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10
11 UNITED STATES DISTRICT COURT
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,) CR NO. 08-582-GW
14)
Plaintiff,) GOVERNMENT'S OPPOSITION TO
15) DEFENDANT'S MOTION TO DISMISS
v.) THE INDICTMENT FOR FAILING TO
16) STATE A CLAIM
LORI DREW,)
17) Hearing Date: September 4, 2008
Defendant.) Hearing Time: 8:30 a.m.
18) Trial Date: October 7, 2008
19) Trial Time: 8:00 a.m.
) Place: Courtroom of the
) Hon. George H. Wu

20
21 Plaintiff United States of America, by and through its
22 counsel of record, Assistant United States Attorney Mark C.
23 Krause, hereby files this opposition to defendant's motion to
dismiss for failure to state a claim.

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1 This opposition is based on the attached memorandum of
2 points and authorities, the files and records in this case, and
3 whatever evidence or argument this Court may consider.

4 Dated: August 12, 2008

5 Respectfully submitted,

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 I

3 INTRODUCTION

4 Defendant Lori Drew has been charged in the four count
5 indictment with (1) conspiring to access protected computers
6 without authorization in violation of 18 U.S.C. § 371 (Count
7 One); and (2) accessing protected computers without authorization
8 to obtain information to further a tortious act in violation of
9 18 U.S.C. § 1030(a)(2) (Counts Two through Four). Trial in this
10 matter has been scheduled for October 4, 2008.

11 On July 23, 2008, defendant filed a motion to dismiss the
12 indictment for failure to state a claim. Defendant contends the
13 indictment should be dismissed because it contains insufficient
14 factual allegations in support of the elements of the offense.
15 Specifically, although defendant appears to concede that the
16 indictment alleges each of the elements of the offense, she
17 appears to contend that the indictment fails to allege sufficient
18 facts to show that she intentionally accessed a computer without
19 authorization or that her conduct was not in fact authorized.
20 Relying on an out of district copyright case that has been
21 superseded by statute, defendant also appears to contend that the
22 indictment fails to allege a violation of the Computer Fraud and
23 Abuse Act ("the CFAA") based on an assumption that the CFAA does
24 not cover the conduct at issue. Defendant's arguments are
25 unavailing.

26 First, due process and Rule 7 of the Federal Rules of
27
28

1 Criminal Procedure require nothing more than a "plain, concise
2 and definite written statement of the essential facts
3 constituting the offense charged." The indictment, which covers
4 10 pages and forty paragraphs and subparagraphs provides ample
5 factual detail, including particularized dates, specific overt
6 acts conducted in furtherance of the conspiracy, and numerous
7 allegations regarding the scheme and its manner and means. It
8 therefore provides sufficient factual detail to, among other
9 things, plead double jeopardy.

10 Second, defendant's demand for precise allegations of how
11 the government will prove its case is improper. Neither Rule 7
12 nor due process require the government to outline in detail how
13 it will present its case. Were either authority to impose such a
14 requirement, even the simplest one day trials would require pages
15 of mind numbing factual detail. But even if this circuit's
16 authority demanded factual detail, the indictment in its current
17 forms includes substantial factual allegations.

18 Finally, defendant's assumption regarding the limited scope
19 of the CFAA is misplaced. Since its inception, the Act was
20 intended to serve as the principal statute to address computer-
21 related crimes and was designed to be flexible enough to address
22 changing circumstances. Nor would dismissal be warranted based
23 on an out-of-district case addressing a copyright violation that
24 has been superseded by statute.

1 II

2 STATEMENT OF FACTS

3 A. BACKGROUND ON MYSPACE.COM

4 MySpace is a social networking website; that is, MySpace is
5 a website that focuses on building online communities of people
6 who share interests and activities, or who are interested in
7 exploring the interests and activities of others. MySpace
8 accounts are free. There are two types of users of the website:
9 visitors and members. Visitors can navigate to the website and
10 view certain content that is publically available. Members have
11 greater rights of access. Not only can members view the
12 publically available content, they also can view some content
13 that is not available to nonmembers. They also are permitted to
14 create unique personal profiles online. These profiles can
15 include text, pictures, and audio files. Members also can find
16 and communicate with old and new friends using MySpace
17 communication services, including email and instant messaging
18 services. Some content on MySpace is only available to MySpace
19 members and only MySpace members have access to MySpace
20 communication services.

