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12 UNITED STATES DISTRICT COURT
13 FOR THE CENTRAL DISTRICT OF CALIFORNIA

14
15 UNITED STATES OF AMERICA,) CR No. 08-582-GW
16 Plaintiff,)
17 v.) GOVERNMENT'S OPPOSITION TO
18 LORI DREW,) DEFENDANT'S MOTION FOR JUDGMENT
19 Defendant.) OF ACQUITTAL
20)
21)

22 Plaintiff United States of America, by and through its
23 counsel of record, United States Attorney Thomas P. O'Brien and
24 Assistant United States Attorneys Mark C. Krause and Yvonne L.
25 Garcia, respectfully files its opposition to defendant's motion
26 for judgment of acquittal pursuant to Federal Rule of Criminal
27 Procedure 29(a).
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 INTRODUCTION

4 On November 21, 2008, the government completed its case-in-
5 chief against defendant Lori Drew ("defendant"). Drew is charged
6 with (1) conspiracy to access protected computers without
7 authorization or in excess of authorized access to obtain
8 information, in violation of 18 U.S.C. § 371 (count one); and
9 (2) intentionally accessing protected computers without
10 authorization or in excess of authorized access to obtain
11 information, and doing so in furtherance of a tortious act,
12 namely, intentional infliction of emotional distress, in
13 violation of 18 U.S.C. §§ 1030(a)(2)(C) and (c)(2)(B)(ii) (counts
14 two through four).

15 At the close of the government's case, defendant moved for a
16 judgment of acquittal pursuant to Federal Rule of Criminal
17 Procedure 29(a) ("Rule 29(a)"). Defendant claims that the
18 government did not present sufficient evidence that defendant
19 knew that her accessing of the MySpace servers in Los Angeles,
20 California, was without authorization or in excess of
21 authorization because the government has not shown that defendant
22 read the MySpace Terms of Service ("TOS").¹ The Court reserved
23 judgment and took the motion under submission in order to review
24 transcripts of pertinent government witness testimony. The Court

25
26 ¹ The government concedes that it cannot prove that
27 defendant read the MySpace TOS. As discussed below, however, the
28 crimes charged do not require proof that defendant read the
MySpace TOS. The government may, as it has, show that defendant
knew her access to be unauthorized or in excess of authorized
access, by way of other evidence.

1 also requested briefing from the parties regarding the standard
2 it should apply in considering defendant's Rule 29(a) motion.

3 For the reasons described in detail below, defendant's
4 motion should be denied. First, the government is not required
5 to prove that defendant read the MySpace TOS in order prove that
6 she knew her accessing of the MySpace servers was unauthorized or
7 in excess of authorized access. Second, the government has
8 presented substantial direct and circumstantial evidence from
9 which a reasonable juror could infer that defendant knew that she
10 was accessing the MySpace computers without authorization or in
11 excess of authorization because knew her conduct in helping to
12 create a fictitious juvenile account and then use this account to
13 torment another juvenile, M.T.M., was "illegal," wrong, and in
14 violation of MySpace's rules, yet continued using the MySpace
15 account to further this conduct. Because a rational trier of
16 fact reviewing this evidence and drawing all inferences in favor
17 of the government could find that the essential elements of the
18 crimes charged have all been proven beyond a reasonable doubt,
19 the Court must deny defendant's motion.

20 II.

21 ARGUMENT

22 **A. IN RULING ON A MOTION FOR JUDGMENT OF ACQUITTAL, THE COURT** 23 **MUST DRAW ALL REASONABLE INFERENCES IN FAVOR OF THE** 24 **GOVERNMENT**

25 Rule 29(a) permits a trial court to "enter a judgment of
26 acquittal on any offense for which the evidence is insufficient
27 to sustain a conviction." In ruling on a motion for judgment of
28 acquittal, the court must review the evidence "in the light *most*
favorable to the government to determine whether 'any rational

