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UNITED STATES DISTRICT COURT

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CENTRAL DISTRICT OF CALIFORNIA

15

UNITED STATES,

Case No. CR-08-0582-GW

16

Plaintiff,

REPLY TO GOVERNMENT'S RESPONSE TO
PRE-TRIAL CONFERENCE ORDER

17

vs.

18

LORI DREW

19

Defendant.

20

21

22

Comes now counsel for defendant Lori Drew, and replies to the
23 response filed by the government to the Court's pre-trial
24 conference order.

25

26

Dated: Oct. 20, 2008

s./ H. Dean Steward

27

H. Dean Steward

Orin Kerr

Counsel for Defendant

28

Lori Drew

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1 A. The Indictment Must Be Dismissed Because the Conduct Alleged
2 Does Not Violate 18 U.S.C. § 1030(a)(2)(C).

3 The Government's Response to the Court's September 23 Inquiry
4 focuses on several matters that are not in dispute. First, the
5 government argues that 18 U.S.C. § 1030 is within the commerce
6 clause power. Second, the government argues that courts cannot
7 exercise discretion to dismiss indictments simply because judges
8 feel a case is "too local." We agree with both of these
9 positions. At the same time, we understand the Court was
10 interested in a different question: Whether the indictment is
11 sufficient as a matter of law given the statute *as it exists*.

12 The difference is essential. While courts lack the power to
13 dismiss an indictment because a case "feels" too local, an
14 indictment must be dismissed if it fails to allege facts that would
15 constitute the crime charged. That is just as true when the
16 indictment fails to allege facts that satisfy a necessary
17 jurisdictional requirement such as an interstate commerce
18 requirement. See *e. g., United States v. Havelock*, 560 F. Supp.2d
19 828, 834 (D. Ariz. 2008) (dismissing indictment for intrastate gun
20 charge); *United States v. LaFleur*, 669 F. Supp. 1029, 1035 (D. Nev.
21 1987) (dismissing interstate racketeering count). See also *United*
22 *States v. Oxendine*, 531 F.2d 957, 959 (9th Cir. 1976) (per curiam)
23 (overturning conviction for failure to establish requirement of
24 interstate communication).

25 The allegations in the indictment do not satisfy the statute
26 as a matter of law. Under *Theofel v. Farey-Jones*, 359 F.3d 1066
27 (9th Cir. 2004), the government must do more than simply allege that
28 some Terms of Service were violated over an interstate network.

1 "Not all deceit vitiates consent." *Id.* at 1073. Instead, the
2 indictment must allege that MySpace.com was actually tricked as to
3 "the essential character of the act" that the MySpace computers had
4 consented to when the computers allowed the defendant and others to
5 use its services. *Id.* at 1073. If the allegations in the
6 indictment merely suggest that MySpace.com was induced into
7 providing access by misrepresentation as to "some collateral matter
8 which merely operates as an inducement," such misrepresentation
9 cannot make the access unauthorized and the indictment is
10 insufficient as a matter of law. *See id.*

11 Put another way, the government must prove that the victim was
12 tricked as to *what* it was consenting to rather than *why* it was
13 consenting. *See Boro v. Superior Court*, 163 Cal. App.3d 1224,
14 1228-31 (Cal. App. 1 Dist. 1985) (fraud that induces victim to act
15 does not make act without consent so long as victim knew the nature
16 of the act); Rollins M. Perkins & Ronald N. Boyce, *Criminal Law*
17 1075-84 (3d ed. 1982) (distinguishing consent obtained by "fraud in
18 the factum," which vitiates consent, from consent obtained by
19 "fraud in the inducement," which does not).

20 The fatal flaw in the government's case is that MySpace knew
21 perfectly well at all times exactly what it was doing. MySpace
22 knew that it was providing an account to users who might or might
23 not comply with the Terms of Service. Most users violate Terms of
24 Service frequently, as MySpace is surely aware. As a result,
25 MySpace was never tricked into thinking that it was providing
26 access to a user that would comply strictly with all of MySpace's
27 Terms of Service.

