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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14 UNITED STATES,
15
16 Plaintiff,
17 vs.
18 LORI DREW,
19 Defendant.

Case No. CR-08-582-GW
COURT ORDERED SUPPLEMENT TO
MOTIONS
Hearing Date: Oct. 30, 2008
Time: 8:30 AM

20 COMES NOW defendant Lori Drew, together with counsel, and
21 files the attached supplement, as ordered by this Court.
22

23 Dated: Oct. 6, 2008

s./ H. Dean Steward

24
25 H. Dean Steward
Counsel for Defendant
26 Lori Drew

27
28 ¹ Pro hac vice application pending

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26 2. Orin S. Kerr, *A User's Guide to the Stored*
27 *Communications Act, and a Legislator's Guide*
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1 72 Geo. Wash. L. Rev. 1208, 1238-39 (2004). 5

2 3. Rollins M. Perkins & Ronald N. Boyce,

3 Criminal Law 1075-84 (3d ed. 1982) 6

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1 1.) The Alleged Conduct Did Not Violate 18 U.S.C. § 1030(a)(2)(C)
2 Because The "Essential Nature" of the Alleged Conduct is Not an
3 "Interstate or Foreign Theft"

4 The Ninth Circuit has explained the scope of unauthorized
5 access statutes in *Theofel v. Farey Jones*, 359 F.3d 1066 (9th Cir.
6 2004).² *Theofel* analogized unauthorized access statutes to
7 traditional trespass statutes. According to Judge Kozinski,
8 unauthorized access statutes protect the privacy of owners of
9 computerized information just like trespass statutes protect the
10 privacy of physical space. See *id.* at 1072-73.

11 Under traditional trespass principles, Judge Kozinski
12 explained, not all efforts to obtain access using trickery or
13 deceit triggers a trespass: "Not all deceit vitiates consent." *Id.*
14 at 1073. By analogy, not all efforts to gain access to a computer
15 using trickery or misrepresentation exceeds authorized access:

16
17 The mistake must extend to the essential character of the
18 act itself, which is to say that which makes it harmful or
19 offensive, rather than to some collateral matter which merely
20

21 ² *Theofel* interpreted 18 U.S.C. § 2701, a sister statute to 18
22 U.S.C. § 1030(a)(2). Whereas 18 U.S.C. § 1030(a)(2) is the general
23 federal unauthorized access statute, § 2701 is an unauthorized
24 access statute that applies specifically to e-mail, codified as
25 part of the federal e-mail privacy statute, the Stored
26 Communications Act, 18 U.S.C. §§ 2701-11. Both statutes were
27 enacted in 1986, and at the time the two statutes did not overlap
28 because Section 1030 was very narrow in its original form. Section
1030 has since expanded, and it now overlaps substantially with
Section 2701, rendering the latter largely redundant. See generally
Orin S. Kerr, *A User's Guide to the Stored Communications Act, and
a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208,
1238-39 (2004). Either way, the meaning of "access without
authorization" and "exceeds authorized access" is the same in the
two statutes.

1 operates as an inducement. In other words, it must be a
2 substantial mistake concerning the nature of the invasion or
3 the extent of the harm. Unlike the phony meter reader, the
4 restaurant critic who poses as an ordinary customer is not
5 liable for trespass, nor, unlike the wired cop, is the invitee
6 who conceals only an intent to repeat what he hears. These
7 results hold even if admission would have been refused had all
8 the facts been known.

9 These are fine and sometimes incoherent distinctions. But
10 the theory is that some invited mistakes go to the essential
11 nature of the invasion while others are merely collateral.
12 Classification depends on the extent to which the intrusion
13 trenches on the specific interests that the tort of trespass
14 seeks to protect.

15
16 *Id.* at 1073 (internal quotations and citations omitted). See also
17 *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345,
18 1351 (7th Cir. 1995) (Posner, C.J.) (noting that "consent to an
19 entry is often given legal effect" even when "procured by fraud"
20 and false promises).³

21 Under *Theofel*, violation of a Term of Service can only make an
22 access unauthorized or in excess of authorization if the violation
23 "go[es] to the essential nature of the invasion" that 18 U.S.C. §
24 1030(a)(2) was designed to prohibit. Violations of Terms of
25

26 ³ The Court may recognize this as the traditional common law
27 distinction between "fraud in the factum" and "fraud in the
28 inducement" traditionally used in criminal statutes that have an
element requiring lack of consent. See Rollins M. Perkins & Ronald
N. Boyce, *Criminal Law* 1075-84 (3d ed. 1982).