1 trier of fact could have found the essential elements of the
2 crime beyond a reasonable doubt.'" United States v. Freter, 31
3 F.3d 783, 785 (9th Cir. 1994) (quoting Jackson v. Virginia, 443
4 U.S. 307, 319 (1979)) (emphasis added); see also United States v.
5 Iriarte-Ortega, 113 F.3d 1022, 1024 n.2 (9th Cir. 1997); United
6 States v. Bancalari, 110 F.3d 1425, 1428 (9th Cir. 1997). In its
7 review of the evidence for this purpose, the court must assume
8 that the trier of fact could resolve all credibility issues and
9 any "conflicting inferences" from the evidence in favor of the
10 government. See United States v. Johnson, 229 F.3d 891, 894 (9th
11 Cir. 2000).

12 **B. AS A MATTER OF LAW, A DEFENDANT CAN INTENTIONALLY ACCESS A**
13 **COMPUTER "WITHOUT AUTHORIZATION" OR "EXCEED AUTHORIZED**
14 **ACCESS" EVEN IF SHE DID NOT READ THE TERMS OF SERVICE THAT**
15 **DEFINE WHAT CONSTITUTES AUTHORIZED ACCESS**

16 _____Section 1030(a)(2)(C) prohibits anyone from intentionally
17 accessing a computer without authorization or in excess of
18 authorization, and thereby obtaining information from any
19 protected computer if the conduct involved an interstate or
20 foreign communication. 18 U.S.C. § 1030(a)(2)(C). In support of
21 her Rule 29(a) motion, defendant erroneously argues that the
22 government presented insufficient evidence at trial to prove that
23 defendant intentionally accessed the MySpace server without
24 authorization or in excess of authorization because the
25 government did not present evidence that defendant read the
26 MySpace TOS. Proof of that fact is not required, however.

27 The Computer Fraud and Abuse Act ("CFAA") does not
28

1 explicitly define "without authorization."² Courts have
2 routinely looked to written agreements, including TOS, to
3 determine whether access of a protected computer is authorized,
4 unauthorized, or in excess of authorization. In doing so, courts
5 have suggested that a plain meaning interpretation of "without
6 authorization" should apply. See, e.g., Calyon v. Mizuho Sec.
7 USA, Inc., 2007 WL 2618658 (S.D.N.Y. Sept. 5, 2007) ("the plain
8 language of the statute seems to contemplate that, whatever else,
9 'without access' and 'exceeds authorized access' would include an
10 employee who is accessing documents on a computer system which
11 that employee had to know was in contravention of the wishes and
12 interests of his employer"); Calence LLC v. Dimension Data
13 Holdings, 2007 WL 1526349 (W.D. Wash. May 23, 2007) (in case
14 alleging defendant breached employment and confidentiality
15 agreements in accessing and disseminating information, holding
16 "this Court has generally accepted the notion that Congress
17 intended to encompass actions such as those allegedly taken by
18 defendant"); Ticketmaster LLC v. RMG Tech., Inc., 507 F.Supp.2d
19 1096 (C.D. Cal. 2007) (Collins, J.) (violation of terms of
20 service resulted in "unauthorized access"); Hewlett-Packard Co.
21 v. Byd:Sign, Inc., No. 05-CV-456, 2007 WL 275476, at *13 (E.D.
22 Tex. Jan. 25, 2007) (defendant's conduct violated written
23 agreements regarding access and were, therefore, unauthorized);
24 America Online, Inc. v. LCGM, Inc., 46 F. Supp.2d 444, 450-51
25 (E.D. Va. 1998) (holding that massive email transmissions, or

26
27 ²Section 1030(e)(6) defines the term "exceeds authorized
28 access" as "to access a computer with authorization and to use
such access to obtain or alter information in the computer that
the accesser is not entitled to so obtain or alter."

