

In the  
**United States Court of Appeals**  
**For the Seventh Circuit**

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No. 15-1830

FIDLAR TECHNOLOGIES,

*Plaintiff-Appellant,*

*v.*

LPS REAL ESTATE DATA SOLUTIONS, INC.,

*Defendant-Appellee.*

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Appeal from the United States District Court for the  
Central District of Illinois.

No. 4:13-CV-4021 — **Sara Darrow**, Judge.

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ARGUED NOVEMBER 5, 2015 — DECIDED JANUARY 21, 2016

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Before FLAUM, MANION, and ROVNER, *Circuit Judges*.

FLAUM, *Circuit Judge*. Fidlar Technologies (“Fidlar”) brings this action against LPS Real Estate Data Solutions, Inc. (“LPS”) for violations of the Computer Fraud and Abuse Act (“CFAA”) and the Illinois Computer Crime Prevention Law (“CCPL”). Fidlar claims that LPS improperly downloaded county land records provided through Fidlar’s services. The district court granted summary judgment in favor of LPS. It

held that Fidler failed to show that LPS acted with intent to defraud under CFAA § 1030(a)(4) or that LPS caused “damage” under § 1030(a)(5)(A). The court also rejected Fidler’s argument that LPS knew or had reason to know that it might cause loss as required by the CCPL. For the following reasons, we affirm.

### I. Background

Fidler is a technology company that develops software for county offices to manage public land records. Fidler’s software allows counties to digitize and index land records. Fidler licenses its software to the counties, and the individual counties contract with users who want access to these land records.

One of Fidler’s software products, Laredo, provides users with remote internet access to county records. The “Laredo system,” as Fidler describes it, consists of three components: the county databases, the “Laredo client” (or just “the client”), and the “middle tier.” The county databases store county land records and index data. The “Laredo client” is a user-interface that allows users to remotely access these land records and related data. Finally, the “middle tier” facilitates the communication between the Laredo client and a specific county database. Fidler offers its county customers the option of whether to host the county database and middle tier components on the county’s own servers or on Fidler’s servers. The client is stored on the user’s own computer.

In order to use the client, a user must accept Fidler’s End-User License Agreement (“EULA”). In relevant part, the EULA provides that a user may “use ... any portion of the software for any purpose,” but it also provides that a user

may “not ... copy the software covered by this Agreement in any manner.” Importantly, the EULA specifies that it does not grant access to any county information. The authority to grant access to records remains with the relevant county.

When a user inputs a record search into the Laredo client, the client sends a request to the middle tier via the internet. The middle tier then retrieves the appropriate record from the county database and “streams” this record to the user through the Laredo client. In other words, the user can view an image of the record in the client, but cannot download or save it for later viewing. However, the client gives the user an option to “print” an image of the record, either on paper or to a PDF file.

The client communicates with the middle tier through a technology called Simple Object Access Protocol (“SOAP calls”). The Laredo client sends SOAP calls unencrypted over the internet. In order to access a particular record, the client generates the appropriate SOAP call and sends it to the middle tier. After analyzing the SOAP call, the middle tier retrieves the matching record and sends it back to the client for viewing. Each Laredo user has a unique username and password for each county with which it has an agreement. Accordingly, each SOAP call is coded with a corresponding unique identifier.

Fidlar tracks access to county records in order to facilitate billing by the individual counties. Each county develops its own subscription plan for access to its records. All the subscription plans charge a monthly fee set by the county based on time spent accessing records. Some—but not all—counties also charge a separate “print fee” (or “copy fee”) for each record a user prints using the client. Fidlar also uses

SOAP calls to track access and printing. For example, if a user prints a record from the client, the client generates and sends a SOAP call of the print request to the middle tier where it is logged for billing purposes.

LPS is a real estate data analytics company that used Laredo to gather real property data. LPS's business requires a continuous acquisition of land records and data. It currently has agreements for access to public land records with approximately 2,600 counties nationwide. However, LPS is not interested in the land records themselves, but rather the data in these records.

To further its data collection efforts, in 2010, LPS contracted with 82 of Fidlar's county customers to gain access to their land records. For each of these 82 counties, LPS agreed to pay the monthly fee for unlimited access to the county's records. For those counties that charged separate print fees, LPS's unlimited subscription did not include printing—if LPS printed a record from the client, it was still charged the applicable print fee. Fidlar was not a party to any of the contracts between LPS and the individual counties.

