274 F.3d 577
United States Court of Appeals,
First Circuit.

EF CULTURAL TRAVEL BV, EF Cultural Tours BV, EF Institute for Cultural
Exchange, Inc., EF Cultural Services BV, and Go Ahead Vacations, Inc., Plaintiffs,
Appellees,
v.
EXPLORICA, INC., Olle Olsson, Peter Nilsson, Philip Gormley, Alexandra
Bernadotte, Anders Eriksson, Deborah Johnson, and Stefan Nilsson, Defendants,
Appellants.

No. 01–2000. | Heard Oct. 1, 2001. | Decided Dec. 17, 2001.

* * *

COFFIN, Senior Circuit Judge.

Appellant Explorica, Inc. ("Explorica") and several of its employees challenge a
preliminary injunction issued against them for alleged violations of the Computer Fraud
and Abuse Act ("CFAA"), 18 U.S.C. § 1030. We affirm the district court's ***579**
conclusion that appellees will likely succeed on the merits of their CFAA claim, but rest
on a narrower basis than the court below.

I. Background

Explorica was formed in 2000 to compete in the field of global tours for high school
students. Several of Explorica's employees formerly were employed by appellee EF,
which has been in business for more than thirty-five years. EF and its partners and
subsidiaries make up the world's largest private student travel organization.

Shortly after the individual defendants left EF in the beginning of 2000, Explorica began
competing in the teenage tour market. The company's vice president (and former vice
president of information strategy at EF), Philip Gormley, envisioned that Explorica could
gain a substantial advantage over all other student tour companies, and especially EF, by
undercutting EF's already competitive prices on student tours. Gormley considered
several ways to obtain and utilize EF's prices: by manually keying in the information
from EF's brochures and other printed materials; by using a scanner to record that same
information; or, by manually searching for each tour offered through EF's website.
Ultimately, however, Gormley engaged Zefer, Explorica's Internet consultant, to design a
computer program called a "scraper" to glean all of the necessary information from EF's
website. Zefer designed the program in three days.

The scraper has been likened to a "robot," a tool that is extensively used on the Internet. Robots are used to gather information for countless purposes, ranging from compiling results for search engines such as Yahoo! to filtering for inappropriate content. The widespread deployment of robots enables global Internet users to find comprehensive information quickly and almost effortlessly.

Like a robot, the scraper sought information through the Internet. Unlike other robots, however, the scraper focused solely on EF's website, using information that other robots would not have. Specifically, Zefer utilized tour codes whose significance was not readily understandable to the public. With the tour codes, the scraper accessed EF's website repeatedly and easily obtained pricing information for those specific tours. The scraper sent more than 30,000 inquiries to EF's website and recorded the pricing information into a spreadsheet.[2]

*580 Zefer ran the scraper program twice, first to retrieve the 2000 tour prices and then the 2001 prices. All told, the scraper downloaded 60,000 lines of data, the equivalent of eight telephone directories of information.[3] Once Zefer "scraped" all of the prices, it sent a spreadsheet containing EF's pricing information to Explorica, which then systematically undercut EF's prices.[4] Explorica thereafter printed its own brochures and began competing in EF's tour market.

The development and use of the scraper came to light about a year and a half later during state-court litigation regarding appellant Olsson's departure from appellee EFICE. EF then filed this action, alleging violations of the CFAA . . . . It sought a preliminary injunction barring Explorica and Zefer from using the scraper program and demanded the return of all materials generated through use of the scraper.

* * *

III. The Computer Fraud and Abuse Act

Although appellees alleged violations of three provisions of the CFAA, the district court found that they were likely to succeed only under section 1030(a)(4).[7] . . . At the heart of the parties' dispute is whether appellants' actions either were "without authorization" or "exceed[ed] authorized access" as defined by the CFAA.[9] We conclude that because of the broad confidentiality agreement appellants' actions "exceed[ed] authorized access," and so we do not reach the more general arguments made about statutory ***582** meaning, including whether use of a scraper alone renders access unauthorized.

A. *"Exceeds authorized access"*
Congress defined "exceeds authorized access," as accessing "a computer with

authorization and [using] such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." 18 U.S.C. § 1030(e)(6). EF is likely to prove such excessive access based on the confidentiality agreement between Gormley and EF. Pertinently, that agreement provides:

> Employee agrees to maintain in strict confidence and not to disclose to any third party, either orally or in writing, any Confidential or Proprietary Information ... and never to at any time (i) directly or indirectly publish, disseminate or otherwise disclose, deliver or make available to anybody any Confidential or Proprietary Information or (ii) use such Confidential or [P]roprietary Information for Employee's own benefit or for the benefit of any other person or business entity other than EF.
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> * * *
>
> As used in this Agreement, the term "Confidential or Proprietary Information" means (a) any trade or business secrets or confidential information of EF, whether or not reduced to writing ...; (b) any technical, business, or financial information, the use or disclosure of which might reasonably be construed to be contrary to the interests of EF.
>
> ...

