its site are not similar to trade practices previously recognized as acceptable justifications for contract interference.

Further, LinkedIn's conduct may well not be "within the realm of fair competition." *Inst. of Veterinary Pathology*, 116 Cal. App. 3d at 127. HiQ has raised serious questions about whether LinkedIn's actions to ban hiQ's bots were taken in furtherance of LinkedIn's own plans to introduce a competing professional data analytics tool. There is evidence from which it can be inferred that LinkedIn knew about hiQ and its reliance on external data for several years before the present controversy. Its decision to send a cease-and-desist letter occurred within a month of the announcement by LinkedIn's CEO that LinkedIn planned to leverage the data on its platform to create a new product for employers with some similarities to hiQ's Skill Mapper product. If companies like LinkedIn, whose servers hold vast amounts of public data, are permitted selectively to ban only potential competitors from accessing and using that otherwise public data, the result—complete exclusion of the original innovator in aggregating and analyzing the public information—may well be considered unfair competition under California law.[10]

Finally, LinkedIn's asserted private business interests—"protecting its members' data and the investment made in developing its platform" and "enforcing its User Agreements' prohibitions on automated scraping"—are relatively weak. LinkedIn has only a non-exclusive license to the data shared on its platform, not an ownership interest. Its core business model—providing a platform to share professional information—does not require prohibiting hiQ's use of that information, as evidenced by the fact that hiQ used LinkedIn data for some time before LinkedIn sent its cease-and-desist letter. As to its members' interests in their data, for the reasons already explained, we agree with the district court that members' privacy expectations regarding information they have shared in their public profiles are "uncertain at best." Further, there is evidence that LinkedIn has itself developed a data analytics tool similar to HiQ's products, undermining LinkedIn's claim that it has its members' privacy interests in mind. Finally, LinkedIn has not explained how it can enforce its user agreement against hiQ now that its user status has been terminated.

For all these reasons, LinkedIn may well not be able to demonstrate a "legitimate business purpose" that could justify the intentional inducement of a contract breach, at least on the record now before us. We therefore conclude that hiQ has raised at least serious questions going to the merits of its tortious interference with contract claim. Because such

[10] The district court determined that LinkedIn's legitimate business purpose defense overlapped with hiQ's claim under California's Unfair Competition Law ("UCL"), which the district court found raised serious questions on the merits: "hiQ has presented some evidence supporting its assertion that LinkedIn's decision to revoke hiQ's access to its data was made for the purpose of eliminating hiQ as a competitor in the data analytics field, and thus potentially `violates [the UCL].'"

a showing on the tortious interference claim is sufficient to support an injunction prohibiting LinkedIn from selectively blocking hiQ's access to public member profiles, we do not reach hiQ's unfair competition claim.

2. Computer Fraud and Abuse Act (CFAA)

Our inquiry does not end, however, with the state law tortious interference claim. LinkedIn argues that even if hiQ can show a likelihood of success on any of its state law causes of action, all those causes of action are preempted by the CFAA, 18 U.S.C. § 1030, which LinkedIn asserts that hiQ violated.

The CFAA states that "[w]hoever . . . intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer . . . shall be punished" by fine or imprisonment. 18 U.S.C. § 1030(a)(2)(C). The term "protected computer" refers to any computer "used in or affecting interstate or foreign commerce or communication," 18 U.S.C. § 1030(e)(2)(B)—effectively any computer connected to the Internet, see *United States v. Nosal (Nosal II)*, 844 F.3d 1024, 1050 (9th Cir. 2016)—including servers, computers that manage network resources and provide data to other computers. LinkedIn's computer servers store the data members share on LinkedIn's platform and provide that data to users who request to visit its website. Thus, to scrape LinkedIn data, hiQ must access LinkedIn servers, which are "protected computer[s]." See *Nosal II*, 844 F.3d at 1050.

The pivotal CFAA question here is whether once hiQ received LinkedIn's cease-and-desist letter, any further scraping and use of LinkedIn's data was "without authorization" within the meaning of the CFAA and thus a violation of the statute. 18 U.S.C. § 1030(a)(2). If so, LinkedIn maintains, hiQ could have no legal right of access to LinkedIn's data and so could not succeed on any of its state law claims, including the tortious interference with contract claim we have held otherwise sufficient for preliminary injunction purposes.