In 2011, LPS designed a "web-harvester," a computer program to download county records en masse. To create the web-harvester, LPS ran a number of standard record searches and used a "traffic analyzer" to view the SOAP calls sent from the client to the middle tier. LPS then identified the SOAP calls necessary to retrieve records and developed its own client, the web-harvester, to emulate those SOAP calls and send them to the middle tier.<sup>1</sup> LPS's web-harvester only

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<sup>1</sup> "Web-harvester" is in fact a misnomer since LPS's client retrieved records from the county databases, not the World Wide Web.

sent the SOAP calls necessary to retrieve records; it did not send other SOAP calls, such as those that track a user's activity. But every SOAP call did include LPS's unique identifier assigned by each county.

Like the Laredo client, the web-harvester allowed LPS to search for and retrieve any record from the county databases it subscribed to. However, LPS's web-harvester had three major differences from Fidlar's Laredo client. First, the web-harvester allowed LPS to acquire records en masse rather than viewing or printing them one at a time. Second, the web-harvester allowed LPS to download or save records, an option not available in the Laredo client. Third, LPS's web-harvester did not send any tracking data at all and did not register any print fees, even if LPS downloaded or saved a record.

LPS used its web-harvester to obtain a large number of records from the 82 county databases it subscribed to over approximately two years. It downloaded the records in bulk onto its computers and then sent the records to India. There, select data from the records were "keyed," or entered, into LPS's database. Throughout this period, LPS continued to pay for unlimited subscriptions in all 82 counties but did not incur (or pay) print fees for all of the records it acquired through its web-harvester. Indeed, essentially none of LPS's activities were tracked during this period. Nonetheless, LPS's web-harvester did not disrupt Fidlar's services to other users or alter any content in the middle tier or county databases.

In 2012, Fidlar received a message from one of its county customers noting that LPS was paying subscription fees but was not logging any time used. In early 2013, Fidlar decided

to investigate LPS. Based on server logs, Fidler concluded that LPS was using a web-harvester instead of the Laredo client to obtain records.

On March 11, 2013, Fidler filed this action in the Central District of Illinois alleging violations of the Computer Fraud and Abuse Act and the Illinois Computer Crime Prevention Law, as well as trespass to chattels. LPS moved to dismiss, filed a counterclaim, and requested a TRO and preliminary injunction to prevent Fidler from reporting LPS's activities to the counties and from upgrading Laredo to prevent web-harvesting. The district court denied LPS's motion to dismiss and its requests for injunctive relief. On December 1, 2014, LPS moved for summary judgment on all of Fidler's claims. On March 5, 2015, the district court granted LPS's motion for summary judgment and dismissed LPS's counterclaim as moot. Fidler appeals.

## II. Discussion

We review a district court's grant of summary judgment de novo. *Bunn v. Khoury Enters., Inc.*, 753 F.3d 676, 681 (7th Cir. 2014). Summary judgment is appropriate if there is no genuine dispute of material fact and the nonmoving party is entitled to judgment as a matter of law. *Id.* A "material fact" is one that affects the outcome of the suit. *Id.* A "genuine issue" exists as to any material fact when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 681–82. In determining whether a genuine dispute of material fact exists, we view the record in the light most favorable to the nonmoving party, drawing reasonable inferences in the nonmovant's favor. *Id.* at 682.

### A. Computer Fraud and Abuse Act Claim

The CFAA, 18 U.S.C. § 1030, is primarily a criminal anti-hacking statute. However, § 1030(g) provides a civil remedy for any person who suffers damage or loss due to a violation of § 1030. § 1030(g). The district court held that Fidlar failed to demonstrate a violation of § 1030. On appeal, Fidlar argues that LPS violated § 1030(a)(4) and § 1030(a)(5)(A). We review each of these arguments in turn.

#### 1. *Intent to Defraud Under § 1030(a)(4)*

Section 1030(a)(4) punishes anyone who:

[K]nowingly and *with intent to defraud*, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value ....

The district court held that no reasonable jury could find that LPS acted with intent to defraud. Fidlar maintains that LPS's use of its web-harvester constituted an intentional scheme to avoid paying print fees, thus defrauding the counties.

Although this Court has not previously examined this element of § 1030, we have explained that in similar statutes "intent to defraud means that the defendant acted willfully and with specific intent to deceive or cheat, usually for the purpose of getting financial gain for himself or causing financial loss to another." *United States v. Pust*, 798 F.3d 597, 600 (7th Cir. 2015) (quoting *United States v. Paneras*, 222 F.3d 406, 410 (7th Cir. 2000)) (internal quotation marks omitted). Because direct evidence of intent is often unavailable, intent to defraud "may be established by circumstantial evidence

and by inferences drawn from examining the scheme itself which demonstrate that the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension." *Id.* at 600-01.