1 Service that involve "some collateral matter" other than "that
2 which makes it harmful" may trigger liability for breach of
3 contract, but they do not violate the prohibition on access without
4 authorization or exceeding authorized access.

5 The Senate Report accompanying the 1996 passage of 18 U.S.C. §
6 1030(a)(2)(C) explains that the essential nature of the invasion
7 contemplated by the statute is interstate or foreign theft of
8 information by computer. See S. Rep. No. 357, 104th Cong., 2nd
9 Sess. 1996, at 7, available at 1996 WL 492169 ("The proposed
10 subsection 1030(a)(2)(C) is intended to protect against the
11 interstate or foreign theft of information by computer."). When
12 Congress enacted this provision in 1996, it was operating against
13 the backdrop of the holding of *United States v. Brown*, 925 F.2d
14 1301, 1308 (10th Cir. 1991). *Brown* had held that the Interstate
15 Transportation of Stolen Property statute, 18 U.S.C. § 2314, did
16 not apply to intangible property. As a result, a person who stole
17 data remotely in one state and caused the data to be transmitted
18 into another state did not violate § 2314.

19 Congress enacted § 1030(a)(2)(C) to effectively overrule the
20 *Brown* decision. Under the new statute, interstate thefts of
21 information from one state to another state would violate §
22 1030(a)(2)(C) instead of § 2314:

23
24 This information, stored electronically, is intangible, and it
25 has been held that the theft of such information cannot be
26 charged under more traditional criminal statutes such as
27 Interstate Transportation of Stolen Property, 18 U.S.C. 2314.
28 See *United States v. Brown*, 925 F.2d 1301, 1308 (10th Cir.

1 1991). This subsection would ensure that the theft of
2 intangible information by the unauthorized use of a computer
3 is prohibited in the same way theft of physical items are
4 protected.

5
6 S. Rep. No. 357, 104th Cong., 2nd Sess. 1996, at 7, available at
7 1996 WL 492169. In the language of the statute, the "conduct"
8 charged must involve an "interstate or foreign communication." 18
9 U.S.C. § 1030(a)(2)(C).

10 The question is, does the "essential nature" of the alleged
11 conduct in this case involve an interstate theft? The correct
12 answer is "no." The United States has alleged that the defendant
13 accessed MySpace.com in violation of its Terms of Service and
14 obtained information from M.T.M.. At all relevant times, the
15 defendant and M.T.M. were both in the same town in the same state,
16 O' Fallon, Missouri. To the extent any "theft" occurred, that
17 theft was from M.T.M. in Missouri to the defendant in Missouri. It
18 was "theft" down the street, not a theft of property in one state
19 that was then transmitted to another state.

20 The dismissal of the indictment in *United States v. Ropp*, 347
21 F.Supp.2d 831 (C.D. Cal. 2004), is illustrative. In *Ropp*, the
22 defendant was charged with wiretapping for installing a
23 "KeyKatcher" monitoring device on the desktop computer of a co-
24 worker named Karen Beck. Ropp had placed the monitoring device on
25 the cable that connected Beck's keyboard to the base of her
26 computer, and the monitoring device permitted Ropp to monitor every
27 keystroke that she typed into her computer. See *id.* at 831.

1 The Court granted Ropp's motion to dismiss the indictment on
2 the ground that "the transmission of keystrokes from a keyboard to
3 a computer's processing unit is not the transmission of an
4 electronic signal by a system that affects interstate commerce."
5 *Id.* at 832. Although Beck's communications were later sent across
6 the Internet, clearly crossing state lines, the Court concluded
7 that "the acquisition of internal computer signals that constitute
8 part of the process of *preparing* a message for transmission" could
9 not satisfy the interstate commerce requirement of the Wiretap Act.
10 *Id.* at 837 (emphasis in original). The Court continued:

11
12 Although [Beck's computer] . . . is connected to a larger
13 system -- the network -- which affects interstate or foreign
14 commerce, the transmission in issue did not involve that
15 system. The network connection is irrelevant to the
16 transmissions, which could have been made on a stand-alone
17 computer that had no link at all to the internet or any other
18 external network.

19
20 *Id.* at 838.

21 The reasoning of *Ropp* is applicable to this case. As in *Ropp*,
22 the defendant was using computers that were "connected to a larger
23 system" in interstate commerce. But as in *Ropp*, "the network
24 connection is irrelevant," as the transmissions at issue could have
25 been made entirely on an intrastate network "that had no link at
26 all to the internet." *Ropp*, 347 F.Supp.2d at 838. Thus, under
27 *Theofel*, the violations of Terms of Service unrelated to any
28 interstate theft cannot constitute exceeding authorized access on

1 MySpace's computers or accessing the MySpace computers without
2 authorization. The alleged violations of Terms of Service do not
3 go to "that which makes it harmful or offensive" - that is,
4 interstate theft of information - but rather concern "collateral
5 matter[s]" completely unrelated to any possible interstate theft.
6 *Theofel*, 359 F.3d at 1073.