21 Although MySpace membership is free, prospective members are
22 required to agree to certain Terms of Service ("TOS") before they
23 can become members. Prospective members are "authorized" to use
24 MySpace's services only if they agree to abide by all applicable
25 laws and the TOS. ("You are only authorized to use the Services
26 . . . if you agree to abide by all applicable laws and to this
27

1 Agreement"). The TOS also enumerate certain conduct that is not
2 permitted on the website, is unauthorized, and can lead to
3 termination of the member's account. Among other things, the
4 rules prohibit:

- 5 1. "criminal or tortious activity, including child
6 pornography, fraud, trafficking in obscene
7 material, drug dealing, gambling, harassment,
8 stalking, spamming, spimming, sending of viruses
9 or other harmful files, copyright infringement,
10 patent infringement or theft of trade secrets"
- 11 2. "using any information obtained from [MySpace
12 services] in order to harass, abuse, or harm
13 another person"
- 14 3. "soliciting personal information from anyone under
15 18"
- 16 4. "harass[ing] or advocat[ing] harassment of another
17 person.
- 18 5. promot[ing] information that the member knows is
19 false or misleading; and
- 20 6. using a photograph with out a person's consent.

21 The registration process and TOS also require prospective members
22 to promise that their registration information is truthful and
23 accurate.

24 B. DEFENDANT EMBARKS ON SCHEME TO OBTAIN INFORMATION ABOUT
25 M.T.M.

26 For several years, defendant's family, the Drews, and
27 another local neighborhood family, the Meiers, were friendly.
28 Each family had a daughter the same age who was friendly with the
other and attended school together. Over time, however, the two
girls drifted apart and, in 2005, the Meiers decided to transfer
their daughter, a thirteen year old girl with the initials

1 M.T.M., from the local public school to a local Catholic school.
2 Cristina Meier, M.T.M.'s mother confided in defendant that she
3 was concerned about M.T.M.'s mental health and was particularly
4 vulnerable at that time.

5 Over the summer of 2006, defendant and her family were
6 concerned that M.T.M. was spreading malicious rumors about
7 defendant's daughter. Defendant discussed the matter with her
8 daughter and her eighteen year old employee, Ashley Grills, and
9 the three conceived of a scheme where they would pretend to be an
10 attractive male teenager on Myspace.com and approach M.T.M.
11 through MySpace using that false identity to obtain M.T.M.'s
12 confidence. Once they had gained M.T.M.'s confidence, the co-
13 conspirators could find out what M.T.M. was saying on MySpace,
14 including what M.T.M. was saying about defendant's daughter.
15 Grills pointed out that there was a risk they would get in
16 trouble if the scheme were uncovered; however, defendant assured
17 Grills that they would not and, in any event, many people created
18 fake identities on the Internet.

19 C. DEFENDANT AND HER CO-CONSPIRATORS USE THE FAKE MYSPACE
20 ACCOUNT

21 Committed to the scheme, on September 18, 2008, defendant
22 and her co-schemers created a MySpace profile under the fake name
23 "Josh Evans." "Evans" was supposedly a teenager who was new to
24 the area and was home schooled. "Evans" was supposedly lonely
25 because he did not know anyone in the area and "his" father had
26 abandoned the family. The co-schemers also posted a photograph
27

1 of an attractive boy on the profile to further the fraud.¹ On
2 that same date, defendant and her co-schemers contacted M.T.M.
3 through the MySpace communication services.² Smitten with the
4 attractive "boy's" invitation to communicate, M.T.M. agreed to
5 communicate with "him."

6 Although the initial communications were innocent enough,
7 within days, defendant encouraged her co-schemers to flirt with
8 M.T.M. Defendant also discussed using the information obtained
9 during the scheme to humiliate M.T.M. in the real world.

10 Specifically, when it became clear that M.T.M. was attracted to
11 "Josh Evans," defendant proposed that the co-conspirators lure
12 M.T.M. to a mall where they would reveal that there was no "Josh
13 Evans" and taunt M.T.M. with the contents of her MySpace page and
14 information learned during the scheme.

