

1 H. Dean Steward SBN 85317
107 Avenida Miramar, Ste. C
San Clemente, CA 92672
949-481-4900
2 Fax: (949) 496-6753

3 Orin S. Kerr
4 Dist. of Columbia BN 980287
2000 H. Street NW
5 Washington, DC 20052
202-994-4775
6 Fax 202-994-5654
okerr@gwu.edu

7
8 Attorneys for Defendant
Lori Drew

9
10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12

13 UNITED STATES,

14 Plaintiff,

15 vs.

16 LORI DREW, Defendant.
17

Case No. CR-08-582-GW

SUPPLEMENT TO RULE 29 MOTION

18 Comes now defendant, together with counsel, and supplements
19 her previous Rule 29 motions, made orally at the close of the
20 government's case, again at the close of the defense case, and
21 by written motion filed Nov. 23, 2008 [docket entry #96].

22 Dated: Dec. 15, 2008

s./ H. Dean Steward

23 H. Dean Steward
24 Orin Kerr
25 Counsel for Defendant Drew

1
2
3 I. INTRODUCTION

4 On Nov. 20, 2008, at the end of the government's case in
5 chief, counsel moved for dismissal of the charges against the
6 defendant Lori Drew under Rule 29 of the Federal Rules of
7 Criminal Procedure. Counsel moved again under Rule 29 at the
8 close of the defense case, on Nov. 21, 2008. On Nov. 23, 2008,
9 counsel filed a memorandum providing argument for one of the
10 bases of the motion, namely the lack of evidence that any
11 unauthorized access was "intentional." This supplemental
12 memorandum provides argument for a second basis of the Rule 29
13 motion: That when the statute is construed properly, there is no
14 evidence that any access was unauthorized.

15 II. ARGUMENT

16 The prosecution of Lori Drew has been front-page news in
17 newspapers across the country. It has been a major TV story.
18 It has been covered extensively on the radio. It has been a
19 popular topic of heated debate on the Internet. With the trial
20 now over, and the media hoopla subsided, it is essential to step
21 back and see what this prosecution is and what it is not.

22 The jury's refusal to convict Lori Drew of any of the
23 government's felony counts has left the court with only a small
24 part of the original prosecution. At this stage, emotional

1 distress is no longer part of the case. If this case was ever
2 about "cyberbullying," the jury's verdict ended that connection:
3 the government simply failed to meet its burden of proof that
4 Drew was guilty of any cyberbullying. Instead, the jury's
5 verdict has left the Court with only one type of behavior that
6 is allegedly criminal. That conduct is the violation of
7 MySpace's Terms of Service.

8 In light of the jury's verdict, it is now time for the
9 court to confront and either approve or reject the government's
10 novel and breathtakingly broad theory of the Computer Fraud and
11 Abuse Act. The theory of the prosecution is that breach of a
12 contractual restriction on the Internet is a federal crime. The
13 government's view is that breach of a contract to use a computer
14 makes the computer usage unauthorized: The contract governs
15 rights to use a computer, so breaching the computer makes
16 accessing the computer "without right" and therefore a crime.
17 The question the Court must confront in this motion to dismiss
18 is whether to endorse or reject the government's novel theory.
19 *Put simply, the question is this: Is it a federal crime to*
20 *violate a website Terms of Service?*

21 The correct answer should be a resounding *no*.

22 A. Violations of Contractual Terms Such as Terms of Service Do
23 Not Make Access Unauthorized.

1 Breaching a contractual term does not make access
2 unauthorized because crimes punishing conduct "without
3 authorization" or "without consent" have a well-established and
4 specific meaning -- a meaning that the government's broad
5 theory simply ignores. When Congress or a state legislature
6 punishes an act when it occurs "without authorization," that act
7 is prohibited only when the person or business that can grant
8 authorization has *actually declined or failed to give*
9 *permission*.

10 If a person or business actually *grants* permission for the
11 act, conditioned on some understanding that turns out to be
12 false, then the act is *still authorized* for the purposes of
13 criminal law. See Rollins M. Perkins & Ronald N. Boyce,
14 Criminal Law 1075-84 (3d ed 1982); Theofel v. Farey-Jones, 359
15 F.3d 1066, 1073 (9th Cir. 2004). As one court summarized,
16 "whenever lack of consent is a necessary element of a crime, the
17 fact that consent is obtained through misrepresentation will not
18 supply the essential element of nonconsent." People v. Cook,
19 228 Cal.App.2d 716, 719 (1964). In this case, MySpace permitted
20 Ashley Grills to create an account and permitted Grills to
21 access MySpace. By allowing the account and giving its users
22 access to MySpace, MySpace affirmatively authorized the access
23 to its computers. The fact that the account breached a
24

1 contractual restriction does not transform that authorized
2 access into an unauthorized access.