28

1 Assuming the government can prove the facts alleged in the
2 indictment, those facts amount to a breach of contract. MySpace
3 was induced to provide an account to the defendant or others based
4 on a false representation that they would comply with the Terms of
5 Service, breaching the Terms of the service contract. This is at
6 most a misrepresentation that induced reliance, however, not a
7 misrepresentation as to what service was being provided.

8 As a result, the access was not "without authorization" or in
9 "excess of authorization" under Ninth Circuit precedent. See
10 *Theofel*, 359 F.3d at 1073.

11 What occurred was a breach of contract with minimal damages, not an
12 interstate theft that constitutes a federal crime. See *SecureInfo*
13 *Corp. v. Telos Corp.*, 387 F. Supp.2d 593, 609 (E.D. Va. 2005)
14 (holding that access to a computer in violation of license
15 agreement does not make access without authorization or in excess
16 of authorization). It was an intended use, and therefore not
17 criminal. See *United States v. Phillips*, 477 F.3d 215, 219 (5th
18 Cir. 2007) (noting that courts "typically analyze[] the scope of a
19 user's authorization to access a protected computer on the basis of
20 the expected norms of intended use").

21
22 B. The Legislative History of the Recent Amendment to 18 U.S.C .
23 § 1030(a)(2)(C) Offers Additional Evidence that the Statute
24 Does Not Apply When the Defendant and the Victim Are in the
Same State.

25 The United States also argues that 18 U.S.C. § 1030(a)(2)(C)
26 does not require that an interstate communication must be obtained.
27 According to the government, an *intrastate* communication is
28 sufficient so long as some aspect of the defendant's conduct

1 involves some kind of interstate communication. See Govt's
2 Response at 21, n.11. The Government cites a very recent
3 amendment to § 1030 as evidence. The Vice President's Protection
4 Act was passed into law on September 26, 2008, and it eliminated
5 the requirement that the government must prove that an interstate
6 communication was obtained. See Govt's Response at 2 n.2, 10 n.6.
7 According to the Government, Congress's amendment to § 1030
8 establishes that the interstate requirement in the statute is
9 minimal. By amending the statute, the Government suggests, Congress
10 simply reaffirmed that it never intended to require the government
11 to prove that an interstate communication was obtained. See Govt's
12 Response at 10 n.6.

13 This interpretation would come as quite a surprise to the
14 members of the United States Congress who pushed for the recent
15 amendment with the support of the U.S. Department of Justice.
16 Congress pressed for the elimination of the interstate commerce
17 requirement because influential members decided to change the law:
18 Congress's express goal was to change the law so § 1030(a)(2)(C)
19 could be used in cases, like this one, where a defendant and the
20 victim were in the same state. Because the government has properly
21 charged the defendant under the earlier version of the statute,
22 before the recent changes, the statute as charged must be construed
23 as applying only to thefts from a victim in one state to a
24 defendant in another.

25 The changes to § 1030 that passed on September 26 began life
26 as the *Identity Theft Enforcement and Restitution Act*, S. 2168,
27 introduced in the Senate by Vermont Senator Patrick Leahy on
28 October 16, 2007. Section 4 of the original bill eliminated the

1 interstate requirement for 18 U.S.C. § 1030(a)(2)(C) offenses.¹ When
2 Senator Leahy introduced the Act in the Senate, he explained that
3 the purpose of the elimination of the interstate requirement in
4 §1030(a)(2)(C) was precisely to allow prosecutions when the
5 defendant and the victim are located in the same state, which was
6 then not covered by the statute. See *Leahy, Specter Introduce Bill*
7 *To Add And Toughen Penalties For Identity Theft And Fraud*, October
8 16, 2007, available at
9 <http://leahy.senate.gov/press/200710/101607b.html> (emphasis added).
10 According to Senator Leahy, eliminating the interstate requirement
11 in §1030(a)(2)(C) would:

12
13 Eliminate the prosecutorial requirement that sensitive
14 identity information must have been stolen through an
15 interstate or foreign communication and instead focuses on
16 whether the victim's computer is used in interstate or foreign
17 commerce, *allowing for the prosecutions of cases in which both*
18 *the identify thief's computer and the victim's computer are*
19 *located in the same state[.]*

20
21 *Id.* (emphasis added).

