EXHIBIT A

THOMAS P. O'BRIEN
United States Attorney
CHRISTINE C. EWELL
Assistant United States Attorney
Chief, Criminal Division
MARK C. KRAUSE (SBN 198142)
Assistant United States Attorney
Deputy Chief, Cyber and Intellectual
Property Crimes Section
1200 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 894-3493
Facsimile: (213) 894-8601
Email: mark.krause@usdoj.gov

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. LORI DREW, Defendant.	CR NO. 08-582-GW GOVERNMENT'S SUR-REPLY TO DEFENDANT'S SUPPLEMENT TO RULE 29 MOTION Place: Courtroom of the Hon. George H. Wu

Plaintiff United States of America, by and through its counsel of record, Assistant United States Attorney Mark C. Krause, hereby files this sur-reply to defendant's reply in support of her Rule 29 motion.

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EXHIBIT A.

This sur-reply is based on the attached memorandum of points and authorities, the files and records in this case, and whatever evidence or argument this Court may consider.

Dated: January 5, 2009

Respectfully submitted,

THOMAS P. O'BRIEN
United States Attorney

CHRISTINE C. EWELL
Assistant United States Attorney
Chief, Criminal Division

MARK C. KRAUSE
Assistant United States Attorney

Attorneys for Plaintiff
UNITED STATES OF AMERICA

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I

INTRODUCTION

On December 15, 2008, defendant filed a motion for acquittal under Rule 29 of the Federal Rules of Criminal Procedure in effect claiming that the Court incorrectly instructed the jury on the meaning of the terms "unauthorized" and "in excess of authorization" because those terms, as a matter of law, could not be construed in reference to rules promulgated by the owners of those computers. Although defendant represented she would not be filing a reply, on January 2, 2009, defendant filed a reply raising a host of new arguments. Defendant now contends in her reply brief that her conviction should be overturned because (1) the Court's construction of "unauthorized" and "in excess of authorization" violates notions of due process because she had no notice that her conduct was criminal; and (2) the Court's construction of "unauthorized" and "in excess of authorization" were overbroad and would cause Section 1030(a)(2)(C) to encroach on First Amendment rights. Defendant instead contends the Court should have applied the rule of lenity when construing the statute. Defendant's new arguments are meritless.

First, defendant's due process challenge fails for the same reasons it failed pretrial. As explained previously, the statute's terms are plain. Those plain terms allow a prosecution of a defendant who lies to gain access to a computer and intentionally violates the rules established by a computer's owner for the use of that computer and accesses that computer for the purpose of committing another crime or tortious act. This

plain reading of the statute has been embraced by courts throughout the United States. Accordingly, the statute gives adequate notice of its scope. Indeed, the adequacy of the statute's notice was borne out at trial: defendant and her co-schemers discussed what they were doing was "illegal" and defendant had to encourage them to continue.

Second, defendant's alleged First Amendment challenge fails for the same reason it failed pretrial. Section 1030 does not implicate any First Amendment rights. The statute does not proscribe speech -- it proscribes conduct. But even if the conduct the statute proscribes is tangentially related to speech, that would not justify dismissal. Courts have repeatedly recognized that there is no privilege to trespass in order to exercise First Amendment rights.

Finally, defendant's appeal to the rule of lenity is of no moment. The rule of lenity should only be applied if the other canons of construction fail. Here, and as explained previously, the plain language of the statute indicates that the Court's instructions to the jury were proper. As a consequence, it would have been inappropriate to rely on the rule of lenity when formulating jury instructions.

II

ARGUMENT

A. APPLICATION OF SECTION 1030 IN THIS CASE DOES NOT VIOLATE DUE PROCESS

In her reply brief, defendant again contends that the application of Section 1030 to her conduct violates due process because she lacked notice that her conduct was criminal. (Def's

Reply at 5-6). The Court should once again reject this argument. Defendant had ample notice that Section 1030 covered her unlawful conduct and, in any event, the evidence at trial establishes that defendant actually knew that her conduct was criminal.