We have held in another context that the phrase "`without authorization' is a non-technical term that, given its plain and ordinary meaning, means accessing a protected computer without permission." *Nosal II*, 844 F.3d at 1028. *Nosal II* involved an employee accessing without permission an employer's private computer for which access permissions in the form of user accounts were required. Id. at 1028-29. *Nosal II* did not address whether access can be "without authorization" under the CFAA where, as here, prior authorization is not generally required, but a particular person—or bot—is refused access. HiQ's position is that *Nosal II* is consistent with the conclusion that where access is open to the general public, the CFAA "without authorization" concept is inapplicable. At the very least, we conclude, hiQ has raised a serious question as to this issue.

First, the wording of the statute, forbidding "access[] . . . without authorization," 18 U.S.C. § 1030(a)(2), suggests a baseline in which access is not generally available and so permission is ordinarily required. "Authorization" is an affirmative notion, indicating that access is restricted to those specially recognized or admitted. See, e.g., Black's Law Dictionary (11th ed. 2019) (defining "authorization" as "[o]fficial permission to do something; sanction or warrant"). Where the default is free access without authorization, in ordinary parlance one would characterize selective denial of access as a ban, not as a lack of "authorization." Cf. *Blankenhorn v. City of Orange*, 485 F.3d 463, 472 (9th Cir. 2007) (characterizing the exclusion of the plaintiff in particular from a shopping mall as "bann[ing]").

Second, even if this interpretation is debatable, the legislative history of the statute confirms our understanding. "If [a] statute's terms are ambiguous, we may use . . . legislative history[] and the statute's overall purpose to illuminate Congress's intent." *Jonah R. v. Carmona*, 446 F.3d 1000, 1005 (9th Cir. 2006).

The CFAA was enacted to prevent intentional intrusion onto someone else's computer—specifically, computer hacking. *** In recognizing that the CFAA is best understood as an anti-intrusion statute and not as a "misappropriation statute," *Nosal I*, 676 F.3d at 857-58, we rejected the contract-based interpretation of the CFAA's "without authorization" provision adopted by some of our sister circuits. Compare *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1067 (9th Cir. 2016) ("[A] violation of the terms of use of a website—without more—cannot establish liability under the CFAA."). *** In sum, *Nosal II* and *Power Ventures* control situations in which authorization generally is required and has either never been given or has been revoked. As *Power Ventures* indicated, the two cases do not control the situation present here, in which information is "presumptively open to all comers." *Power Ventures*, 844 F.3d at 1067 n.2. As to the computers at issue in those cases, the authorization gate was "down." ***

For all these reasons, it appears that the CFAA's prohibition on accessing a computer "without authorization" is violated when a person circumvents a computer's generally applicable rules regarding access permissions, such as username and password requirements, to gain access to a computer. It is likely that when a computer network generally permits public access to its data, a user's accessing that publicly available data will not constitute access without authorization under the CFAA. The data hiQ seeks to access is not owned by LinkedIn and has not been demarcated by LinkedIn as private using such an authorization system. HiQ has therefore raised serious questions about whether LinkedIn may invoke the CFAA to preempt hiQ's possibly meritorious tortious interference claim.

Entities that view themselves as victims of data scraping are not without resort, even if the CFAA does not apply: state law trespass to chattels claims may still be available.[21] And other causes of action, such as copyright infringement, misappropriation, unjust enrichment, conversion, breach of contract, or breach of privacy, may also lie. See, e.g., *Associated*

---

[21] LinkedIn's cease-and-desist letter also asserted a state common law claim of trespass to chattels. Although we do not decide the question, it may be that web scraping exceeding the scope of the website owner's consent gives rise to a common law tort claim for trespass to chattels, at least when it causes demonstrable harm. Compare *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1070 (N.D. Cal. 2000) (finding that eBay had established a likelihood of success on its trespass claim against the auction-aggregating site Bidder's Edge because, although eBay's "site is publicly accessible," "eBay's servers are private property, conditional access to which eBay grants the public," and Bidder's Edge had exceeded the scope of any consent, even if it did not cause physical harm); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 437-38 (2d Cir. 2004) (holding that a company that scraped a competitor's website to obtain data for marketing purposes likely committed trespass to chattels, because scraping could—although it did not yet—cause physical harm to the plaintiff's computer servers); *Sw. Airlines Co. v. FareChase, Inc.*, 318 F. Supp. 2d 435, 442 (N.D. Tex. 2004) (holding that the use of a scraper to glean flight information was unauthorized as it interfered with Southwest's use and possession of its site, even if the scraping did not cause physical harm or deprivation), with *Ticketmaster Corp. v. Tickets.Com, Inc.*, No. 2:99-cv-07654-HLH-VBK, 2003 WL 21406289, at *3 (C.D. Cal. Mar. 7, 2003) (holding that the use of a web crawler to gather information from a public website, without more, is insufficient to fulfill the harm requirement of a trespass action); *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342, 1364 (2003) (holding that "trespass to chattels is not actionable if it does not involve actual or threatened injury" to property and the defendant's actions did not damage or interfere with the operation of the computer systems at issue).