3 Because computer crimes are new, the cases that best
4 illustrate this principle are found in other areas of criminal
5 law that use the same element of lack of authorization or
6 consent. Perhaps the most analogous cases involve the crime of
7 taking a vehicle of another without the owner's consent. See,
8 e.g., Cal. Vehicle Code § 10851. In particular, consider the
9 cases in which a person uses fraud, misrepresentation, and
10 trickery to persuade a car owner into handing over the keys. The
11 trickster is then charged with taking the automobile of another
12 without the owner's consent. In these cases, the courts have
13 held that the trickster is not liable for taking the car
14 "without consent" as a matter of law. Because the owner handed
15 over the keys, giving the defendant permission to use the car,
16 the use of the car was authorized rather than unauthorized for
17 purposes of criminal law. See, e.g., People v. Cook, 228 Cal
18 App.2d 716 (1964) (Burke, P.J.) (defendant who purchased car by
19 misrepresenting his identity not guilty of auto theft, as taking
20 of car was with consent of seller).

21 People v. Donell, 32 Cal.App.3d 613 (1973), is particularly
22 relevant to this case. In Donell, the defendant allegedly
23 rented a Hertz rental car using a stolen ID and a stolen Hertz
24 credit card. The rental contract required the person renting

1 the car to make only truthful representations. The defendant
2 rented the car in violation of this contractual term, however:
3 While his real name was Jon Donell, the defendant pretended that
4 he was "Ernest Carl Johnson." At trial, the judge instructed
5 the jury that if the jury believed that the defendant had
6 obtained the car by fraud, then the contract was violated and
7 the taking of the car was without consent. The Court of Appeal
8 reversed, applying the usual rule that "fraudulently induced
9 consent is consent nonetheless." Id. at 617. Although Donell
10 had rented the car in violation of the rental contract, the
11 rental company had in fact consented to him taking the car.
12 The fact that the consent was obtained by fraud did *not* make the
13 taking unauthorized as a matter of law. Id.

14 The same principle applies to the proper interpretation of
15 statutes prohibiting unauthorized access to a computer, as the
16 Ninth Circuit recognized in Theofel. Access to a computer is
17 not unauthorized merely because it violates a contract. To be
18 sure, such access may fraudulently induce the computer owner to
19 grant access, which under contract law would generally void the
20 contract between the computer owner and the computer user. See,
21 e.g., Extra Equipamentos E Exportacao Ltda. v. Case Corp. 541
22 F.3d 719, 726 (7th Cir. 2006) (Posner, J.) ("[T]he remedy for
23 fraud in the inducement is to rescind the contract."). Criminal
24 law is different, however. In criminal law, fraud in the

1 inducement does not make the access unauthorized. See Rollins
2 M. Perkins & Ronald N. Boyce, Criminal Law 1075-84 (3d ed 1982).

3
4 B. The Government Failed to Establish Unauthorized Access in
5 this Case.

6 Construing the evidence in the government's favor, Lori
7 Drew and Ashley Grills were at most in the same position as Jon
8 Donell. Like Donell, they obtained property through
9 misrepresentation of identity that breached a contract. Just as
10 with Donell, their conduct was not without the authorization of
11 the property owner. MySpace gave Grills access just like Hertz
12 gave Donell access. The fact that it was not really "Josh
13 Evans" registering the account is no more relevant to
14 authorization than was the fact hat it was not "Ernest Carl
15 Johnson" who rented the car in Donell. In both cases, the
16 property owner permitted the defendant to control the property:
17 The access was authorized even though it violated a contractual
18 restriction on access.

19 This important legal principle explains why most Internet
20 users are not criminals for the way they send e-mail and surf
21 the web. Violating Terms of Service by providing false
22 information to register an account is extremely common online.
23 Even the founder of MySpace, Tom Anderson, violated that Term of
24 Service with his own MySpace profile: Anderson knowingly and

1 intentionally entered in a fake age in his MySpace profile,
2 perhaps to appear younger to the youthful audience of MySpace
3 users. Jessica Bennett, *Is Age Just A Number?*, Newsweek,
4 November 5, 2007, available at <http://www.newsweek.com/id/62330>.
5 Anderson's conduct was not criminal for the same reason that
6 Drew's conduct and the similar conduct of millions of Americans
7 is not criminal: A website Terms of Service can define the
8 contract between owner and user, but it does not define the
9 scope of criminal law.

10 The government's case in chief was based on the theory that
11 Drew committed a crime by violating MySpace's Terms of Service.
12 This theory must be rejected as a matter of law. When it is
13 rejected, it becomes clear that the government did not provide
14 any evidence by which a rational jury could find that Drew
15 committed an unauthorized access into MySpace's computers.

16 /
17 /
18 /
19 /
20 /
21 /
22 /

1 III. CONCLUSION

2 For these reasons, and for the reasons explained in
3 counsel's earlier written and oral arguments, the Motion to
4 Dismiss under Rule 29 should be granted.

5 Dated: Dec. 15, 2008

6 s./ H. Dean Steward

7 H. Dean Steward

8 Orin Kerr

9 Counsel for Defendant

10 Lori Drew

1 **CERTIFICATE OF SERVICE**

2
3 IT IS HEREBY CERTIFIED THAT:

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

8 I am not a party to the above entitled action. I have
9 caused, on Dec. 15, 2008, service of the defendant's:

10 **SUPPLEMENT TO RULE 29**

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

15 **AUSA MARK KRAUSE- LA**

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

19 Executed on DEC. 15, 2008

20 H. Dean Steward

21 H. Dean Steward
22
23
24