7 It would be a different case if the government claimed that
8 the defendant had stolen property belonging to MySpace.com.
9 MySpace's servers are located in Los Angeles County, and a
10 defendant who used the Internet from Missouri to steal information
11 belonging to MySpace in California would be engaging in an
12 interstate theft. This would be the kind of conduct that 18 U.S.C.
13 § 1030(a)(2)(C) was designed to prohibit.

14 In this case, however, the government has not alleged the
15 theft of any property belonging to MySpace.com. Nor could it: The
16 MySpace Terms of Service state clearly that MySpace.com does not
17 have any property rights in the information that users provide.
18 See MySpace.com Terms of Service at § 6.1 ("MySpace does not claim
19 any ownership rights in the text, files, images, photos, video,
20 sounds, musical works, works of authorship, applications, or any
21 other materials . . . that you post on or through the MySpace
22 Services.") (emphasis added).⁴ To the extent any "theft" of
23 property occurred - and it is not clear any theft did occur - it
24 was intrastate rather than interstate.

25 Put another way, the government must chose who it believes is
26 the victim in this case. Either the victim was M.T.M. or else the

27
28 ⁴ <http://www.myspace.com/index.cfm?fuseaction=misc.terms>

1 victim was MySpace.com. If the government believes the victim was
2 MySpace.com, the indictment must be dismissed because none of
3 MySpace's information was stolen. If the government believes the
4 victim was M.T.M, then the indictment must be dismissed because
5 violating MySpace's Terms of Service is at most a "collateral
6 matter" to the harm under the Ninth Circuit's *Theofel* test.

7
8 **2.) Conduct In Furtherance of a Common Law Tort Does Not Trigger**
9 **Felony Liability Under 18 U.S.C § 1030(c)(2)(B)(ii).**

10
11 Even assuming that the defendant is liable for a misdemeanor
12 violation of 18 U.S.C. § 1030(a)(2)(C), she cannot be held liable
13 under the felony provisions of 18 U.S.C. § 1030(c)(2)(B)(ii). The
14 felony provision permits more severe punishment when "the offense
15 was committed in furtherance of any criminal or tortious act in
16 violation of the Constitution or laws of the United States or of
17 any State." 18 U.S.C. § 1030(c)(2)(B)(ii). The government
18 hypothesizes that the defendant committed a felony by violating
19 MySpace's Terms of Service in furtherance of the common law tort of
20 intentional infliction of emotional distress. This reading of the
21 statute is erroneous because the "laws of the United States or of
22 any state" refer only to *statutory* laws, not common law doctrines
23 such as intentional infliction of emotional distress.

24 The phrase "laws of the United States or of any state" is a
25 well-known phrase in federal law. It has been interpreted
26 consistently to refer only to statutory laws. The first major case
27 establishing this interpretation was *Eliot v. Freeman*, 220 U.S. 178
28 (1911), a taxation case. In *Freeman*, the Supreme Court considered

1 whether a federal tax levied on business entities organized under
2 "the laws of the United States, or of any state or territory of the
3 United States" applied to three large business trusts organized in
4 Massachusetts under the common law of trusts and estates. The
5 Supreme Court concluded that the trusts organized under the common
6 law recognized in Massachusetts courts had not been organized
7 "under the laws of the state." According to the Court, the phrase
8 "laws of the state" referred only to the statutory laws of the
9 state, not the common law followed in the state's courts:

10
11 The language of the act . . . imports an organization deriving
12 power from statutory enactment. The statute does not say under
13 the law of the United States, or a state, or lawful in the
14 United States or in any state, but is made applicable to such
15 as are organized under the laws of the United States, etc. The
16 description of the corporation or joint stock association as
17 one organized under the laws of a state at once suggests that
18 they are such as are the creation of statutory law, from which
19 they derive their powers and are qualified to carry on their
20 operations. . . .

21
22 *Id.* at 186.

23 Congress has relied on this judicial construction of the
24 phrase in later statutes, as the U.S. Supreme Court has recognized.
25 For example, in *Hecht v. Malley*, 265 U.S. 144 (1924), the Court
26 interpreted a 1916 taxation statute that referred to business
27 entities organized "under the laws of the United States or any
28 State or Territory." The Supreme Court concluded that Congress

1 must have implicitly incorporated the Court's earlier holding that
2 this phrase referred only to entities enacted by statute, not the
3 common law: "In adopting the language used in an earlier act
4 Congress must be considered to have adopted also the construction
5 given by this Court to such language, and made it a part of the
6 enactment." *Id.* at 153.