Press v. Meltwater U.S. Holdings, Inc., 931 F. Supp. 2d 537, 561 (S.D.N.Y. 2013) (holding that a software company's conduct in scraping and aggregating copyrighted news articles was not protected by fair use).

D. Public Interest

Finally, we must consider the public interest in granting or denying the preliminary injunction. Whereas the balance of equities focuses on the parties, "[t]he public interest inquiry primarily addresses impact on non-parties rather than parties," and takes into consideration "the public consequences in employing the extraordinary remedy of injunction." *Bernhardt v. Los Angeles Cnty.*, 339 F.3d 920, 931-32 (9th Cir. 2003) (citations omitted).

As the district court observed, each side asserts that its own position would benefit the public interest by maximizing the free flow of information on the Internet. HiQ points out that data scraping is a common method of gathering information, used by search engines, academic researchers, and many others. According to hiQ, letting established entities that already have accumulated large user data sets decide who can scrape that data from otherwise public websites gives those entities outsized control over how such data may be put to use.

For its part, LinkedIn argues that the preliminary injunction is against the public interest because it will invite malicious actors to access LinkedIn's computers and attack its servers. As a result, the argument goes, LinkedIn and other companies with public websites will be forced to choose between leaving their servers open to such attacks or protecting their websites with passwords, thereby cutting them off from public view.

Although there are significant public interests on both sides, the district court properly determined that, on balance, the public interest favors hiQ's position. We agree with the district court that giving companies like LinkedIn free rein to decide, on any basis, who can collect and use data—data that the companies do not own, that they otherwise make publicly available to viewers, and that the companies themselves collect and use—risks the possible creation of information monopolies that would disserve the public interest.

Internet companies and the public do have a substantial interest in thwarting denial-of-service attacks and blocking abusive users, identity thieves, and other ill-intentioned actors. But we do not view the district court's injunction as opening the door to such malicious activity. The district court made clear that the injunction does not preclude LinkedIn from continuing to engage in "technological self-help" against bad actors—for example, by employing "anti-bot measures to prevent, e.g., harmful intrusions or attacks on its server." Although an injunction preventing a company from securing even the public parts of its website from malicious actors would raise serious concerns, such concerns are not present here.

The district court's conclusion that the public interest favors granting the preliminary injunction was appropriate.

CONCLUSION

We AFFIRM the district court's determination that hiQ has established the elements required for a preliminary injunction and remand for further proceedings.

Nguyen v. Barnes & Noble Inc.

763 F.3d 1171 (9th Cir. 2014)

NOONAN, CIRCUIT JUDGE: Barnes & Noble, Inc. ("Barnes & Noble") appeals the district court's denial of its motion to compel arbitration against Kevin Khoa Nguyen ("Nguyen") pursuant to the arbitration agreement contained in its website's Terms of Use. In order to resolve the issue of arbitrability, we must address whether Nguyen, by merely using Barnes & Noble's website, agreed to be bound by the Terms of Use, even though Nguyen was never prompted to assent to the Terms of Use and never in fact read them. We agree with the district court that Barnes & Noble did not provide reasonable notice of its Terms of Use, and that Nguyen therefore did not unambiguously manifest assent to the arbitration provision contained therein.

We also agree with the district court that Nguyen is not equitably estopped from avoiding arbitration because he relied on the Terms of Use's choice of law provision.

We therefore affirm the district court's denial of Barnes & Noble's motion to compel arbitration and to stay court proceedings.

I. Background

A.