Additionally, the legislative history of § 1030(a)(4) indicates that Congress intended for this provision to reach cases of computer theft. S. Rep. No. 99-432, at 9, *reprinted in* 1986 U.S.C.C.A.N. 2479, 2486-87 ("The new subsection 1030(a)(4) to be created by this bill is designed to penalize thefts of property via computer that occur as part of a scheme to defraud."). The intent to defraud element is meant to distinguish computer theft from mere trespass. *Id.* at 10 ("[T]here must be a clear distinction between computer theft, punishable as a felony, and computer trespass, punishable in the first instance as a misdemeanor. The element in the new paragraph (a)(4), requiring a showing of an intent to defraud, is meant to preserve that distinction ....").

We note at the outset that this is not a case of theft. It is undisputed that LPS had authority to access the county records as a general matter, the question is whether the *way* in which it did so violated the statute.

Nonetheless, appealing to the broad nature of § 1030(a)(4)'s language, Fidler argues that LPS's conduct supports an inference of an intent to defraud. By using its web-harvester, LPS obtained county records at no additional cost. Moreover, LPS knew that printing records through the client resulted in an additional fee in some counties. And LPS received invoices that did not reflect any downloads it made using its web-harvester, suggesting that LPS was aware that Fidler and the counties were not tracking its activities. Assuming that LPS otherwise would have paid a



print fee for the records it downloaded, LPS's web-harvester allowed it to avoid paying these fees. Therefore, Fidler contends that LPS's "scheme" appears consistent with an intent to defraud.

By contrast, LPS argues that its conduct is consistent with a legitimate, non-fraudulent intent. By using its web-harvester, LPS rapidly acquired records en masse, something it could not do with the Laredo client, even if it paid print fees. In other words, LPS could have been driven by a need to access documents more quickly, and not by an intent to defraud the counties by avoiding print fees. Indeed, if LPS just wanted to avoid print fees, it could have done so through simpler means such as copying the salient data by hand, taking pictures of the records on its computer screens with a digital camera, or simply keying the data directly from the Laredo client. Hence, LPS contends that its intent was to engage in efficient and legitimate business practices, not to "deceive or cheat" the counties. *Pust*, 798 F.3d at 600.

Examining the "scheme" itself, we conclude that no reasonable juror could infer that LPS had an intent to defraud. In other words, LPS's conduct was not "reasonably calculated to deceive persons of ordinary prudence and comprehension." *Id.* at 601. First, LPS used its web-harvester even in those counties that did not charge a print fee. If LPS's intent was to evade print fees, it would have only used its web-harvester in counties that did charge print fees. The fact that LPS used its web-harvester in all counties suggests that its goal was to accelerate its data acquisition efforts. Second, LPS continued to pay for unlimited subscriptions in all 82 counties, even though it was not logging any time by using its web-harvester. If LPS intended to defraud the counties, it

could have selected a limited subscription for less money. Third, LPS did not conceal its use of a web-harvester.<sup>2</sup> In fact, each of LPS's SOAP requests contained its unique identifier. As a result, no reasonable jury could conclude that LPS had the requisite intent to defraud based only on the scheme itself.

Moreover, Fidler failed to present sufficient circumstantial evidence from which a reasonable jury could conclude that LPS intended to commit fraud, or even that LPS knew its actions were fraudulent. LPS maintains that it honestly believed that its conduct was permissible under the county agreements. Fidler cannot demonstrate that LPS intended to commit fraud without evidence that LPS knew that its conduct was fraudulent. *See id.* at 601 (considering whether the defendant knew "the fraudulent nature of the scheme" in assessing intent to defraud).

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<sup>2</sup> Fidler argues that LPS did conceal its conduct because LPS's web-harvester did not send SOAP calls that track user activity. But this conduct is entirely consistent with LPS's purported non-fraudulent reason for using a web-harvester in the first place. LPS designed its web-harvester to obtain records and a tracking function like the one built into Laredo was irrelevant to accomplishing that purpose.

Typically, a person who is concealing fraudulent activity will take unusual, out of the ordinary steps to do so. For example, in *United States v. Westerfield*, we considered the fact that a criminal defendant had directed fraudulent proceeds to a third party as evidence of concealment when "a seller rarely—if ever—directs 100% of the proceeds to a third party." 714 F.3d 480, 485–86 (7th Cir. 2013). In this case, LPS did not go out of its way to conceal its conduct. Rather, it merely designed a web-harvester in the simplest way it knew how. In fact, an LPS employee expressed skepticism as to whether LPS even could have ascertained how Fidler tracked user activity.