1. Defendant Had Ample Notice

The general rule in criminal prosecutions is that ignorance of the law is no excuse. See United States v. Baker, 63 F.3d 1478, 1491 (9th Cir. 1995); see also United States v. Marsh, 894 F.2d 1035, 40-41 (9th Cir. 1990) (approving jury instruction that "ignorance of the law is not defense" in controlled substance conspiracy where jury sent note regarding whether the government had to prove defendants knew manufacture of drug "euphoria" was illegal). The Supreme Court has explained that a statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983); Gammoh v. City of La Habra, 395 F.3d 1114, 1119 (9th Cir. 2005).[1] In applying those standards, courts have emphasized that scienter requirements establish the requisite minimal guidelines to prevent arbitrary or discriminatory enforcement. See United States v. Wyatt, 408 F.3d 1257, 1261 (9th Cir. 2005) ("The intent requirement thus limits the discretion of law enforcement and mitigates any perceived vagueness"); United States v. Panfil, 338 F.3d 1299, 1301 (11th Cir. 2003) (terms meanings were clear and

[1] At least one court has rejected the argument that Section 1030 is vague in another context. See, e.g., United States v. Fernandez, 1993 WL 88197 (S.D.N.Y. Mar. 25, 1993) (rejecting argument that protected computer was unconstitutionally vague).

scienter requirement clarified meaning and protected against arbitrary enforcement).

Here, the statute gave ample notice that it covered defendant's conduct. As previously explained, the plain language of the statute prohibits accessing a computer in violation of rules set by the computer's owner. (See Government's Opp. at 4-10). Moreover, scores of courts -- including multiple courts of appeal -- have reiterated this principle. (See id.). To the extent defendant is instead contending that the Court's construction of the statute will lead to arbitrary or discriminatory enforcement, defendant's argument still fails given the statute's requirement that the government prove that defendant intend to access computers without authorization or in excess of authorization. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982) ("[A] scienter requirement [in a criminal statute] may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."); see also United States v. Washam, 312 F.3d 926, 930 (8th Cir. 2002). Section 1030(a)(2)(C) required that the government show that defendant intentionally accessed the computers at issue without authorization or in excess of authorization to impose liability. As a consequence, the Court instructed the jury that the government was required to show that defendant intentionally accessed computers without authorization, and in excess of

authorization. The government did just that.[2]

Indeed, the evidence at trial demonstrated that defendant not only intended to access computers without authorization and in excess of authorization but that she knew that her conduct was criminal. As the testimony of Ashley Grills established, defendant and her co-schemers discussed how their conduct was illegal:

> Q: During the first week after you created the account did anyone raise any concerns about what you were doing?
>
> A: Yes.
>
> Q: And who was that?
>
> A: It was both [S.D.] and I.
>
> Q: And who did you raise those concerns with?

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[2] Defendant again seems to suggest that a person need to be intimately familiar with written articulations of terms of service to be culpable under Section 1030. (Def's Reply at 7 n.1.) Defendant is mistaken. As the government has pointed out previously, the critical issue is not whether defendant was intimately familiar with the written articulation of the rules, but instead whether she intended to access protected computers at issue without authorization or in excess of authorization. See Lambert v. California, 355 U.S. 225, 228 (1957) (noting that the "[t]he rule that 'ignorance of the law will not excuse' is deep in our law . . . . ") (quoting Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910)); see also Nash v. United States, 229 U.S. 373, 377 (1913) ("[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."). The government satisfied its burden in a variety of ways, including by showing that defendant was told her access was not authorized, that defendant acted in a manner consistent with the requisite scienter, and that defendant made statements showing she acted with requisite scienter. Defendant's suggestion that defendants need to be familiar with the written articulation of rules would raise Section 1030's scienter requirement in an unprecedented fashion beyond that found in securities, tax or other white collar cases. Defendant's argument, therefore, should be rejected.

A: Lori.

Q: And what did you tell the defendant?

A: That we thought we would get in trouble because it's illegal to make a fake MySpace.

(Draft Grills Tr.) Defendant's notice argument, therefore, fails. Ostrosky v. Alaska, 913 F.2d 590, 596 (9th Cir. 1990) (due process challenge to statute for lack of notice failed because defendant had actual knowledge of law).