The underlying facts are not in dispute. Barnes & Noble is a national bookseller that owns and operates hundreds of bookstores as well as the website. In August 2011, Barnes & Noble, along with other retailers across the country, liquidated its inventory of discontinued Hewlett-Packard Touchpads ("Touchpads"), an unsuccessful competitor to Apple's iPad, by advertising a "fire sale" of Touchpads at a heavily discounted price. Acting quickly on the nationwide liquidation of Touchpads, Nguyen purchased two units on Barnes & Noble's website on August 21, 2011, and received an email confirming the transaction. The following day, Nguyen received another email informing him that his order had been cancelled due to unexpectedly high demand. Nguyen alleges that, as a result of "Barnes & Noble's representations, as well as the delay in informing him it would not honor the sale," he was "unable to obtain an HP Tablet during the liquidation period for the discounted price," and was "forced to rely on substitute tablet technology, which he subsequently purchased . . . [at] considerable expense."

B.

In April 2012, Nguyen filed this lawsuit in California Superior Court on behalf of himself and a putative class of consumers whose Touchpad orders had been cancelled, alleging that Barnes & Noble had engaged in deceptive business practices and false advertising in violation of both California and New York law. Barnes & Noble removed the action to federal court and moved to compel arbitration under the Federal Arbitration Act ("FAA"), arguing that Nguyen was bound by the arbitration agreement in the website's Terms of Use.

The website's Terms of Use are available via a "Terms of Use" hyperlink located in the bottom left-hand corner of every page on the Barnes & Noble website, which appears

alongside other hyperlinks labeled "NOOK Store Terms," "Copyright," and "Privacy Policy." These hyperlinks also appear underlined and set in green typeface in the lower lefthand corner of every page in the online checkout process.

Nguyen neither clicked on the "Terms of Use" hyperlink nor actually read the Terms of Use. Had he clicked on the hyperlink, he would have been taken to a page containing the full text of Barnes & Noble's Terms of Use, which state, in relevant part: "By visiting any area in the Barnes & Noble.com Site, creating an account, [or] making a purchase via the Barnes & Noble.com Site . . . a User is deemed to have accepted the Terms of Use." Nguyen also would have come across an arbitration provision, which states:

> XVIII. DISPUTE RESOLUTION
>
> Any claim or controversy at law or equity that arises out of the Terms of Use, the Barnes & Noble.com Site or any Barnes & Noble.com Service (each a "Claim"), shall be resolved through binding arbitration conducted by telephone, online or based solely upon written submissions where no in-person appearance is required. In such cases, arbitration shall be administered by the American Arbitration Association under its Commercial Arbitration Rules (including without limitation the Supplementary Procedures for Consumer-Related Disputes, if applicable), and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. ***

Nguyen contends that he cannot be bound to the arbitration provision because he neither had notice of nor assented to the website's Terms of Use. Barnes & Noble, for its part, asserts that the placement of the "Terms of Use" hyperlink on its website put Nguyen on constructive notice of the arbitration agreement. Barnes & Noble contends that this notice, combined with Nguyen's subsequent use of the website, was enough to bind him to the Terms of Use. The district court disagreed, and Barnes & Noble now appeals. ***

III. Discussion

A.

*** Here, the parties agree that the validity of the arbitration agreement is governed by New York law, as specified by the Terms of Use's choice of law provision. But whether the choice of law provision applies depends on whether the parties agreed to be bound by Barnes & Noble's Terms of Use in the first place. As the district court acknowledged in its order, we need not engage in this circular inquiry because both California and New York law dictate the same outcome. Thus, in evaluating the validity of Barnes & Noble's arbitration agreement, we apply New York law, to the extent possible.

For the reasons that follow, we hold that Nguyen did not enter into Barnes & Noble's agreement to arbitrate.

B.

"While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract." *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004). One such principle is the requirement that "[m]utual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone

of contract." *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 29 (2d Cir. 2002) (applying California law).

Contracts formed on the Internet come primarily in two flavors: "clickwrap" (or "click-through") agreements, in which website users are required to click on an "I agree" box after being presented with a list of terms and conditions of use; and "browsewrap" agreements, where a website's terms and conditions of use are generally posted on the website via a hyperlink at the bottom of the screen. Barnes & Noble's Terms of Use fall in the latter category. ***

Were there any evidence in the record that Nguyen had actual notice of the Terms of Use or was required to affirmatively acknowledge the Terms of Use before completing his online purchase, the outcome of this case might be different. Indeed, courts have consistently enforced browsewrap agreements where the user had actual notice of the agreement. Courts have also been more willing to find the requisite notice for constructive assent where the browsewrap agreement resembles a clickwrap agreement—that is, where the user is required to affirmatively acknowledge the agreement before proceeding with use of the website.