15 On October 15, 2006, another girl in the neighborhood
16 obtained the username and password for the "Josh Evans" account
17 and sent M.T.M. a message suggesting that "Evans" did not want to
18 be friends with M.T.M. anymore because M.T.M. was not nice to her
19 friends. When the co-schemers resumed the on-line conversation
20 the following day, the dispute escalated until Grills told M.T.M.
21 that the world would be a better place without M.T.M. in it.

23 ¹ The co-conspirators did not ask anyone's permission before
24 posting the photograph.

25 ² Because M.T.M. registered for a juvenile account, that is,
26 an account for members under the age of sixteen, her account was
27 designated "private." As a result, the content on her page was
not available to the public at large and could only be viewed if
M.T.M. agreed to let the member contact her.

1 Distraught, M.T.M. hung herself in her bedroom closet.

2 When emergency crews responded to the Meier residence,
3 defendant instructed her co-conspirators to find out what had
4 happened. Upon learning that M.T.M. had attempted to commit
5 suicide, defendant and her husband directed the co-schemers to
6 delete the MySpace account.

7 Later that evening, defendant called the neighborhood girl
8 who had sent M.T.M. the message on October 15. Defendant
9 instructed her not to "keep her mouth shut," to "stay off the
10 MySpace," and to avoid accessing the Josh Evans account. Sensing
11 something was amiss because defendant never called her daughter
12 directly, the mother of the neighborhood girl, Michelle Mulford,
13 asked her daughter what had happened. Mulford subsequently
14 confronted defendant. Defendant told Mulford that she
15 (defendant), her daughter, and Grills had created the account to
16 play a prank on M.T.M. and that she (defendant) caused the
17 account to be deleted. In subsequent phone conversation,
18 defendant tried to disclaim responsibility, telling Mulford that
19 Meier previously tried to commit suicide.

20 III

21 ARGUMENT

22 A. THE COURT SHOULD DENY DEFENDANT'S MOTION TO DISMISS BECAUSE
23 THE INDICTMENT ADEQUATELY STATES A CRIME UNDER THE COMPUTER
24 FRAUD AND ABUSE ACT

25 Defendant first contends this Court should dismiss the
26 indictment because she claims it fails to allege certain facts
27 sufficient to support the elements of the offense. Defendant

1 does not suggest that the indictment fails to allege any element
2 of the offense -- simply that the government has not alleged how
3 it will prove those various elements. As set forth below, both
4 the Supreme Court and the Ninth Circuit have expressly held that
5 indictments need not set forth the government's theory of the
6 case nor lay out the evidence in support of the allegations of
7 the indictment. Accordingly, defendant's motion should be
8 denied.

- 9 1. Because the Indictment Tracks the Words of the
10 Applicable Statutes, Unambiguously Sets Forth All the
11 Elements Necessary to Constitute the Crimes Alleged,
and Allows Defendant to Plead Double Jeopardy, It Is
Sufficient

12 Rule 7 of the Federal Rules of Criminal Procedure provides
13 that an indictment must be a "plain, concise and definite written
14 statement of the essential facts constituting the offense
15 charged." Fed. R. Crim. P. 7(c)(1). The Supreme Court and Ninth
16 Circuit have therefore explained that an indictment is sufficient
17 if it contains the elements of the charged crime in adequate
18 detail to inform the defendant of the charge and to enable her to
19 plead double jeopardy. Hamling v. United States, 418 U.S. 87,
20 117 (1974); see also Russell v. United States, 369 U.S. 749, 763-
21 64 (1962). For example, in United States v. Davis, 336 F.3d 920
22 (9th Cir. 2003), the Ninth Circuit held:

23 In cases where the indictment "tracks the words of the
24 statue charging the offense," the indictment will be
25 held sufficient "so long as the words unambiguously set
forth all elements necessary to constitute the
offense."