22 This amendment passed the Senate in November 2007 but stalled
23 in the House of Representatives. In July 2008, Senator Leahy

24
25 _____
26 ¹ The text of the original bill is available at
27 <http://www.govtrack.us/congress/bill.xpd?bill=s110-2168>. Section 4
28 was titled "ENSURING JURISDICTION OVER THE THEFT OF SENSITIVE
IDENTITY INFORMATION," and it states: "Section 1030(a)(2)(C) of
title 18, United States Code, is amended by striking 'if the
conduct involved an interstate or foreign communication'."

1 "attached provisions of the anti-cyber crime bill to a House-passed
2 bill to extend Secret Service protection to former Vice
3 Presidents." *Leahy-Authored Anti-Cyber Crime Provisions Set To*
4 *Become Law*, Sept 15, 2008, available at
5 <http://leahy.senate.gov/press/200809/091508b.html>. The cybercrime
6 amendments became Title II of the Former Vice Presidents Protection
7 Act, H.R. 5938, and that Act passed into law on September 26, 2008.
8 The removal of the interstate commerce requirement of §
9 1030(a)(2)(C) became § 203 of the law, titled "ENSURING
10 JURISDICTION OVER THE THEFT OF SENSITIVE IDENTITY INFORMATION."

11 The legislative history directly contradicts the Government's
12 interpretation. Although the Government imagines that Congress
13 amended § 1030(a)(2)(C) to reaffirm that the statute was always
14 meant to be read broadly, Senator Leahy pushed this legislation
15 precisely to permit the kind of prosecution found in this case: the
16 goal was to "allow[] for the prosecutions of cases in which both
17 the identify thief's computer and the victim's computer are located
18 in the same state[.]" As Senator Leahy's statement reflects, such
19 prosecutions were not permitted under the version of § 1030 in
20 place in the period covered by the indictment.

21 Indeed, even the Justice Department's own guidance to its
22 prosecutors on the meaning of § 1030(a)(2)(C) contradicts the broad
23 claims made by the Government in this case. The Justice
24 Department's manual on computer crimes explains:

25
26 Note that a violation of this subsection must involve an
27 actual interstate or foreign communication and not merely the
28 use of an interstate communication mechanism, as other parts

1 of the CFAA allow. The intent of this subsection is to protect
2 against the interstate or foreign theft of information by
3 computer, not to give federal jurisdiction over all
4 circumstances in which someone unlawfully obtains information
5 via a computer. See S. Rep. No 104-357. Therefore, using the
6 Internet or connecting by telephone to a network may not be
7 sufficient to charge a violation of this subsection where
8 there is no evidence that the victim computer was accessed
9 using some type of interstate or foreign communication.

10
11 United States Department of Justice, Prosecuting Computer Crimes
12 Manual, Ch.1, Part C.6, available at
13 <http://www.cybercrime.gov/ccmanual/01ccma.html#tocC.6>.

14 The interpretation of § 1030(a)(2)(C) that the Government has
15 offered in this case is contrary to what the Justice Department has
16 said and contrary to what Congress has long thought the statute
17 meant. It should be rejected.

18
19
20 C. Prosecutions Under 18 U.S.C. § 1030(a)(2)(C) Require Proof of
21 A Theft, and There Was No Theft In This Case.