But where, as here, there is no evidence that the website user had actual knowledge of the agreement, the validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract. Whether a user has inquiry notice of a browsewrap agreement, in turn, depends on the design and content of the website and the agreement's webpage. Where the link to a website's terms of use is buried at the bottom of the page or tucked away in obscure corners of the website where users are unlikely to see it, courts have refused to enforce the browsewrap agreement. On the other hand, where the website contains an explicit textual notice that continued use will act as a manifestation of the user's intent to be bound, courts have been more amenable to enforcing browsewrap agreements. In short, the conspicuousness and placement of the "Terms of Use" hyperlink, other notices given to users of the terms of use, and the website's general design all contribute to whether a reasonably prudent user would have inquiry notice of a browsewrap agreement.

Barnes & Noble argues that the placement of the "Terms of Use" hyperlink in the bottom left-hand corner of every page on the Barnes & Noble website, and its close proximity to the buttons a user must click on to complete an online purchase, is enough to place a reasonably prudent user on constructive notice. ***

But the proximity or conspicuousness of the hyperlink alone is not enough to give rise to constructive notice, and Barnes & Noble directs us to no case law that supports this proposition. *** In light of the lack of controlling authority on point, and in keeping with courts' traditional reluctance to enforce browsewrap agreements against individual consumers, we therefore hold that where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice. While failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract, the onus must be on website owners to put users on notice of the terms to which they wish to bind con-

sumers. Given the breadth of the range of technological savvy of online purchasers, consumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound. ***

We hold that Nguyen had insufficient notice of Barnes & Noble's Terms of Use, and thus did not enter into an agreement with Barnes & Noble to arbitrate his claims.

AFFIRMED.

Alcaraz v. StubHub, Inc.

No. 22-15879 (9th Cir. Aug 9, 2023)

MEMORANDUM*

Plaintiff consumers, a class of fifty-six named individuals, sued StubHub, Inc., for alleged violation of its "FanProtect™ Guarantee" by failing to provide its consumers with a full refund instead of a credit for tickets purchased for events canceled due to the COVID-19 pandemic. The district court compelled a subset of forty-eight Plaintiffs (those who purchased tickets from StubHub's website) to arbitration; however, the district court denied the motion to compel as to eight Plaintiffs (those who purchased tickets on StubHub's mobile application) ("Mobile Application Plaintiffs"). StubHub appeals the district court's May 13, 2022 Order denying StubHub's renewed motion to compel arbitration as to the Mobile Application Plaintiffs. ***

The district court erred in part by finding that the Mobile Application Plaintiffs did not assent to the arbitration clause in the User Agreement. StubHub alleges that the Mobile Application Plaintiffs assented to the User Agreement in one of two ways: (1) by signing into their accounts via StubHub's website; or (2) by registering via StubHub's mobile application.

The district court erred in denying the renewed motion to compel as to five Mobile Application Plaintiffs—David Dahl, Amanda Matlock, Reginald McDaniel, Jennifer Williams, and Benjamin Wutz—who signed into StubHub's website before purchasing tickets.

StubHub's website sign-in screen that these Plaintiffs viewed provided sufficient notice of their agreement to arbitrate any disputes. The sign-in screen contains hyperlinks in offset, bolded, underlined, and bright blue typeface, in close proximity to the sign-in button. In fact, the website sign-in screen is nearly identical to the website checkout screen that the district court found was sufficient to compel the other forty-eight Plaintiffs to arbitration. See Appendix A.

The fact that these Plaintiffs signed into StubHub's website days, or even months, prior to purchasing their tickets does not change our conclusion. We have held that once an individual registers for an online service or account and assents to its broad terms, she is bound by those terms if she accesses the website at a later date, unless the terms or conditions have changed. See *Stover v. Experian Holdings, Inc.*, 978 F.3d 1082, 1086 (9th Cir. 2020) (holding that a user of Experian's credit monitoring service, who assented to Experian's

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

2014 terms of use, was bound by the 2014 terms when she accessed Experian's website in 2018).

The district court did not err in denying the motion to compel arbitration as to the Mobile Application Plaintiffs—Glaspey and Paul Koble—who registered on the Android application prior to purchasing tickets. To examine whether textual notice is sufficiently conspicuous to put an individual on notice under California law, courts evaluate factors including: (1) the size of the text; (2) the color of the text compared to the background; (3) the location of the text and its proximity to where the user clicks to consent; (4) the obviousness of an associated hyperlink; and (5) other elements on the screen which clutter or obscure the textual notice. *Sellers v. JustAnswer LLC*, 73 Cal. App. 5th 444, 473, reh'g denied (Jan. 18, 2022), review denied (Apr. 13, 2022).