26 Id. at 922 (citing United States v. Fitzgerald, 882 F.2d 397, 399
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1 (9th Cir. 1989)).³ The Ninth Circuit has even repeatedly
2 rejected attempts to dismiss indictments for failing to state
3 claims even when they did not explicitly state all of the
4 elements of the offense at issue. See, e.g., Davis, 336 F.3d at
5 923 (affirming district court's denial of motion to dismiss even
6 though there was no dispute that the indictment did not contain a
7 specific verbal elaboration of the criminal intent"); United
8 States v. Buckley, 689 F.2d 893, 898 (9th Cir. 1982) (indictment
9 sufficient even though it did not allege falsity of report);
10 Giese, 597 F.2d at 1178 (indictment sufficient even though
11 conspiracy embraced non-federal offenses); Stein v. United
12 States, 313 F.2d 518 (9th Cir. 1962) (indictment sufficient even
13 though it failed to allege defendant knew heroin had been
14 illegally imported even though such knowledge was necessary
15 element); Danielson v. United States, 321 F.2d 441 (9th Cir.
16 1963) (indictment sufficient despite mingling elements of forgery
17 and uttering under 18 U.S.C. § 495); United States v. Pfeaster,
18 544 F.2d 353, 363 (9th Cir. 1976) (conspiracy indictment
19 sufficient even though it did not allege all the elements of
20 underlying substantive offense).

21 Because Rule 7 and due process require only a short and
22 plain statement of the crime that alleges each of the elements of
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24 ³Indictments alleging criminal conspiracies are to be read
25 in an even more liberal fashion: "[a]n indictment charging a
26 conspiracy under 18 U.S.C. § 371 satisfies these requirements if
27 it alleges the three elements which are the gist of the offense:
28 'the agreement, the unlawful object towards which the agreement
is directed, and an overt act in furtherance of the conspiracy.'" United States v. Giese, 597 F.2d 1170, 1177-1178 (9th Cir. 1979).

1 the crime charged, the Ninth Circuit has emphasized that "[t]he
2 government need not allege its theory of the case or supporting
3 evidence, but only the essential facts necessary to apprise a
4 defendant of the crime charged." Buckley, 689 F.2d at 897
5 (internal citation and quotation marks omitted). As a
6 consequence, "[a] defendant may not properly challenge an
7 indictment, sufficient on its face, on the ground that the
8 allegations are not supported by adequate evidence." United
9 States v. Clifford, 93 F.3d 667, 669 (9th Cir. 1996) (quoting
10 United States v. Mann, 517 F.2d 259, 267 (5th Cir. 1975)).

11 Here, the indictment alleges sufficient facts to withstand a
12 motion to dismiss. Specifically, the ten page indictment alleges
13 each of the elements of the charged offenses and gives the
14 defendant sufficient notice of the charges. Buckley, 689 F.2d at
15 899 n.5 ("Although Fed. R. Crim P. 7(c) requires that the
16 indictment be a 'plain, concise and definite written statement of
17 the essential facts constituting the offense charged,' the courts
18 have construed this language to require little more than that the
19 indictment give the defendants sufficient notice of the crime")
20 (citing cases); see also Wong Tai v. United States, 273 U.S. 77,
21 81 (1927) (indictment sufficient where it alleged time, place,
22 co-schemer, specified offenses, and overt acts). First, Count
23 One alleges an unlawful agreement, namely, that defendant
24 "conspired and agreed with [others] intentionally to access a
25 computer used in interstate and foreign commerce without
26 authorization and in excess of authorized access and, by means of
27

1 an interstate communication, obtain information from that
2 computer to further a tortious act, namely, intentional
3 infliction of emotional distress, in violation of 18 U.S.C.
4 §§ 1030(a)(2)(c), (c)(2)(B)(2).” It likewise alleges several
5 means by which that unlawful objective was to be accomplished.
6 Specifically, the indictment alleges that defendant and her co-
7 schemers (1) fraudulently created an account on MySpace, (2) used
8 that account to obtain information about M.T.M., (3) used that
9 information to torment, harass, humiliate, and embarrass M.T.M.,
10 and (4) covered up the scheme by destroying the MySpace account.
11 The indictment also alleged twelve distinct overt acts undertaken
12 by defendant and her co-schemers in furtherance of the
13 conspiracy. The factual allegations are more than sufficient to
14 satisfy the minimal requirements of Rule 7 and due process.
15 Wong Tai, 273 U.S. at 81 (“In charging . . . a conspiracy
16 ‘certainty to a common intent, sufficient to identify the offense
17 which the defendants conspired to commit is all that is
18 necessary.”).