1 "spam," sent by customers of the plaintiff were sent without
2 authorization because the emails violated the terms of service of
3 plaintiff); Hotmail Corp. v. Van\$ Money Pie, Inc., 1998 WL 388389
4 (N.D. Cal. Apr. 16, 1998) (misuse of email addresses in violation
5 of terms of service constituted "unauthorized" access). Put
6 simply, to access a computer without authorization means "to
7 access a computer without the approval, permission, or sanction
8 of the computer's owner." Gov't Proposed Jury Instruction No.
9 26; see also Webster's New World Dictionary, 3d Collegiate Ed. 92
10 (1988) (defining "authorization" as "legal power or right,
11 sanction"); [http://dictionary.reference.com /browse/authorized](http://dictionary.reference.com/browse/authorized)
12 (defining "authorization" as "permission or power granted by an
13 authority, sanction"); see also Black's Law Dictionary 1559, 143
14 8th ed. (defining "unauthorized" as "done without authority" and
15 "authorize" as "to give legal authority; to empower" and "to
16 formally approve").

17 TOS, by their very nature, define both authorized and
18 unauthorized uses of a website. Conduct in accessing a computer
19 in violation of the terms set forth by the computer's owner is
20 plainly "without the approval, permission, or sanction" of that
21 computer owner. MySpace's TOS explicitly prohibit posting the
22 photograph of a person without that person's consent, harassment,
23 abusive conduct, encouraging others to harass, and solicitation
24 of personal information from anyone under the age of 18 - all
25 activities in which defendant engaged by using the fake MySpace
26 account. (See Gov't Ex. 3.) As Jae Sung, MySpace's Vice
27 President of Customer Care, testified, these rules are necessary
28 to ensure a safe online community. MySpace even has teams of

1 employees dedicated to ensuring that members adhere to the TOS.
2 Failure to comply results in termination of services and, on
3 occasion, referral to law enforcement. MySpace's policing of its
4 website to enforce the TOS makes it clear that access that
5 involves a violation of the TOS is "without the approval,
6 permission, or sanction" of MySpace.

7 Although the point at which access becomes "without
8 authorization" or in excess of authorization is defined by the
9 MySpace TOS, defendant need not have read the TOS in order for
10 her conduct to be in violation of the law. As an initial matter,
11 the statute merely requires that defendant intend to access a
12 computer without authorization or in excess of authorization --
13 it does not explicitly mention TOS, nor does it limit in any way
14 the means by which the intent to engage in unauthorized access
15 must be established. Nothing in the statute, therefore, can be
16 read as requiring that a defendant must actually read the TOS
17 that render her access unauthorized so long as there is
18 alternative evidence from which a jury can infer this knowledge.

19 Moreover, absent from the statute is any use of the term
20 Congress has used when it intends to require actual knowledge of
21 the specific rules that render one's conduct unlawful, namely,
22 the term "willfulness." A venerable principle of criminal law is
23 that ignorance of the law is no defense to a criminal charge.
24 Cheek v. United States, 498 U.S. 192, 199 (1991). This is a
25 concept that is "deeply rooted in the American legal system."
26 Id. Where Congress has intended to soften that blow, it has done
27 so explicitly by ascribing a *mens rea* that requires the
28 defendant's conduct to be "willful." Id. at 200. The Ninth

1 Circuit has repeatedly held that where a statute does not require
2 proof of a willful violation, the government is not required to
3 prove that a defendant has knowledge of the particular law that
4 has been violated. See, e.g., United States v. Hancock, 231 F.3d
5 557, 562 (9th Cir. 2002) (affirming district court's refusal to
6 give instruction that defendant "knew that it was illegal for him
7 to possess firearms" because prosecution under 18 U.S.C. § 922(g)
8 does not require proof of willful violation). That section
9 1030(a)(2)(C) does not contain a willfulness requirement,
10 therefore, supports the government's position that it is not
11 required to prove that defendant read the TOS in order for the
12 jury to find that defendant intentionally accessed the MySpace
13 server "without authorization" or in excess of authorization, but
14 may instead prove defendant's knowledge that her access was
15 unauthorized or in excess of authorization by other means.