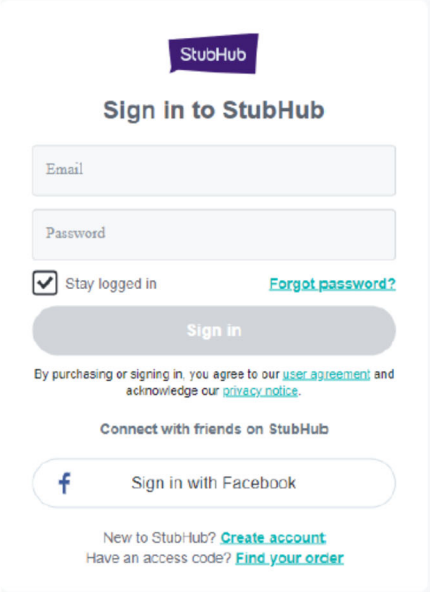
Applying these factors here leads to the conclusion that the mobile registration screen Koble and Glaspey saw lacked several important features that would adequately provide notice of an arbitration clause. See Appendix A. The color of the relevant text is gray and does not stand out against the white background; it is not obvious to the user that the text is hyperlinked; and the bright pink sign-up button obscures the muted colors of the relevant text providing notice. See, e.g., *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 854, 56 (9th Cir. 2022) (holding that terms were inconspicuous where, inter alia, text in "gray font. . . rather than in blue"). While the hyperlinked text is bolded, it is not underlined, which generally indicates that the text is hyperlinked. This is distinct from the text of the website checkout and sign-in pages, in which the term "User Agreement" is underlined and in bright blue font to emphasize that it is hyperlinked. See *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1178 (9th Cir. 2014); *Oberstein v. Live Nation Ent., Inc.*, 60 F.4th 505, 516 (9th Cir. 2023) ("[C]rucially, the 'Terms of Use' hyperlink is conspicuously distinguished from the surrounding text in bright blue font."). Because the User Agreement on the Android registration screen provided insufficient notice, the district court did not err in denying StubHub's motion to compel arbitration as to Koble's and Glaspey's claims.

Accordingly, we affirm in part, and reverse and remand in part. The parties shall bear their own costs.

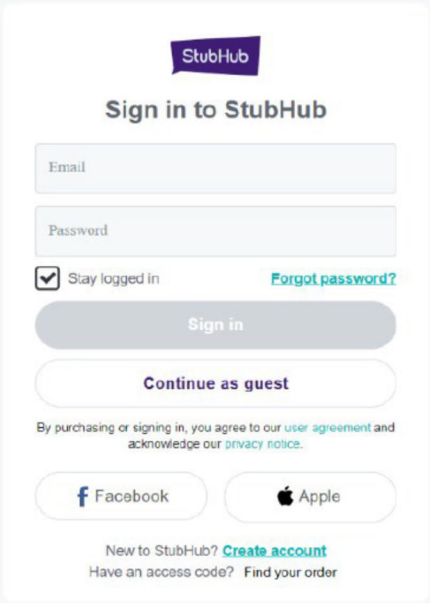
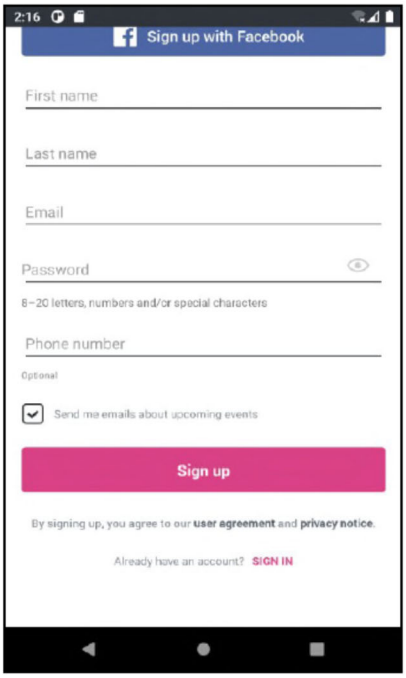
AFFIRMED IN PART. REVERSED AND REMANDED IN PART.

APPENDIX A

Website Sign-In Screen



Website Checkout Screen



Mobile Application Registration Screen