19 Likewise, Counts Two through Four, which charge violations
20 of 18 U.S.C. § 1030(a)(2) are adequately pled. Each of those
21 counts allege each of the necessary elements. The indictment
22 explicitly alleges that defendant intentionally accessed a
23 computer without authorization and exceeded authorized access to
24 a protected computer (Indictment, ¶ 18); alleges facts showing
25 that her access of that computer involved an interstate or
26 foreign communication (Indictment, ¶¶ 7-8, 18); that by accessing
27

1 the computer without authorization and exceeding authorized
2 access, defendant obtained information from a computer used in
3 interstate or foreign commerce or communication (Indictment,
4 ¶ 8); and that the information was used to further a tortious
5 act, (Indictment, ¶ 18). The indictment also alleges dates when
6 the unauthorized access to protected computers occurred, as well
7 as venue allegations.⁴ (Id.)

8 Counts Two through Four also incorporate by reference five
9 pages of detailed allegations setting forth the manner in which
10 the conduct was unauthorized and the manner in which the conduct
11 involved an interstate nexus. Counts Two through Four also
12 incorporate by reference the factual allegations contained in the
13 overt acts of Count One. In doing so, Counts Two though Four
14 describe the scheme in the same way as Count One and the
15 multitude of ways in which the activities of the co-conspirators
16 were unauthorized. (Indictment, ¶¶ 12(a)-(f)).⁵

18 ⁴ Although the undersigned is unaware of any published
19 criminal case addressing the sufficiency of an indictment
20 alleging a violation of 18 U.S.C. 1030, challenges in civil cases
21 under Rule 12(b)(6) are routinely rejected under similar
22 circumstances. See, e.g., Dudick v. Vaccarro, 2007 WL 1847435 at
23 *7(M.D. Pa. Jun. 25, 2007) (rejecting argument that allegations
24 were too conclusory by tracking statutory language); Hewlett-
Packard Co. v Byd:Sign, Inc, 2007 WL 275476 (E.D. Tex. Jan. 25,
2007) (rejecting motion to dismiss); P.C. of Yonkers, Inc. v.
Celebrations! The Party and Seasonal Superstore, 2007 WL 708978,
at *7 (N.D.N.J. Mar. 5, 2007) (holding that the plaintiffs
adequately alleged a violation of the CFAA when their complaint
exactly mirrored the statutory language).

25 ⁵ In this regard, the indictment provides greater detail
26 than the indictments in Jenson, cited by defendant and which the
27 Ninth Circuit found sufficient notwithstanding the limited
allegations regarding venue. 93 F.3d at 669. There, the Ninth
Circuit held the indictments were sufficient because they alleged

1 Indeed, the factual detail, and the indictment as a whole,
2 place defendant on notice of the theory of the government's case
3 by describing how defendant and her co-conspirators carried out a
4 scheme to humiliate a little girl by posing as a boy, flirting
5 with her so that she would become attracted to "him," and gaining
6 information to humiliate her. As the indictment explains, the
7 account was created in September 2006 and was designed as a means
8 to obtain information that would be used to "torment, harass,
9 humiliate, and embarrass" a juvenile MySpace member. The scheme
10 continued through the end of September and into October, during
11 which time the co-conspirators flirted with M.T.M., told M.T.M.
12 she was "sexi," and obtained personal information from M.T.M. By
13 October, M.T.M. was hooked such that she told the co-
14 conspirators: "aww sexi josh ur so sweet if u moved back u could
15 see me up close and personal lol" and "Heyy babe!! Call me
16 sometime 636 [xxxxxxx]! It's the cell. I love you so much."
17 (Indictment, ¶¶ 9-10).⁶ Consequently, although the indictment

18 _____
19 that the last known residences of defendants were in the Western
20 District of Washington - without more. Id. No additional detail
21 regarding how long they lived there or where in the district they
22 resided was required. In much the same way, how defendant
23 learned about the TOS and when she learned about them need not be
24 alleged so long as it is alleged that she intentionally accessed
25 the computers without authorization or in excess of her
26 authorization.