22
23 The government argues also that 18 U.S.C. § 1030(a)(2) does
24 not require proof of a theft. According to the government, any
25 Term of Service violation plus any sort of information receipt -
26 such as what any Internet user would receive when surfing the
27 Internet - is sufficient. The Government's vision of the statute
28 reveals a remarkable misunderstanding of the basic purpose and

1 scope of 18 U.S.C. § 1030(a)(2). To see the government's basic
2 error, and to see why the indictment must be dismissed for failure
3 to assert a theft, a review of the history of unauthorized access
4 law and the structure of § 1030 is necessary.

5 18 U.S.C. § 1030 was enacted by Congress because Congress
6 recognized the difficulties of prosecuting computer crimes using
7 statutes designed for traditional property crimes. With
8 traditional physical property, it was easy to identify when
9 property was stolen, damaged, or destroyed. Property was stolen
10 when it was taken away from its owner; property was damaged when it
11 was physically altered; and property was destroyed when it was
12 physically altered so much that it could not be used. This wasn't
13 true with computer crimes, however. As a result, prosecutors and
14 judges struggled to fit the new computer crimes into the
15 traditional property crime statutes. See generally Orin S. Kerr,
16 *Cybercrime's Scope: Interpreting "Access" and "Authorization" in*
17 *Computer Misuse Statutes*, 78 NYU L. Rev. 1596, 1607-1616 (2003)
18 (discussing cases).

19 Specifically, the fit was a poor one because the physicality
20 requirements of traditional criminal laws no longer made sense with
21 data crimes. An Internet thief would break into a network and take
22 data away without depriving the owner of the original copy.
23 Although the data was "stolen" in the sense of taken from the
24 owner, the owner was not actually deprived of the original when a
25 copy was made. To use the common law term, there was no
26 "asportation" of the original data. Similarly, an Internet vandal
27 would alter valuable files but not alter the physical computer
28 itself. Congress realized that it needed new statutes to apply

1 the traditional concepts of theft and damage in a virtual
2 environment. See *id.*

3 The statute that Congress enacted, 18 U.S.C. § 1030, features
4 seven distinct crimes found in §§ 1030(a)(1)-(7). Each of these
5 seven crimes mirrors traditional offenses in the United States Code
6 that predate Section 1030 and apply to the physical crimes
7 committed with physical property. Section 1030(a)(1) punishes
8 theft of classified information by computer; Section 1030(a)(2)
9 punishes theft of interstate information; Section 1030(a)(3)
10 prohibits trespass into a U.S. Government computer; Section
11 1030(a)(4) prohibits theft of information that furthers a fraud
12 scheme; Section 1030(a)(5) prohibits damaging computer data;
13 Section 1030(a)(6) prohibits computer password trafficking; and
14 Section 1030(a)(7) prohibits extortionate threats to damage
15 computers. Each statute has a physical-world cousin upon which the
16 computer version is based.²

17 Section 1030(a)(2)(C) is the interstate theft prohibition in
18 the statute. It prohibits breaking into a computer and taking
19 information across state lines. Of course, given the then-
20 existing conceptual problems with identifying when copied
21 information is "property" that is "stolen," see Kerr, *supra*, at
22 1609-13, Congress studiously avoided using the words such as
23 "theft" or "stolen" to describe the prohibited act. Instead,

24
25 ² See, e.g., 18 U.S.C. § 793 (theft of classified information,
26 analogous to §1030(a)(1)); 18 U.S.C. § 641, § 2314 (theft of and
27 transportation of property, analogous to § 1030(a)(2)); 18 U.S.C.
28 § 1832 (trespass on to U.S. military property, analogous to §
1030(a)(3)); 18 U.S.C. § 1343 (wire fraud, analogous to §
1030(a)(4)); 18 U.S.C. § 1361 (damage to property, analogous to §
1030(a)(5)); 18 U.S.C. § 1029 (password trafficking, analogous to §

1 Congress expressed the notion of interstate theft by requiring an
2 intentional breaking in - that is, unauthorized access - followed
3 by obtaining information.

