CRS Reports & Analysis

Legal Sidebar

Password Sharing May Be a Federal Crime: *Nosal* Part I

12/09/2016

The Computer Fraud and Abuse Act (CFAA) creates a number of separate federal crimes. One section outlaws accessing a database without authorization or in excess of authorization for fraudulent purposes. Another, seemingly more benign, condemns accessing a database without authorization or in excess of authorization and obtaining information as a result. A broad construction of the phrases "without authorization" and "in excess of authorization" likely encompasses the invidious and innocuous alike. The U.S. Court of Appeals for the Ninth Circuit in *United States v. Nosal* recently held that the term "without authorization" in the CFAA fraud section reaches password sharing under some circumstances. A dissenting member of the court castigated the majority opinion for its implications for benign, non-fraudulent password sharing. The Ninth Circuit also addressed the restitution for attorneys' fees in *Nosal,* discussed in greater detail in a separate sidebar.

Nosal's troubles began when he quit his job and established a competing business. Nosal recruited two colleagues, Christian and Jacobson, to join him, but left behind a third, Froehlich-L'Heureaux. Before they moved on, Christian and Jacobson downloaded masses of confidential data from their employer's database. After they had gone, Christian and Jacobson used the password of a remaining employee, Froehlich-L'Heureaux, to continue the data dump. Nosal's indictment included conspiracy, CFAA, trade secret, and mail fraud counts. The district court dismissed the CFAA charges under the "in excess of authorization" prong of the offense. The Ninth Circuit affirmed the dismissal, holding that the access in excess of authorization prong does not extend to authorized access for an unauthorized purpose.

Nosal still faced charges under the access without authorization prong, *i.e.*, charges that he had aided and abetted his recruits' fraudulent, unauthorized access. The jury convicted Nosal on the remaining CFAA and trade secret counts. The district court sentenced him to imprisonment for a year and a day, a fine, and restitution. (An accompanying sidebar, *Nosal Part II* discusses the restitution portion of the Ninth Circuit's opinion in greater detail.) Nosal appealed. A majority of the Ninth Circuit panel held that Christian and Jacobson's post-employment access to their former employer's database was without authorization, even if accomplished using Froehlich-L'Heureaux's authorized password. Whether their own passwords had expired, as the dissent contended, or been revoked, as the majority contended, the result was the same. Christian and Jacobson's access was "without authorization" and committed with the intent to defraud. Thus, the CFAA's fraud proscription applied to them, as well as to Nosal, the co-conspirator and accomplice who recruited them.

A dissenting member of the panel saw it differently. From the dissenter's point of view, the CFAA is about hackers, not faithless employees or petty rule-breakers. He felt this was the message of the court's earlier decision, which rejected application of the CFAA's "in excess of authorization" prong to faithless employees and its implications for more innocuous access: "[That] case's central lesson that the CFAA should not be interpreted to criminalize the ordinary conduct of millions of citizens applies equally strongly here. Accordingly, I would hold that consensual password sharing is not the kind of 'hacking' covered by the CFAA. That is the case whether or not the voluntary password sharing is with a former employee and whether or not the former employee's own password had expired or been terminated." The dissent concluded, "in sum, §1030(a)(2)(C)[the CFAA's access without authorization and acquiring information section] covers so large a swath of our daily lives that the majority's construction [of the words 'unauthorized access'] will 'criminalize a broad range of day-to-day activity.' Such 'ubiquitous, seldom prosecuted

crimes invite arbitrary and discriminatory enforcement.’”

Posted at 12/09/2016 10:00 AM

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Legal Sidebar

Circuit Split on Restitution for Attorneys' Fees: *Nosal* Part II

12/09/2016

The mandatory federal restitution statute calls for those convicted of fraudulent offenses to "reimburse the victim for … necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense," which may include attorneys' fees. The U.S. Court of Appeals for the Ninth Circuit in *United States v. Nosal* described its decision as at odds with one from the U.S. Court of Appeals for the D.C. Circuit over reimbursement for the victim's attorneys' fees, attributable to her independent internal investigation and efforts to initiate a prosecution. The Ninth Circuit also addressed the password sharing in *Nosal,* discussed in greater detail in a separate sidebar.

Nosal involved a former executive and three wayward employees of an international executive search company, K/F. Nosal left the company and set up a competitor. He recruited three colleagues to supply him with data dumps of the company's confidential business information. When K/F became suspicious, it hired a former prosecutor to investigate. In conjunction with K/F's civil suit against Nosal, K/F's attorney presented her findings to federal prosecutors. Nosal was charged as a co-conspirator and accomplice in his recruits' violation of the Computer Fraud and Abuse Act (CFAA). Among other things, the CFAA outlaws accessing a computer database without authorization or in excess of authorization. Following his conviction, the district court sentenced Nosal to prison for a year and a day, a fine, and restitution. The government had asked the district court to award restitution for attorneys' fees in the amount of $964,929.65, which the district court reduced to a little under $600,000. The Ninth Circuit panel returned the case to the district court for reconsideration of its restitution award.

The panel articulated several principles governing the reimbursement of attorneys' fees. First, "the fees must be the direct and foreseeable result of the defendant's conduct." Second, the fees must be reasonable, that is, measured "against the necessity of the fees under the terms of the statute, thus excluding duplicate effort, time that is disproportionate to the task and time that does not fall with the [statute's] mandate." Third, the "fees are only recoverable if incurred during '*participation in* the investigation or prosecution of the offense'" [emphasis of the court]. "[T]he company's attorneys are not a substitute for the work of the prosecutor, nor do they serve the role of a shadow prosecutor."

In doing so, the Ninth Circuit acknowledged that "[u]nlike some other circuits, *see e.g., United States v. Papagno* …, we have adopted a broad view of the restitutional authorization [for investigation costs]." Papagno was a Naval Research Laboratory employee who stole computers and related equipment from the Laboratory. The Laboratory conducted an internal inquiry, as did naval criminal investigators. The district court ordered Papagno to reimburse the Laboratory for the costs of its internal investigation under the theory that "the Naval Research Laboratory's internal investigation of Papagno's wrongdoing constituted 'participation in the investigation or prosecution of the offense' because it assisted the criminal investigators or prosecutors." The D.C. Circuit refused to equate "assistance" with "participation." It understood "'participation' to exclude an organization's internal investigation – at least one that has not been required or requested by criminal investigators or prosecutors." The implication is that the Ninth Circuit permits restitution of a corporate victim's attorneys' fees, incurred as a consequence of its internal investigation, even in the absence of a request from federal authorities.

One member of the Ninth Circuit panel dissented, but not over the restitution issue. The dissenter objected to the

breadth of the majority's construction of the CFAA, which he saw as "a recipe for giving large corporations undue power over their rivals, their employees, and ordinary citizens." An earlier sidebar discusses the Ninth Circuit's interpretation of the CFAA in greater detail.

Posted at 12/09/2016 10:02 AM