27 ⁶Contrary to defendant's suggestion, the indictment also
28 describes some of the facts that show defendant knew her conduct
violated the rules established by MySpace and intended to break
those rules. For example, the indictment alleges how defendant
and her co-conspirators sought to cover up the scheme. United
States v. Turner, 400 F.3d 491, 496-97 (7th Cir. 2005); see also
United States v. Lench, 806 F.2d 1443 (9th Cir. 1986). The
indictment describes how after learning of M.T.M.'s death,

1 need not include that information, defendant has been provided
2 with a wealth of factual information regarding the government's
3 theory of the case.

4 2. Defendant's Demand for Additional Factual Detail
5 Is Improper

6 Although defendant acknowledges that the government alleges
7 the elements of the offense, she nonetheless faults the
8 indictment for failing to identify the proof that the government
9 intends to adduce at trial regarding her scienter. (Def's Mot. 6
10 ("Where the indictment fails is the total lack of alleged facts
11 on 'intentionally,' that if proven beyond a reasonable doubt
12 would cause a conviction under § 1030".)) This is not what is
13 required by Rule 7 or due process, however. Brandon v. United
14 States, 190 F.2d 175 (9th Cir. 1951) "The indictment stage of
15 the proceedings is not the appropriate time to require the
16 Government to present its proof." Buckley, 689 F.2d at 900
17 (relying on United States v. Sampson, 371 U.S. 75, 78-79 (1962).)
18 Defendant's motion is, therefore, in effect a motion for summary
19 judgment suggesting that the government cannot adduce evidence to
20 create a triable issue of fact on one or more elements.⁷ See

21 defendant directed her co-schemers to delete the Josh Evans
22 MySpace Account to destroy any evidence of the scheme.
23 (Indictment, ¶ 16). The indictment also describes how defendant
24 instructed one witness to "keep her mouth shut" and to avoid
accessing the Josh Evans MySpace Account. (Id.)

25 ⁷ Nor would defendant's motion be properly styled as a
26 motion for a bill of particulars under Rule 7(f). A defendant is
27 not entitled to know all the evidence the government intends to
introduce at trial. Cook v. United States, 354 F.2d 529, 531
(9th Cir. 1965) (citing United States v. Yeargain, 314 F.2d 881,
882 (9th Cir. 1963)); see also United States v. Giampa, 904 F.

1 Jensen, 93 F.3d at 669 ("There is no summary judgment procedure
2 in criminal cases. Nor do the rules provide for a pre-trial
3 determination of the evidence") (citing United States v. Critzer,
4 951 F.2d 306, 307 (11th Cir. 1992)).⁸

5 Defendant's reliance on United States v. Cecil, 608 F.2d
6 1294 (9th Cir. 1979), is likewise unavailing. In Cecil, the
7 Ninth Circuit reversed defendant's conviction after concluding
8 that the six paragraph indictment in that case was insufficient.
9 Id. at 1295. Specifically, the Ninth Circuit faulted the
10 government for failing to allege any facts or circumstances
11 pertaining to the conspiracy or any overt acts done in
12 furtherance thereto. Id. "Most importantly," however, the
13 indictment failed to place the conspiracies within any time frame
14 as the indictment was "open ended" both in terms of when it
15 allegedly started and when it allegedly ended. Id. By

16 _____
17 Supp. 235, 279 (D.N.J. 1995) ("Although Rule 7(f) is to be
18 construed liberally, it does not permit a defendant to receive
19 wholesale discovery of the Government's evidence.").
20 "Ultimately, the test for validity of an indictment is not
21 whether it could have been framed in a more satisfactory manner,
22 but whether it conforms to minimal constitutional standards."
23 United States v. Schmitt, 2005 WL 2449627 at *8 (E.D. Wisc. Oct.
3, 2005). "Indeed, because a Bill of Particulars serves to
24 restrict how the government may present its case at trial, the
25 question is not whether the information sought would be
26 beneficial to the defendant, but whether it is necessary for his
27 defense." United States v. Diaz, 303 F. Supp.2d 84, 89 (D. Conn.
2004).