None of the circumstantial evidence, including the testimony of LPS employees, the agreements governing LPS's access to county records, and the Laredo technology itself, undermines LPS's claim that it believed it could permissibly download records through its web-harvester without paying print fees. First, LPS presented testimony from its employees indicating that they believed that although printing a record resulted in a fee, downloading a record did not. For example, LPS's former Senior Vice President Erick Marroquin stated that he believed that LPS was "entitled to download images from the Laredo program without incurring a print charge." LPS also offered evidence that it did not use a web-harvester to avoid print fees. The employee who oversaw development of the web-harvester, John McCabe, testified that in designing the web-harvester, "no part of [the process] was to avoid a print fee" and that the purpose was "[e]fficiency, speed."<sup>3</sup>

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<sup>3</sup> In a declaration supporting LPS's request for a temporary restraining order, McCabe stated that "many counties engage Fidlar Technologies to act as the exclusive provider of internet access to the county's public records" and that "[a]nyone interested in reviewing the public records online must download Fidlar's Laredo software and obtain a username and password from the county." These statements do not support a finding of intent to defraud. Taking the second statement first, it is undisputed that in order to gain access to these records, initially, LPS had to download the Laredo client and obtain a username and password from each county. But as McCabe's complete declaration illustrates, LPS's conduct did not stop there. Our inquiry is focused on what happened after—when LPS created and used its web-harvester. As for the first statement, it is also undisputed that the counties contracted exclusively with Fidlar to provide internet access to their records. But LPS did access the records through Fidlar. LPS's web-harvester connected through the middle tier to the county databases, both of which were

Fidlar's own conduct, moreover, bolsters LPS's testimony on this point. LPS presented evidence that Fidlar knew that at least two of LPS's competitors used third party programs to acquire record data via Laredo. In particular, CoreLogic used a "screen-scraper" to collect data from county records. Similarly, the First American Title Company used its own web-harvester to acquire records. Fidlar was aware of this conduct yet did not do anything to stop it. Indeed, in an internal e-mail, a Fidlar employee stated that Fidlar *could* make screen-scraping or web-harvesting illegal with a "simple disclaimer that states the information can't be scraped from the image." Taken together, this evidence suggests that even Fidlar itself did not believe that web-harvesting was impermissible.

Second, the agreements between LPS and the counties did not prohibit LPS from using a web-harvester or require LPS to access the records through the Laredo client. *Cf. EF Cultural Travel BV v. Zefer Corp.*, 318 F.3d 58, 63 (1st Cir. 2003) ("[T]he public website provider can easily spell out explicitly what is forbidden .... If [the plaintiff] wants to ban [certain conduct], let it say so on the webpage or a link clearly marked as containing restrictions."). These agreements also did not prohibit LPS from downloading records or require LPS to pay a print fee for any records it downloaded.<sup>4</sup> Yet,

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maintained by Fidlar, and did not access the county records directly. The question therefore is whether the Laredo client was the exclusive means of accessing county records, not whether Fidlar was the exclusive provider of remote access.

<sup>4</sup> Some of the county agreements and invoices stated that there was an additional fee for making "copies." But evidence presented by LPS indicates that it understood "copy" fees as synonymous with "print" fees and that neither a print fee nor a copy fee applied to downloads.

LPS derived its authority to access records entirely from these agreements. The agreement between LPS and Fidler, the Laredo client EULA, stated that it does not grant access to any county information. So the EULA, by its own terms, did not limit—or even affect—LPS’s access to county records.

Third, the Laredo client’s technological limitations do not support an inference that LPS knew it could not download records. Fidler contends that because the client was designed to prevent downloading records, LPS should have known that it was not authorized to do so.<sup>5</sup> But the client’s technological limitations only show that LPS knew that it could not download records *through the Laredo client*. We see no reason why LPS should have inferred that it could not download records through a completely different program that it designed. LPS’s access to records was tied to the individual agreements with each county—agreements that did not require LPS to use the Laredo client and that Fidler was not even party to. Further, the EULA, which was the only agreement between Fidler and LPS, expressly provided that it did not grant access to records and that access could only be granted by the relevant county. In other words, if LPS believed that the county agreements granted it the authority to access records through its own software, the limitations on

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<sup>5</sup> The client did not give the user the option to download records and it disabled certain standard computer function such as the copy-paste and the print-screen functions. It also inhibited third party software from taking screen shots. Fidler presented evidence that it hobbled the client intentionally as a way to generate revenue for the counties from print fees.