4 The idea behind § 1030(a)(2)(C) was that a person who
5 intentionally broke into a computer and retrieved interstate data
6 had committed an interstate theft by breaking in to the other
7 person's machine and taking (unlawfully obtaining) their
8 confidential data. See S. Rep. 104-357, available at 1996 WL
9 492169 at *7-*8 ("The proposed subsection 1030(a)(2)(C) is intended
10 to protect against the interstate or foreign theft of
11 information.") There was no requirement that the original data
12 be actually removed from the original storage site, which was the
13 conceptual difficulty with using traditional physical property
14 theft laws. See *id.* (noting that "actual asportation" need not
15 be proved). But the goal was for the new statute to be a theft
16 statute, otherwise mirroring theft statutes in the physical world.
17 As a result, the new § 1030(a)(2) would "ensure that the theft of
18 intangible information by the unauthorized use of a computer is
19 prohibited in the same way theft of physical items are protected."
20 S. Rep. No. 104-357, at *7, available at 1996 WL 492169.

21 With this understanding in place, it becomes clear that the
22 authorities cited by the government support the view that some sort
23 of theft is necessary to violate 18 U.S.C. § 1030(a)(2)(C). As
24 the government notes, "Section (a)(2) is, in the truest sense, a
25 provision designed to protect the confidentiality of computer
26 data." See Govt's Response at 18. That is correct: A person who
27

28 1030(a)(6)); 18 U.S.C. § 875(d) (threat to damage property,
analogous to § 1030(a)(7)).

1 steals data has breached the confidentiality of the data. Indeed,
2 breaching confidentiality is what it means to "steal" in the case
3 of electronic data. Theft of data brings the data into the
4 possession of the thief who is not authorized to possess the data,
5 breaching its confidentiality even though the original is not taken
6 away. See, e.g., 18 U.S.C. § 1832(a) (equating the theft of
7 information with the unauthorized duplication of information in a
8 statute that prohibits the theft of trade secrets).

9 Similarly, the government cites the passage of legislative
10 history in which Congress stated that "[t]he seriousness of a
11 breach of confidentiality depends in considerable part, on the
12 value of the information taken, or on what is planned for the
13 information after it is obtained." S. Rep. 104-357, available at
14 1996 WL 492169 at *7-*8. The Government claims that this shows
15 that Congress "sought to protect against harm other than simple
16 theft." Govt. Response at 17. But that is incorrect: This
17 legislative history demonstrates that Congress sought to limit the
18 statute to property that was "taken" - that is, stolen - and that
19 Congress understood that the requirement the information must be
20 "obtained" is the same as saying that it was "taken." See also §
21 203 of the Former Vice Presidents Protection Act, H.R. 5938
22 (enacted September 26, 2008) (titled an amendment to the
23 jurisdictional scope of § 1030(a)(2)(C) as "ENSURING JURISDICTION
24 OVER THE THEFT OF SENSITIVE IDENTITY INFORMATION.").

25 To be sure, the requirement that the Government must prove a
26 theft has never before been a serious issue in § 1030(a)(2)
27 prosecutions. That is because in the 24 years that § 1030 has
28 existed, the Government has never before taken the position that

1 violations of Terms of Service can make an access "unauthorized" or
2 "in excess of authorization." In the 1990s, the notion of such a
3 prosecution was simply inconceivable to Congress or the Justice
4 Department. At the time it was passed, §1030 was supposed to deal
5 with hackers and employees who stole data from their employers.
6 Congress added two levels of authorization to deal with the two
7 problems. When outsider hackers broke in, they accessed the
8 computers "without authorization." In contrast, when insider
9 employees stole data from their employers, they "exceeded
10 authorized access." See *United States v. Phillips*, 477 F.3d 215,
11 219 (5th Cir. 2007) (discussing legislative history and the
12 insider/outsider distinction).