28 ⁸But even if the indictment did not explicitly plead that
defendant intentionally accessed protected computers without
authorization, such a deficiency would not have been fatal. "An
indictment should be: (1) read as a whole; (2) read to include
facts which are necessarily implied; and (3) construed according
to common sense." Buckley, 689 F.2 at 899 (reading into
indictment allegations in accordance with common sense).

1 implication, the defendant apparently would not have been able to
2 plead double jeopardy in a subsequent case.

3 By contrast here, the four count indictment, which covered
4 ten pages and approximately forty paragraphs and subparagraphs,
5 contained precisely the detail that was found lacking by the
6 Ninth Circuit in Cecil. In contrast to the conspiracy
7 allegations in Cecil, which were open ended in terms of time
8 frame, Count One here alleges a very definite time frame, namely,
9 a closed ended conspiracy beginning in or about September 2006
10 and ending on or about October 16, 2007. (Indictment, ¶ 14.)
11 Moreover, whereas the indictment in Cecil lacked any specific
12 factual allegations or overt acts, the indictment here alleges
13 four distinct ways in which defendant and her co-schemers
14 furthered the object of the conspiracy, (id. at ¶ 15), and twelve
15 distinct overt acts conducted in furtherance of the conspiracy.
16 Counts Two through Four likewise allege conduct on or about
17 specific dates and incorporate by reference the detailed
18 allegations contained previously.⁹ Accordingly, while the
19

20 ⁹Nor are United States v. Edmonds, 103 F.3d 822 (9th Cir.
21 1996), and United States v. Shipsey, 363 F.3d 962 (9th Cir. 2004)
22 cited by defendant, anymore availing. Edmonds did not address a
23 pre-trial challenge to the sufficiency of the pleadings; rather,
24 it dealt with a post-trial challenge to the sufficiency of the
25 evidence. 103 F.3d at 824-25. Likewise, Shipsey did not address
26 the sufficiency of an indictment, addressing instead alleged
27 instructional errors and alleged Speedy Trial violation. In
28 passing, the Ninth Circuit acknowledged the district court
dismissed five counts because the indictment failed to allege an
element of the offense. 363 F.3d at 965 n.1. Here, however,
defendant does not allege that the indictment fails to allege an
element (defendant appears to concede the elements were
adequately pled) - only that the government did not plead enough
facts. Shipsey did not reach that issue.

1 indictment in Cecil was vague and bare bones, particularly on
2 dates, the indictment here has plenty of factual detail and is
3 precise as to the time frame at issue.¹⁰

4 The implication of defendant's argument would be that
5 indictments would be pled with crushing, mind-numbing detail.
6 Indictments charging defendants with being felons in possession
7 of firearms would be forced to include excruciating detail
8 regarding the circumstances surrounding a defendant's
9 constructive possession of firearms. Indictments charging
10 defendants with possession of controlled substances with intent
11 to distribute could very well cover several pages if the
12 government were required to allege the other indicia of drug
13 dealing in defendants' possession, the factors that lead experts
14 to conclude the amounts were consistent with distribution, the

16 ¹⁰ Defendant's suggestion that the government must allege
17 (and presumably prove) "when" or "how" she viewed the terms of
18 service is misplaced. The government need only show she acted
19 with the requisite scienter and can rely on a host of factors and
20 evidence. See NINTH CIRCUIT MODEL JURY INSTRUCTIONS, 5.6 (2003) ("The
21 government is not required to prove that a defendant knew that
22 his acts were unlawful. You may consider evidence of the
23 defendant's words, acts, or omissions, along with all the other
24 evidence, in deciding whether the defendant acted knowingly."); 1
25 O'Malley, Grenig & Lee, FEDERAL JURY PRACTICE INSTRUCTIONS, §17.07 (5th
26 ed.) ("The intent of a person or the knowledge that a person
27 possesses at any given time may not ordinarily be proved directly
because there is no way of directly scrutinizing the workings of
the human mind. In determining the issue of what a person knew or
what a person intended at a particular time, you may consider any
statements made or acts [done] [omitted] by that person and all
other facts and circumstances received in evidence which may aid
in your determination of that person's knowledge or intent. You
may infer, but you are certainly not required to infer, that a
person intends the natural and probable consequences of acts
knowingly done or knowingly omitted. It is entirely up to you,
however, to decide what facts to find from the evidence received
during this trial.").