16 **C. THE GOVERNMENT HAS PRESENTED SUBSTANTIAL EVIDENCE THAT**
17 **DEFENDANT KNEW THAT THE CONTINUED USE OF THE MYSPACE ACCOUNT**
18 **WAS WRONG, IN VIOLATION OF MYSPACE RULES, AND ILLEGAL, YET**
CONTINUED TO MAINTAIN AND USE IT "WITHOUT AUTHORIZATION" OR
IN EXCESS OF AUTHORIZATION

19 The evidence presented by the government in its case-in-
20 chief strongly supports the inference that defendant
21 intentionally accessed the MySpace servers "without
22 authorization" or in excess of authorization because defendant
23 was placed on notice that her conduct was wrong, in violation of
24 the rules of MySpace, and illegal, yet insisted on perpetuating
25 the scheme using the fake MySpace account. Rational jurors could
26 find beyond a reasonable doubt, based upon the testimony of
27 Ashley Grills, Christina Chu, and Christina Meier that defendant
28 intentionally accessed the MySpace servers "without

1 authorization" and in excess of authorization.

2 First, defendant's co-conspirator Ashley Grills twice raised
3 concerns about the propriety of the "Josh Evans" scheme to
4 defendant and explained that their conduct was "illegal." Within
5 days of creating the fake MySpace account, both Ms. Grills and
6 defendant's own daughter, S.D., told defendant that they were
7 concerned that they would get in trouble because what they were
8 doing was "illegal."

9 Q: During the first week after you created the
10 account did anyone raise any concerns about what
you were doing?

11 A: Yes.

12 Q: And who was that?

13 A: It was both [S.D.] and I.

14 Q: And who did you raise those concerns with?

15 A: Lori.

16 Q: And what did you tell the defendant?

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

19 (Draft Grills Tr. at 14, l. 4-13 (emphasis added).) Defendant,
20 however, dismissed Ms. Grills' concerns. Defendant told her "it
21 was fine," and that "people do it all the time." (Id. at 14, l.
22 16.) (Id. at 15, l. 8-15.) Ms. Grills renewed her objections
23 later, stating she no longer wanted to be involved. (Id. at 15,
24 l. 21-22.) Despite this second warning, defendant again assured
25 Ms. Grills "that it was fine and it didn't matter and [they]
26 weren't going to get in any trouble." (Id. at 15, l. 24-25.)
27 Such evidence supports an inference that during the pendency of
28 the conspiracy, defendant was aware of the rules of MySpace, knew

1 that the scheme was illegal because it violated those rules, but
2 believed (and so assured Ms. Grills and S.D.) That she need not
3 worry about the improper conduct because of a perceived lack of
4 enforcement.

5 Similarly, when defendant visited Michael A's Hair Salon,
6 she bragged to her hairdresser, Bonnie King, about the fake
7 MySpace account. According to Dawn Chu's testimony, defendant
8 explained to Ms. King that she was posing as a boy on MySpace in
9 order to get back at an unidentified girl. Dawn Chu became upset
10 and told defendant that her conduct was wrong. Defendant did not
11 respond and instead continued to use the fake MySpace account. A
12 rational jury could infer that this represented a third time that
13 defendant was placed on notice that her conduct in creating and
14 using the fake MySpace account was wrong and illegal, and that
15 defendant's ongoing persistence in using the fake MySpace account
16 represented intentional access of the MySpace servers "without
17 authorization" or in excess of authorization.