2. The Court May Rely on the Substantial Circuit Authority to Find that Unauthorized Has Its Plain Meaning

The crux of defendant's notice challenge nonetheless appears to be that the Court cannot rely on cases applying the plain meaning of Section 1030 in the civil context because this case is a criminal matter. (Def's Reply at 5-6). Defendant's argument is contrary to basic canons of construction. The Supreme Court has repeatedly emphasized that where a statute has both civil and criminal application, its terms must be applied consistently in both the civil and criminal contexts. Marcus v. Hess, 317 U.S. 537, 542 (1943); ("This 'qui tam policy' cannot be used to detract from the meaning of the language in the criminal section; and we cannot say that the same substantive language has one meaning if criminal prosecutions are brought by public officials and quite a different meaning where the same language is invoked by an informer."); United States v. Price, 383 U.S. 787 794-95 n.7 (1966) (applying same meaning to statute in criminal case that it construed in civil context). This unremarkable principle that a statute should be interpreted consistently, regardless of whether the statute is applied in a civil or criminal case, has been applied by Circuits throughout the country. United States

v. Nippon Paper Indust. Co., 109 F.3d 1 (1st Cir. 1997) ("The words of Section One have not changed since the Hartford Fire Court found that they clearly evince Congress' intent to apply the Sherman Act extraterritorially in civil actions, and it would be disingenuous for us to pretend that the words had lost their clarity simply because this is a criminal proceeding."); United States v. Brown, 79 F.3d 1550, 1559 (11th Cir. 1996) (meaning of "scheme to defraud" does not change whether criminal or civil RICO); Mattel v. United States, 624 F.2d 1076, 1080 (1980) (same); Green v. Dumke, 480 F.2d 624, 628 (9th Cir. 1973).[3]

As a consequence, courts in criminal cases repeatedly rely on civil authorities in a variety of contexts. See, e.g., United States v. Smith, 454 F.3d 707, 716 (7th Cir. 2006) (applying rule regarding evidence); United States v. Gewin, 471 F.3d 197, 202 (D.C. Cir. 2006) (same). For example, courts frequently look to civil authorities in securities cases to address issues related to loss. See, e.g., United States v. Rutkoske, 506 F.3d 170, 179 (2d Cir. 2007) (loss calculation). Courts even look to civil cases in the criminal RICO context. Brown, 79 F.3d at 1559. Defendant's suggestion that it is not "proper" to consider those authorities is, simply, incorrect. (Def's Reply at 5). Indeed, defendant's argument cannot be taken seriously as defendant

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[3] Defendant's argument, taken to its logical conclusion, would have nonsensical results. Defendant, after all, contends that notwithstanding the plain language of the statute, her conviction violated due process as only civil cases governed application and construction of Section 1030. The implication of defendant's argument would be that the first prosecution under any statute would always result in a defendant lacking sufficient constitutional notice because there would be insufficient guidance on a new statute or in a new application of an old statute.

herself has repeatedly asked this Court to apply a civil case, Theofel v. Farey Jones, 359 F.3d 1066 (9th Cir. 2004), to this criminal matter, and now asks the court to consider three district court decisions to suggest that the Court erred when it instructed the jury. (Def's Reply at 6.)[4]

B. APPLICATION OF SECTION 1030(a)(2)(C) TO DEFENDANT'S CONDUCT DOES NOT IMPLICATE FIRST AMENDMENT CONSIDERATIONS

Defendant next contends the Court should have applied a narrower construction of "unauthorized" to avoid First Amendment considerations. (Def's Reply at 7-10). That argument fails for the same reasons that it did pretrial.

1. No First Amendment Right Is Implicated

In effect, defendant simply assumes that the Court's construction of Section 1030 would mean that a simple violation of a website operator's terms of service alone would constitute a violation of Section 1030. (Def's Reply at 6-10). As laid out previously, a simple violation of the Terms of Service -- without more -- would not constitute a violation of Section 1030(a)(2) because other statutory elements must be met before the defendant could be found guilty: specifically, a defendant must have intentionally exceeded authorized access or intentionally