1 absence of drug using paraphernalia, transcripts of recorded
2 conversations, or other such evidence. Such factual detail would
3 then likely invite motions to strike. Fed. R. Crim. P. 7(f);
4 United States v. Ramirez, 710 F.2d 535, 544-45 (9th Cir. 1983).
5 Defendant's novel pleading rules would therefore be inconsistent
6 with Ninth Circuit authority and highly impractical.

7 B. UNITED STATES V. LAMACCHIA IS INAPT

8 Finally, defendant contends that this Court should dismiss
9 the indictment under the rationale of United States v. LaMacchia,
10 871 F. Supp. 535 (D. Mass. 1994), an out of district copyright
11 case. In LaMacchia, the district court dismissed an indictment
12 charging a defendant with wire fraud in connection with a scheme
13 to facilitate the wide scale copying of copyrighted material
14 without the consent of the rights holders. Id. at 536, 545.
15 Although the crime sounded in copyright, the defendant had been
16 charged with wire fraud presumably because, at the time, the
17 copyright statute only criminalized conduct pursued for personal
18 financial benefit and defendant had not sought to benefit himself
19 financially. Id. at 537. The district court reasoned that the
20 unique characteristics of copyright law rendered application of
21 18 U.S.C. § 1343 improper. LaMacchia, 871 F. Supp. at 542, 545.
22 The district court observed that Congress had enacted a series of
23 stepped responses to copyright violations and thereby concluded
24 that the use of the wire fraud statute threatened to upset that

1 carefully regimented regime.¹¹

2 Defendant would have this Court believe that just as in
3 LaMacchia, where the district court dismissed the indictment due
4 to an overly expansive reading of the wire fraud statute, this
5 Court should likewise dismiss the indictment due to a different
6 view of the CFAA than she is prepared to accept. The analogy,
7 however, is inapt. In LaMacchia, the district court was
8 concerned with upsetting a carefully stepped civil and criminal
9 regime involving what it believed was a unique intellectual
10 property right. LaMacchia, 871 F. Supp. at 543. By contrast
11 here, application of the CFAA would not upset a carefully
12 conceived regulatory regime. Moreover, in enacting the Act,
13 Congress explicitly stated its intent that it be used to address
14 a whole host of cyber related crimes. S. Rep. 104-357, 104th
15 Cong., 2nd Sess. 1996, at *5 ("the Computer Fraud and Abuse
16 statute facilitates addressing in a single statute the problem of
17 computer crime, rather than identifying and amending every
18 potentially applicable statute affected by advances in computer
19 technology").¹² Accordingly, LaMacchia, is inapt.

21 ¹¹ The district court even observed at one point that the
22 intellectual property rights at issue were different from other
23 property rights, presumably given the highly regimented regime.
Id. at 543.

24 ¹² Defendant also suggests that the fact that the statute has
25 not previously been used to address cyberbullying shows that the
26 statute is too vague. As explained in the government's
27 opposition to defendant's motion to dismiss for vagueness,
28 defendant's argument is fallacious. See Pennsylvania Dept. of
Corrections v. Yeskey, 524 U.S. 206, 212 (1998). Although
Section 1030 may have been in existence for some time,
cyberbullying is a relatively recent phenomenon, as are social

1 IV.

2 CONCLUSION

3 For the foregoing reasons, defendant's motion to dismiss for
4 failure to state a claim should be denied.

5 Dated: August 12, 2008

6 Respectfully submitted,

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24 _____
25 networking websites. Consequently, it is not surprising that no
26 cyberbullying cases were brought when the Act was enacted in
27 1984. But even if the crime at issue were not new, courts have
28 recognized that the government's failure to use or enforce a
statute does not result in its modification or repeal. District
of Columbia v. John R. Thompson Co., 346 U.S. 100, 113-14 (1953).