

1 H. Dean Steward SBN 85317  
2 107 Avenida Miramar, Ste. C  
3 San Clemente, CA 92672  
4 949-481-4900  
5 Fax: (949) 496-6753  
6 deansteward@fea.net

7 Attorney for Defendant  
8 Lori Drew

9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA

11 UNITED STATES,

12 Plaintiff,

13 vs.

14 LORI DREW,

15 Defendant.

Case No. CR-08-582-GW

NOTICE OF MOTION; MOTION TO  
DISMISS INDICTMENT-  
UNCONSTITUTIONAL DELEGATION OF  
PROSECUTORIAL POWER; POINTS AND  
AUTHORITIES

Date: Sept. 4, 2008

Time: 8:30 AM

16 TO: UNITED STATES ATTORNEY THOMAS O'BRIEN AND ASST. U.S  
17 ATTORNEY MARK KRAUSE, please take notice that on September 4, 2008  
18 at 8:30 AM, defendant, through counsel, will bring the attached  
19 motion to dismiss the indictment in the courtroom of the Honorable  
20 George Wu, United States District Judge, 312 N. Spring St.,  
21 Courtroom 10, Los Angeles, California.

22 Dated: July 23, 2008

23 s./ H. Dean Steward

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

1 **MOTION**

2 COMES NOW defendant Lori Drew, together with counsel, and  
3 moves this honorable court for an order dismissing the instant  
4 indictment pursuant to Federal Rules of Procedure 12(b). As set  
5 forth below, the indictment violates constitutional due process by  
6 delegating prosecutorial powers, and it must be dismissed.  
7

8 Dated: July 23, 2008  
9 San Clemente, California s./ H. Dean Steward  
10 H. Dean Steward  
11 Counsel for Defendant  
12 Lori Drew  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 **POINTS AND AUTHORITIES**

2  
3 I. BACKGROUND

4 The defense here challenges the government's delegation to the  
5 power to set guidelines and terms of what will be a criminal law  
6 violation to individuals and entities. The public in general, (and  
7 defendant Drew in particular), are denied due process under the  
8 Constitution when private parties, not the government, are given  
9 these rights and powers.

10 II. FACTS

11 According to the indictment, defendant Lori Drew and others  
12 set about creating a MySpace social network on line personal  
13 profile in the Fall of 2006. The profile was of a teenage boy. The  
14 indictment further alleges that Ms. Drew and others set up the  
15 profile to gain information from one M.T.M., a teenager. In setting  
16 up the profile, the government alleges that Ms. Drew and others  
17 violated the terms of service [hereinafter TOS] that MySpace  
18 maintains as a feature of their website. The government theory is  
19 that a violation of any TOS renders any accessing of a website by  
20 the violator to be "unauthorized", and therefore potentially a  
21 violation of 18 USC §1030(a)(2)(C) and (c)(2)(B)(ii) [hereinafter  
22 §1030],

23 The profile was open for 29 days, during which M.T.M. sent  
24 messages back and forth to the fictional person allegedly named  
25 "Josh Evans"<sup>1</sup>. On the last of those 29 days, the messages from  
26

---

27 <sup>1</sup> The defense believes that at least two other persons and perhaps  
28 as many as four had the "Josh Evans" password and communicated to  
M.T.M. as "Josh Evans".

1 several people to M.T.M., and her responses, became heated, and  
2 M.T.M. soon thereafter took her own life.

3       The facts in this matter are deeply in dispute. For the  
4 purposes of a dismissal motion only, the court is limited to the  
5 four corners of the indictment. U.S. v. Edmonds 103 F.3d 822 (9<sup>th</sup>  
6 Cir. 1996).

### 7 III. DISCUSSION

8       Under §1030, virtually anyone, (be it giant MySpace, the  
9 social network, or an individual computer owner), can determine  
10 whether access to a server or site is authorized, and they can  
11 determine under what circumstances. A computer owner can set the  
12 scope of authorization by contractual language, by a TOS. This can  
13 lead to criminal violations for those who run afoul of the  
14 TOS/contract.

15       Turning to this matter, MySpace dictated, through its TOS,  
16 what acts supposedly constituted a crime. What the government in  
17 its view of §1030 has done is to delegate the responsibility of  
18 deciding what conduct will be criminal to private parties like  
19 MySpace.

20       In *Cybercrime's Scope: Interpreting "Access" and*  
21 *"Authorization" in Computer Use Statutes*, Kerr, 78 N.Y.U.L.Rev.  
22 1596 (2003) Professor Orin Kerr points up the chilling effect of  
23 allowing an entity such as MySpace to anchor and, in truth, dictate  
24 §1030 charges:

25  
26       "Imagine that a Website owner announces [and puts in his  
27 TOS] that only right handed people can view  
28

1 his Website, or perhaps only friendly people.  
2 Under the contract-based approach, a visit to the site  
3 by a left-handed or surly person is an unauthorized  
4 access that may trigger state and federal criminal laws. A  
5 computer owner could set up a public web page, announce that  
6 'no one is allowed to visit my web page', and then refer for  
7 prosecution anyone who clicks on the site out of curiosity. By  
8 granting the computer owner essentially unlimited authority to  
9 define authorization, the contract standard delegates the  
10 scope of criminality to every computer owner."