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[4] Defendant's late citation to Condux International, Inc. v. Haugum, 2008 WL 5244818 (D. Minn. Dec. 15, 2008); Black & Decker Inc. v. Smith, 568 F. Supp.2d 929 (W.D. Tenn. 2008); and Lockheed Martin Corp v. Speed, 2006 WL 2683058 (M.D. Fla. 2006), are unavailing. As explained in greater depth in the government's response to the Amicus brief, that line of cases, which at best must be considered the minority view, is contrary to the plain language of the statute, its legislative history and to cases from this district. They do not, therefore, indicate that the Court erred when it instructed the jury that "'access without authorization' means to access a computer without the approval, permission or sanction of the computer's owner."

accessed a computer without authorization, see, e.g., United States v. Saban, 92 F.3d 865, 869 (9th Cir. 1996), the defendant's purpose must have been to obtain information, 18 U.S.C. § 1030 (a)(2), and various jurisdictional and other elements must be met.

Defendant's argument is particularly problematic because not only does it read the scienter requirement out of the statute, it ignores the fact that the statute prohibits the improper access to a computer to obtain information -- not to disseminate it. Consequently, while the core principle of defendant's argument and the cases she cites is that individuals should be able to disseminate information freely over the Internet, the Court's instructions to the jury did not have the effect of criminalizing speech. Subject to other laws, defendant was free to host her own website to say whatever she wanted. Subject to 47 U.S.C. § 223 and other authorities, defendant was free to make phone calls or stand on a street corner using a pseudonym to proclaim to the world what she felt. Defendant was even free to post information anonymously on websites. What defendant was not free to do, however, was to intentionally break the rules to gain access to information not available to the public at large that was kept on the protected computers of MySpace to further a criminal or tortious purpose. Compare 18 U.S.C. § 1342 (prohibiting using "a fictitious, false or assumed title, name, or address").[5]

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[5] In this regard, defendant's citation of United States v. Popa, 187 F.3d 672 (D.C. Cir. 1999), misses the mark because that case addressed the criminalization of speech -- not the unauthorized access of computers. The defendant in Popa had made

2. Courts Have Repeatedly Recognized that the First Amendment Does Not Immunize Trespasses on Property Belonging to Another

But even if First Amendment rights were implicated, the tangential relationship to those rights would not be enough to suggest that the Court's construction of Section 1030 was improper. The degree of protection afforded to an interest within the scope of the First Amendment depends in substantial part upon the forum in which the activity is being pursued. Acorn v. City of Phoenix, 798 F.2d 1260, 1264 (9th Cir. 1986); Jews for Jesus, Inc. v. Board of Airport Commissioners, 785 F.2d 791, 793 (9th Cir. 1986). In the context of private property, courts have held that "[t]he First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office." Dietemann v. Time, Inc. 449 F.2d 245, 249 (9th Cir. 1971); see also Food Lion, Inc. v. Capital Cities/ABC Inc., 194 F.3d 505, 510 (4th Cir. 1999); Le Mistral, Inc. v. CBS, 402 N.Y.S. 2d 815, 817 (App. Div. 1978)

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a series of abusive phone calls to the office of a political appointee, then-United States Attorney Eric Holder, and was subsequently charged with sending communications with "intent to annoy, abuse, threaten, or harass any person." The Court of Appeals reversed the defendant's conviction because it reasoned the statute at issue, 47 U.S.C. § 223, unconstitutionally burdened the defendant's speech when applied to his making racial epithets and complaining about alleged assaults. The conduct at issue in Popa therefore bore no resemblance to the conduct at issue here. The defendant in Popa was charged for his harassing communications - not illicitly accessing a computer, let alone intentionally accessing a computer without authorization. But even if he did intentionally access a computer without authorization or in excess of authorization, he did not do so for the purpose of obtaining information. He called Holder's office to make statements. The conduct, therefore, would not satisfy a single element of Section 1030. Popa, therefore, demonstrates that the Court's instruction does not implicate First Amendment rights.

("the First Amendment is not a shibboleth before which all other rights must succumb").

For example, the Supreme Court has explicitly stated that it "has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." Lloyd v. Tanner, 407 U.S. 551, 568 (1972). In Lloyd, for example, five young people had entered the mall of the shopping center and distributed handbills protesting the ongoing American military operations in Vietnam. Security guards told them to leave and so they did, "to avoid arrest." Id. at 556. The trial court ruled in favor of the plaintiff-protestors and the Ninth Circuit affirmed, holding that the distribution of handbills on the shopping center's property was protected by the First and Fourteenth Amendments. Id at 517. The Supreme Court reversed, observing that the protestors "could have distributed the[] handbills on any public street, on any public sidewalk, in any public park, or in any public building." Id. at 564. The Court emphasized that the Constitution "by no means requires . . . an attenuated dedication of private property to public use." Id. at 569.

