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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES, Plaintiff, vs. LORI DREW, Defendant.	Case No. CR-08-582-GW COURT ORDERED SUPPLEMENT TO MOTIONS Hearing Date: Oct. 30, 2008 Time: 8:30 AM

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

Dated: Oct. 6, 2008

s./ H. Dean Steward

H. Dean Steward
Counsel for Defendant
Lori Drew

[1] Pro hac vice application pending

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72 Geo. Wash. L. Rev. 1208, 1238-39 (2004).

3. Rollins M. Perkins & Ronald N. Boyce, Criminal Law 1075-84 (3d ed. 1982)

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

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

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

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

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[2] *Theofel* interpreted 18 U.S.C. § 2701, a sister statute to 18 U.S.C. § 1030(a)(2). Whereas 18 U.S.C. § 1030(a)(2) is the general federal unauthorized access statute, § 2701 is an unauthorized access statute that applies specifically to e-mail, codified as part of the federal e-mail privacy statute, the Stored Communications Act, 18 U.S.C. §§ 2701-11. Both statutes were enacted in 1986, and at the time the two statutes did not overlap 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.

> operates as an inducement. In other words, it must be a substantial mistake concerning the nature of the invasion or the extent of the harm. Unlike the phony meter reader, the restaurant critic who poses as an ordinary customer is not liable for trespass, nor, unlike the wired cop, is the invitee who conceals only an intent to repeat what he hears. These results hold even if admission would have been refused had all the facts been known.
>
> These are fine and sometimes incoherent distinctions. But the theory is that some invited mistakes go to the essential nature of the invasion while others are merely collateral. Classification depends on the extent to which the intrusion trenches on the specific interests that the tort of trespass seeks to protect.

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

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

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[3] The Court may recognize this as the traditional common law distinction between "fraud in the factum" and "fraud in the 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).

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

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

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

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

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

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

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

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

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

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

Id. at 838.

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

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

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

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

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

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[4] http://www.myspace.com/index.cfm?fuseaction=misc.terms

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

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

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

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

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

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

Id. at 186.

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

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

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

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

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

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

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[5] This is true for a simple business reason: Providers do not want to get sued for facilitating tortious conduct of their users. To avoid liability, they draft Terms of Service so that they can 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.

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

3. Conclusion

For the foregoing reasons, the indictment must be dismissed.

Dated: 10-6-08

s./ H. Dean Steward

H. Dean Steward
Orin S. Kerr
Counsel for Defendant
Lori Drew

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

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

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

Supplement to Pre-Trial Motions

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

AUSA Mark Krause

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

Executed on Oct. 6, 2008

H. Dean Steward

H. Dean Steward