11  
12 Id. at p. 1650,51  
13  
14

15 Allowing computer owners to set terms that can cause law  
16 violations is similar to the vintage cases in the Supreme Court  
17 where governmental powers were unconstitutionally delegated between  
18 governmental agencies. The Supreme Court invalidated the delegation  
19 of these powers in the 1930's in a series of cases. See Carter v.  
20 Carter Coal Co. 298 U.S. 238 (1936); A.L.A. Schechter Poultry Corp.  
21 v. U.S. 295 U.S. 495 (1935) and Panama Refining Co. v. Ryan 293  
22 U.S. 388 (1935).

23 For example, at issue in Panama Refining was a delegation to  
24 the President of authority to prohibit interstate transportation of  
25 what was known as "hot oil" - oil produced in excess of quotas set  
26 by state law. The problem was that the Act provided no guidance to  
27 the President in determining whether or when to exercise this  
28

1 authority, and required no finding by the President as a condition  
2 of exercise of the authority. Congress "declared no policy, . . .  
3 established no standard, [and] laid down no rule," but rather "left  
4 the matter to the President without standard or rule, to be dealt  
5 with as he pleased." Id. at 293 U.S. at 430.

6 At issue in Schechter was a delegation to the President of  
7 authority to promulgate codes of fair competition that could be  
8 drawn up by industry groups or prescribed by the President on his  
9 own initiative. The codes were required to implement the policies  
10 of the Act, but those policies were so general as to be nothing  
11 more than an endorsement of whatever might be thought to promote  
12 the recovery and expansion of the particular trade or industry. The  
13 President's authority to approve, condition, or adopt codes on his  
14 own initiative was similarly devoid of meaningful standards, and  
15 virtually unfettered. The Act supplied "no standards" for any trade  
16 or industry group, and, unlike other broad delegations that had  
17 been upheld, did not set policies that could be implemented by an  
18 administrative agency required to follow "appropriate  
19 administrative procedure." "Instead of prescribing rules of  
20 conduct, [the Act] authorize[d] the making of codes to prescribe  
21 them." Id. 295 U.S. at 541.

22 Here, §1030 has delegated power, not between branches of  
23 government, but to every day citizens and entities. But like the  
24 older cases above, there are no standards for computer owners when  
25 setting up TOS's. At the same time, however, these owners now have  
26 the power to set guidelines, rules and terms that can, if violated,  
27 cause criminal liability. Such power, by the government's  
28

1 interpretation of §1030, is now in the hands of Internet behemoths  
2 like MySpace, or anyone or any entity that can get on the Internet  
3 and set up a rudimentary Website. The enormous danger in this  
4 interpretation is well set out in Professor Kerr's examples, above.

5 In testimony before Congress in 1992, the Vice President and  
6 General Counsel of the Computer and Communications Industry  
7 Association warned, "You do not want to be accidentally taking a  
8 large percentage of the American people, either small businesses or  
9 citizens, into the gray area of criminal law." U.S. v. LaMacchia  
10 871 F. Supp. 535, 544 (D. Mass. 1994), n. 18. The indictment here  
11 does just that, with no due process protections at all. Almost any  
12 computer owner can set up whatever arbitrary and unique rules they  
13 want, and a violation of those rules can lead to a §1030  
14 prosecution.

#### 15 IV. CONCLUSION

16 Simply put, access that merely breaches a contract  
17 conditioning access should not suffice to trigger criminal  
18 liability. If violating user agreements is a crime, millions of  
19 Americans are probably committing crimes on a daily basis and don't  
20 know it.

21 Basing a federal prosecution on TOS violations, on a contract  
22 theory, denies due process, in that "it allows a computer owner to  
23 harness the criminal law at his or her discretion, using his or her  
24 unilateral power to control authorization by contract as a tool to  
25 criminalize any viewpoint of status the owner wishes to target."  
26 *Cybercrime's Scope: Interpreting "Access" and "Authorization" in*

1 *Computer Use Statutes* supra at p. 1658. Such a delegation is  
2 constitutionally infirm, and the indictment must be dismissed.

3 Dated: July 23, 2008

4 San Clemente, California

s./ H. Dean Steward

H. Dean Steward

Counsel for Defendant

Lori Drew

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28



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 July 23, 2008, service of the defendant's:

10 **NOTICE OF MOTION; MOTION TO DISMISS; POINTS AND AUTHORITIES**

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**

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

19 Executed on July 23, 2008

20  
21 H. Dean Steward

22 H. Dean Steward  
23  
24  
25  
26  
27  
28