Defendant, after all, was not charged in connection with operating her own communication service through which she communicated with victim M.T.M. Instead, she and others obtained access to MySpace's communication services under false pretenses and by promising to refrain from certain conduct. Through that fraud and false promise, defendant and her co-conspirators gained access to MySpace's computers to carry out their scheme by

obtaining information from those computers which they were not authorized to obtain. Accordingly, the issue is whether under the banner of free expression, individuals may intentionally violate the rules that govern the use of property belonging to others. Under Lloyd, they plainly cannot. 407 U.S. at 568; see also People v. Pulliam, 62 Cal.App.4th 1430, 1438-1439 (1998) ("[c]riminal laws penalize conduct. If the conduct is permissibly prohibited under the state and federal Constitutions, the fact that the conduct may peripherally involve speech or association does not cloak it with constitutional protections that invalidate the criminal statute prohibiting the conduct.").[6]

II. DEFENDANT'S ARGUMENT REGARDING THE RULE OF LENITY IS MERITLESS

Defendant instead suggests that the rule of lenity should guide the construction of Section 1030(a)(2)(C). In doing so -- and without any authority -- defendant boldly states: "Given two lines of cases, the court must adopt the narrower one in a criminal prosecution." (Def's Reply at 7.) As explained previously, binding authority is to the contrary. Lisbey v. Gonzales, 420 F.3d 930, 933 (9th Cir. 2005); see also Pearson, 321 F.3d 790 (9th Cir. 2003) ("Lenity cannot be invoked merely because a different reading of the statute is possible.").

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[6] In light of the foregoing, to the extent defendant is asking the Court to apply the constitutional avoidance doctrine, it does not apply. First, "[t]he canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them." Clark v. Martinez, 543 U.S. 371, 385 (1997). Here, no ambiguity need be resolved. Second, and more importantly, no constitutional issues are implicated through the statute's construction. Accordingly, resort to the doctrine is unnecessary.

The rule of lenity only provides that when a statute's language is "grievously" ambiguous, the court should construe the statute in favor of the accused. Chapman v. United States, 500 U.S. 453. 462-63 (1991). Because the rule of lenity only applies when the language is ambiguous, the Ninth Circuit has rejected requests to apply the rule of lenity upon concluding that the statutory language at issue was clear. United States v. Banks, 514 F.3d 959 (9th Cir. 2008); United States v. Carr, 513 F.3d 1164 (9th Cir. 2008).

Here, the rule of lenity does not apply because the statutory language is unambiguous. As explained previously, accessing a computer in contravention of a website operator's rules for that service is "unapproved," "not permitted," "not sanctioned," and, therefore, "unauthorized." Alternatively, access to "obtain . . . information in the computer that the accesser is not entitled so to obtain" by definition exceeds one's authorized access. 18 U.S.C. § 1030(e)(6). The fact that some courts have differed in their interpretation of the meaning of "unauthorized" is of no moment and does not justify a finding of ambiguity. Lisbey, 420 F.3d at 933; see also Pearson, 321 F.3d at 790 ("Lenity cannot be invoked merely because a different reading of the statute is possible."). And because the remaining aids to construction likewise favor this plain reading of the statute, reliance on the rule of lenity is inappropriate. Lisbey, 420 F.3d at 933 ("We have declared statutes ambiguous and applied the rule of lenity only when "'a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating

policies of the statute.'") (quoting Moskal v. United States, 498 U.S. 103, 108 (1990)).

III

CONCLUSION

Accordingly, defendant's Rule 29 motion should be denied.

Dated: January 5, 2009

Respectfully submitted,

THOMAS P. O'BRIEN
United States Attorney

CHRISTINE C. EWELL
Assistant United States Attorney
Chief, Criminal Division

MARK C. KRAUSE
Assistant United States Attorney

Attorneys for Plaintiff
UNITED STATES OF AMERICA