13 In either case, the information "obtained" would *necessarily*
14 be stolen under the traditional understanding of access without
15 authorization and exceeding authorized access. By obtaining the
16 data after breaking in, the information obtained would be a stolen
17 copy. See *United States v. Farraj*, 142 F. Supp.2d 484 (S.D.N.Y.
18 2001) (unauthorized copy of trial plan for litigation treated as
19 "stolen property"). The government is forced to argue that the
20 statute does not require theft because its novel theory of
21 authorization expands the statute so far that it could apply to
22 many cases - such as this one - where no theft occurred. Any
23 person who uses the Internet in any way that violates any Terms of
24 Service will necessarily obtain data in *some* way. Surfing the web
25 necessarily involves the receipt of data from the webserver
26
27
28

1 queried. 18 U.S.C. § 1030(a)(2) was never intended to cover
2 anything remotely like that, however.³

3 There was no theft in this case. The information that was
4 obtained about M.T.M. was freely offered by her. To the extent
5 M.T.M. offered the information in reliance on false
6 representations, the information is still not "stolen" because any
7 false representation only related to the inducement for revealing
8 the information, not the essential fact that the information was
9 revealed. See *Theofel*, 359 F.3d at 1072-73. See also *Boro v.*
10 *Superior Court*, 163 Cal. App.3d 1224, 1228-31 (Cal. App. 1st Dist.
11 1985) (fraud that induces victim to act does not make act without
12 consent so long as victim knew the nature of the act). Because
13 there was no theft, as required by the statute, the indictment must
14 be dismissed.

15
16
17 D. The Computer Fraud and Abuse Act Does Not Punish Everything
18 Bad on the Internet.

19
20
21 ³ It is true that some courts have taken a remarkably expansive
22 interpretation of "without authorization" in the civil setting, a
23 context far removed from that of criminal law. For example, in
24 *Register.com v. Verio*, 126 F. Supp.2d 238 (S.D.N.Y. 2000), the mere
25 fact that the plaintiff decided to bring a civil suit was
26 considered enough to make the defendant's conduct without
27 authorization. But these civil precedents have roamed far from the
28 limited statute Congress intended, and they have been harshly and
soundly criticized. See, e.g., *Lockheed Martin Corp. v. Speed*,
2006 WL 2683058 at *5-7 (M.D. Fla. 2006) (criticizing broad
interpretation of the CFAA in civil cases). Further, the rule of
lenity that applies in the criminal context counsels strongly
against such a broad interpretation here. See *United States v.*

1 Finally, it is essential to correct the Government's broad
2 misunderstanding of the Computer Fraud and Abuse Act. The
3 Government treats this law as if it punishes everything bad that
4 happens on the Internet. According to the Government, § 1030 is
5 "available to be used in a fluid fashion to address new computer
6 crimes as they emerge[]." Govt's Response at 15. It claims that
7 "the fact that the application of the statute was not contemplated"
8 in the past "is of no moment." *Id.* at 16 n.10. As "technology
9 and the evolution of cyber crime" continue, the Government asserts,
10 the statute must undergo "evolution." *Id.*

11 If the statute is to evolve, however, it is Congress that must
12 direct the evolution. In our system of separated powers, the
13 legislature determines the scope of criminal laws. Courts may not
14 expand the scope of criminal statutes by judicial construction
15 beyond what the legislature intended. As the Supreme Court stated
16 in *United States v. Lanier*, 520 U.S. 259, 266 (1997), "due process
17 bars courts from applying a novel construction of a criminal
18 statute to conduct that neither the statute nor any prior judicial
19 decision has fairly disclosed to be within its scope." The Supreme
20 Court explained the point in *Bouie v. City of Columbia*, 378 U.S.
21 347 (1964):

22
23 [A]n unforeseeable judicial enlargement of a criminal statute,
24 applied retroactively, operates precisely like an ex post
25 facto law, such as Art. I, § 10, of the Constitution forbids.
26 An ex post facto law has been defined by this Court as one
27

28 *Lanier*, 520 U.S. 259, 266 (1997) (noting the canon of strict
construction of criminal statutes).