The record contains at least two communications from Gormley to Zefer seeming to rely on information about EF to which he was privy only because of his employment there. First, in an email to Zefer employee Joseph Alt exploring the use of a scraper, Gormley wrote: "[m]ight one of the team be able to write a program to automatically extract prices ... ? I could work with him/her on the specification." Gormley also sent the following email to Zefer employee John Hawley:

> Here is a link to the page where you can grab EF's prices. There are two important drop down menus on the right.... With the lowest one you select one of about 150 tours. * * * You then select your origin gateway from a list of about 100 domestic gateways (middle drop down menu). When you select your origin gateway a page with a couple of tables comes up. One table has 1999–2000 prices and the other has 2000–2001 prices. * * * On a high speed connection it is possible to move quickly from one price table to the next by hitting backspace and then the down arrow.

This documentary evidence points to Gormley's heavy involvement in the conception of the scraper program. Furthermore, the voluminous spreadsheet containing all of the scraped information includes the tour codes, which EF claims are proprietary ***583** information. Each page of the spreadsheet produced by Zefer includes the tour and gateway codes, the date of travel, and the price for the tour. An uninformed reader would regard the tour codes as nothing but gibberish.[11] Although the codes can be correlated to the actual tours and destination points, the codes standing alone need to be "translated" to

be meaningful.

Explorica argues that none of the information Gormley provided Zefer was confidential and that the confidentiality agreement therefore is irrelevant.[12] The case on which they rely, *Lanier Professional Services, Inc. v. Ricci,* 192 F.3d 1, 5 (1st Cir.1999), focused almost exclusively on an employee's non-compete agreement. The opinion mentioned in passing that there was no actionable misuse of confidential information because the only evidence that the employee had taken protected information was a "practically worthless" affidavit from the employee's successor. *Id.* at 5.

Here, on the other hand, there is ample evidence that Gormley provided Explorica proprietary information about the structure of the website and the tour codes. To be sure, gathering manually the various codes through repeated searching and deciphering of the URLs theoretically may be possible. Practically speaking, however, if proven, Explorica's wholesale use of EF's travel codes to facilitate gathering EF's prices from its website reeks of use—and, indeed, abuse—of proprietary information that goes beyond any authorized use of EF's website.[14]

Gormley voluntarily entered a broad confidentiality agreement prohibiting his disclosure of any information "which might reasonably be construed to be contrary to the interests of EF." Appellants would face an uphill battle trying to argue that it was not against EF's interests for appellants to use the tour codes to mine EF's pricing data. *See Anthony's Pier Four, Inc. v. HBC Assoc.,* 411 Mass. 451, 471, 583 N.E.2d 806, 820 (1991) (imposing a duty of good faith and fair dealing in all contracts under Massachusetts law). If EF's allegations are proven, it will likely prove that whatever authorization Explorica had to navigate around EF's site (even in a competitive vein), it exceeded that authorization by providing proprietary information and know-how to Zefer to create the scraper.[16] Accordingly, the district ***584** court's finding that Explorica likely violated the CFAA was not clearly erroneous.

* * *

IV. Conclusion

For the foregoing reasons, we agree with the district court that appellees will likely succeed on the merits of their CFAA claim under 18 U.S.C. § 1030(a)(4). Accordingly, the preliminary injunction was properly ordered.

Affirmed.

Footnotes

2   John Hawley, one of Zefer's senior technical associates, explained the technical progression of the scraper in an affidavit:

> [a.] Open an Excel spreadsheet. The spreadsheet initially contains EFTours gateway and destination city codes, which are available on the EFTours web site.
> [b.] Identify the first gateway and destination city codes [on the] Excel spreadsheet.
> [c.] Create a [website address] request for the EFTours tour prices page based on a combination of gateway and destination city. Example: show me all the prices for a London trip leaving JFK.
> [d.] View the requested web page which is retained in the random access memory of the requesting computer in the form of HTML [computer language] code. * * *
> [e.] Search the HTML for the tour prices for each season, year, etc.
> [f.] Store the prices into the Excel spreadsheet.
> [g.] Identify the next gateway and city codes in the spreadsheet.
> [8.] Repeat steps 3–7 for all gateway and destination city combinations.

3   Appellants dispute the relevance of the size of the printed data, arguing that 60,000 printed lines, while voluminous on paper, is not a large amount of data for a computer to store. This is a distinction without a difference. The fact is that appellants utilized the scraper program to download EF's pricing data. In June 2000, EF's website listed 154,293 prices for various tours.

4   Explorica later varied its prices slightly to mask its across-the-board discount of EF's prices.

5   Zefer, Explorica's consultant, had objected to the initial decision on the ground that it could face liability under the preliminary injunction even though it had not had an opportunity to respond to EF's preliminary injunction motion. The district court allowed all of the parties to submit supplemental briefs and issued a further decision on July 2, 2001.

11 An example of the website address including the tour information is *http://www.eftours.com/tours/PriceResult.asp?* Gate=GTF & TourID=LPM. In this address, the proprietary codes are "GTF" and "LPM."

12 The Agreement provides that confidential information does not include anything that "is or becomes generally known within EF's industry."

14 Among the several emails in the record is one from Zefer employee Joseph Alt to the Explorica "team" at Zefer:

> Below is the information needed to log into EF's site as a tour leader. Please use this to gather competitor information from both a business and experience design perspective.

We may also be able to glean knowledge of their technical abilities. As with all of our information, this is extremely confidential. Please do not share it with anyone.