18 Second, defendant's actions upon learning that M.T.M. had
19 committed suicide are evidence of consciousness of guilt that
20 further demonstrate defendant's knowledge that her use of the
21 MySpace account was unauthorized. After Grills and daughter S.D.
22 investigated the cause of the ambulances at the Meier home and
23 told defendant that M.T.M. had committed suicide, defendant "was
24 kind of quiet for a minute and then her husband started yelling
25 at [Grills and S.D.] to get rid of the MySpace and then
26 [defendant] started yelling at [Grills and daughter S.D.] to get
27 rid of the MySpace." (Draft Grills Tr. at 22, l. 9-11.) The
28 fact that, immediately after M.T.M.'s death, defendant took steps

1 to evade detection by law enforcement by seeking to destroy
2 evidence of the fake MySpace account clearly supports an
3 inference that defendant knew that it was her use of the MySpace
4 account that rendered her conduct illegal because that use was
5 unauthorized. Leathers v. United States, 250 F.2d 159, 159, 162
6 (9th Cir. 1957) (destruction of tax records relevant to
7 defendant's knowledge of illegal conduct; citing Wigmore on
8 Evidence); see also United States v. James, 764 F.2d 885, 890
9 (D.C. Cir. 1985) (destruction of evidence relevant to defendant's
10 knowledge of illegal conduct related to drug trafficking); United
11 States v. Robinson, 635 F.2d 981 (2d Cir. 1980) (destruction of
12 passport relevant to defendant's knowledge of illegal conduct).
13 Defendant, after all, did not instruct her co-conspirators to
14 destroy the evidence of other modes of electronic communication
15 used in communicating with M.T.M., like AOL Instant Messenger,
16 Xanga, or Yahoo! Messenger, thus demonstrating her knowledge that
17 the use of the fake MySpace account was materially different and
18 more culpable, precisely because that use was so patently
19 unauthorized and wrong. Evidence regarding consciousness of
20 guilt, combined with the fact that defendant was placed on notice
21 multiple times that her conduct was wrong, would enable a
22 rational jury to infer that defendant persisted in using the fake
23 MySpace account with the required intent of accessing the MySpace
24 servers "without authorization" and in excess of authorization.

25 Finally, defendant was aware that S.D. had set up her own
26 fake MySpace account prior to the summer of 2006. Ms. Meier
27 testified that, prior to creation of the "Josh Evans" MySpace
28 account, M.T.M. and S.D. created a different MySpace account

1 using the fake name "Kelly." (Draft Meier Tr. at 115, l. 20;
2 116, l. 8.) The girls portrayed "Kelly" as an 18 year old woman.
3 The girls established the "Kelly" account so that they could
4 "talk to boys." (Id. at 116, l. 9.) After learning about the
5 "Kelly" MySpace account, Ms. Meier contacted defendant "and told
6 her that Megan was not allowed on the computers at [the Drew]
7 home." (Id. at 117, l. 10-11.) Soon thereafter, defendant
8 changed S.D.'s cellphone number because boys from various states
9 had obtained the number through the "Kelly" MySpace account and
10 had actually contacted S.D. (Id. at 117, l. 19-24.)

11 Rational jurors could infer that this incident alerted
12 defendant to the risks posed by the Internet and, specifically,
13 MySpace. In addition, Ms. Meier called defendant after Ms. Meier
14 discovered the "Kelly" MySpace account and instructed her not to
15 allow M.T.M. to use the computers in the Drew home, supporting
16 the inference that Ms. Meier placed defendant on notice that S.D.
17 and M.T.M. did something wrong by creating the fake "Kelly"
18 MySpace account. Despite learning this, defendant nevertheless
19 created the fake "Josh Evans" MySpace account. A rational jury
20 viewing this evidence, as well as the fact that defendant was
21 placed on notice multiple times that her conduct was wrong, and
22 sought to destroy evidence of the fake "Josh Evans" MySpace
23 account once she learned of M.T.M.'s suicide, in the light most
24 favorable to the government, could infer that defendant used the
25 fake MySpace account with the required intent of accessing the
26 MySpace servers "without authorization" and in excess of
27 authorization.

28 //

1 III.

2 **CONCLUSION**

3 For the foregoing reasons, the government respectfully
4 requests that the Court deny defendant's motion for judgment of
5 acquittal pursuant to Rule 29(a).

6 Dated: November 23, 2008

7 Respectfully submitted,

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