7 This Court should apply the same construction to the same
8 language that Congress chose in 18 U.S.C. § 1030. By prohibiting
9 conduct "committed in furtherance of any criminal or tortious act
10 in violation of . . . laws of the United States or any State,"
11 Congress used specific language that the U.S. Supreme Court has
12 twice held refers to statutory enactments rather than common law
13 rules. Put simply, the "laws" of a State are the statutory laws
14 enacted by the legislature of that state, not rules recognized by
15 the courts in that state under the common law. "In adopting the
16 language used in an earlier act Congress must be considered to have
17 adopted also the construction given by this Court to such language,
18 and made it a part of the enactment." *Hecht*, 265 U.S. at 153.

19 The government's argument must fail because intentional
20 infliction of emotional distress is not a statutory claim in
21 Missouri. As the Supreme Court of Missouri has recognized, it is a
22 common law tort, and "a relative newcomer to the common law" at
23 that. *K.G. v. R.T.R.*, 918 S.W.2d 795, 799 (Mo. 1996). As a result,
24 the government cannot base felony liability on the theory that 18
25 U.S.C. § 1030 somehow criminalizes all of state tort law, including
26 the common claim of intentional infliction of emotional distress.
27 Common law torts simply cannot trigger the statute.

28

1 This rule makes eminent sense. First, it explains why 18
2 U.S.C. § 1030 does not federalize and criminalize the entirety of
3 common law torts on the Internet. 18 U.S.C. § 1030 was designed to
4 respect federalism, not to gut it. It is routine for Internet
5 Terms of Service to prohibit using Internet services in ways that
6 might constitute tortious activity.⁵ Under the government's theory,
7 every time an Internet user commits a common law tort online in
8 violation of such Terms of Service, that user will have also
9 committed a federal felony crime. Congress's decision to limit the
10 felony enhancement to statutory wrongs avoids this absurd result.
11 It greatly narrows the scope of liability, excluding conduct that
12 would constitute a common law tort from automatically triggering
13 federal criminal liability.

14 Limiting the felony enhancement to conduct in furtherance of
15 statutory wrongs also reinforces the basic principle of federal
16 criminal law that there are no common law crimes. See *United*
17 *States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).
18 Before federal courts can recognize a crime, "[t]he legislative
19 authority of the Union must first make an act a crime." *Id.*
20 Under our system of separated powers, federal courts have no
21 "exercise of criminal jurisdiction in common law cases." *Id.* The
22 government's construction of 18 U.S.C. § 1030 would stand this
23 principle on its head. Under the government's reading of the
24

25 ⁵ This is true for a simple business reason: Providers do not
26 want to get sued for facilitating tortious conduct of their users.
27 To avoid liability, they draft Terms of Service so that they can
28 that cut off service to any users engaging in potentially tortious
conduct. The tortious act makes the tortfeasor in breach of the
service contract, allowing the provider to cut off service without
fear of civil liability.

1 statute, the federal courts would have *total* exercise of criminal
2 jurisdiction in common law cases. This is incorrect because
3 Congress carefully limited the enhancement provisions of 18 U.S.C.
4 § 1030(c)(2)(B)(ii) to wrongs defined by statute.

5 **3. Conclusion**

6 For the foregoing reasons, the indictment must be dismissed.
7

8 Dated: 10-6-08

s./ H. Dean Steward

9
10 H. Dean Steward
11 Orin S. Kerr
12 Counsel for Defendant
13 Lori Drew
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1 **CERTIFICATE OF SERVICE**

2
3
4 IT IS HEREBY CERTIFIED THAT:

5 I, H. Dean Steward, am a citizen of the United States, and am at
6 least 18 years of age. My business address is 107 Avenida Miramar,
7 Ste. C, San Clemente, CA 92672.

8 I am not a party to the above entitled action. I have caused,
9 on Oct. 6, 2008, 2008, service of the defendant's:

10
11 **Supplement to Pre-Trial Motions**

12 On the following parties electronically by filing the foregoing
13 with the Clerk of the District Court using its ECF system, which
14 electronically notifies counsel for that party.

15 **AUSA Mark Krause**

16
17 I declare under penalty of perjury that the foregoing is true and
18 correct.

19 Executed on Oct. 6, 2008

20
21 H. Dean Steward

22 H. Dean Steward
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