1 'that makes an action done before the passing of the law, and
2 which was innocent when done, criminal; and punishes such
3 action,' or 'that aggravates a crime, or makes it greater than
4 it was, when committed.' *Calder v. Bull*, 3 Dall. 386, 390, 1
5 L.Ed. 648. If a . . . legislature is barred by the Ex Post
6 Facto Clause from passing such a law, it must follow that a .
7 . . . Court is barred by the Due Process Clause from achieving
8 precisely the same result by judicial construction. The
9 fundamental principle that 'the required criminal law must
10 have existed when the conduct in issue occurred,' Hall,
11 *General Principles of Criminal Law* (2d ed. 1960), at 58-59,
12 must apply to bar retroactive criminal prohibitions emanating
13 from courts as well as from legislatures.

14
15 *Id.* at 353-54. For this reason, the Supreme Court has stressed
16 that ambiguous criminal statutes must be construed *against* the
17 government. See *United States v. Bass*, 404 U.S. 336, 347 (1971)
18 (noting that "ambiguity concerning the ambit of criminal statutes
19 should be resolved in favor of lenity").

20 Terms of Service have existed for many years. However, there
21 is not one shred of evidence that Congress intended to make
22 violations of Terms of Service a federal crime under 18 U.S.C. §
23 1030. The statute prohibits theft, not breach of a service
24 contract. Despite many opportunities to do so in sympathetic
25 cases, the Justice Department has never before tried to argue that
26 violating Terms of Service amounts to a § 1030 offense. There was
27 no way a citizen of the United States could know that the Justice
28 Department might get creative, change course after 24 years, and

1 try such a theory. The Government proclaims that this is "of no
2 moment" because the law is a "fluid" tool that it can "evolve" to
3 punish what it believes is blameworthy. But the rule of lenity
4 requires a narrow construction that gives fair notice to the
5 public, not a broad construction that gives the government the
6 power to punish whoever it likes.⁴ *Bass*, 404 U.S. at 347-48.

7 If the Department of Justice wants to prosecute people for
8 violating Terms of Service, its representatives should go to
9 Congress and persuade Congress to pass such a law. Or at least
10 they should try: It is hard to imagine Congress would agree to
11 such a law given that everyone who uses the Internet routinely
12 violates Terms of Service (members of Congress included). But the
13 recent passage of the Former Vice Presidents Protection Act shows
14 that Congress is eager to legislate in the area of computer crimes.
15 Congress's door is wide open. If violations of Terms of Service
16 are to become federal crimes, it should be Congress that makes the
17 decision to criminalize them.

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24 ⁴ The government relies on *United States v. Mitra*, 405 F.3d 492
25 (7th Cir. 2005), for the view that §1030 was intended to broaden as
26 technology advances. But *Mitra* simply makes the obvious point that
27 as society relies more on computers, the number of computers will
28 grow and §1030 will become more significant. *Id.* at 495. That is
true, but it has no relevance to this case. The government's theory
of the case is expansive not because technology has advanced, but
because the Government decided to prosecute an individual for
conduct that has existed for many years and has never before been
considered a federal crime.

1 E. Conclusion

2 For the above reasons, the defense continues to request
3 dismissal of the instant indictment.

4 Dated: Oct. 20, 2008 s./ H. Dean Steward

5 H. Dean Steward
6 Orin Kerr
7 Counsel for Defendant
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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. 20, 2008, 2008, service of the defendant's:

10
11 **Reply to Govt. Response to Pre-Trial Conf Order**

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. 20, 2008

20
21 H. Dean Steward

22 H. Dean Steward
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