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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 FOR VAGUENESS;
POINTS AND AUTHORITIES; EXHIBIT

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

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1 **TABLE OF AUTHORITIES**

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4 City of Chicago v. Morales 527 U.S. 41 (1999) 5, 10, 12

5 Hamling v. U.S. 418 U.S. 87 (1974) 8

6 McBoyle v. U.S. 283 U.S. 25 (1931) 8

7 Russell v. U.S. 369 U.S. 749 (1962) 8

8 U.S. v. Resendez-Ponce 127 S.Ct. 782 (2007) 8

9 U.S. v. Mills 32 U.S. (7 Pet.) 138 (1833) 9

10 American Family Mut. Ins. Co. v. Rickman

11 F.Supp. 2d 2008 WL 1805798 (N.D. Ohio 2008) 9

12 EF Cultural Travel BV v. Explorica 274 F.3d 577

13 (1st Cir, 2001) 9

14 U.S. v. Cecil 608 F.2d 1294 (9th Cir. 1979) 8

15 U.S. v. Edmonds 103 F.3d 822 (9th Cir. 1996) 6

16 U.S. v. Keith 605 F.2d 462 (9th Cir. 1979) 8

17 U.S. v. Krasovich 819 F.2d 253 (9th Cir. 1987) 9

18 U.S. v. Sablan 92 F.3d 865 (9th Cir. 1996) 7

21

22 Other Authorities:

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24 Statutes and Rules

25 18 USC §1030(a)(2)(C) 5, 6, 8, 9, 10, 11

26 FRCP 12(b) 4

27 /

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1 *Cybercrime's Scope: Interpreting "Access" and "Authorization" in*
2 *Computer Use Statutes*, Kerr,
3 78 N.Y.U.L.Rev. 1596 (2003) 9, 11
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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 alleges no crime. In the alternative,
6 it is vague and 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
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1 **POINTS AND AUTHORITIES**

2
3 I. BACKGROUND

4 In its 22-year history, the Computer Fraud and Abuse Act has
5 never before been used to criminally punish the violation of a
6 website Terms of Service. The government's novel theory is that
7 the statute prohibits the violation of essentially all Terms of
8 Service [hereinafter TOS] that apply to essentially all computers
9 connected to the Internet.

10 As a matter of statutory construction, the government's far-
11 reaching argument is either right or wrong. In either case,
12 however, the indictment must be dismissed. If the government's
13 statutory construction is wrong, the statute did not reach Lori
14 Drew's conduct and the indictment must be dismissed because the
15 crime has not been committed. If the government's statutory
16 construction is correct and the statute criminalizes violating a
17 website TOS, then the statute is void for vagueness because it
18 fails to provide warning of what is prohibited and ensures
19 discriminatory enforcement under City of Chicago v. Morales 527
20 U.S. 41, 56 (1999).

21 II. FACTS

22 The government alleges that defendant violated the Computer
23 Fraud and Abuse Act, 18 USC §1030(a)(2)(C) and (c)(2)(B)(ii)
24 [hereinafter §1030]. According to the indictment, Ms. Drew
25 conspired and did use a computer to gain information, such access
26 having been unauthorized. The lack of authorization, under the
27 government's theory, was that Ms. Drew and/or others violated the
28 TOS in several ways. Ms. Drew also allegedly over-saw the creation

1 of a MySpace account for a fictitious boy called Josh Evans, and
2 did so to "obtain information". The government also alleges that
3 Ms. Drew had some role in the sending of a harsh e-mail to a 13
4 year old individual, one M.T.M., who then took her own life,
5 apparently shortly after receiving the e-mail.

6 In any pre-trial challenge to the legal vitality of an
7 indictment, the court in general must view the evidence most
8 favorably for the government's case, and assume for purposes of
9 analysis of the issue that the government can prove all facts
10 alleged in the indictment. U.S. v. Edmonds 103 F.3d 822 (9th Cir.
11 1996).

12 While these facts must be assumed to be provable at trial for
13 the limited purpose of this motion, the defense has and will
14 critically dispute them.

15 III. THE LAW

16 A. *GOVERNMENT'S CONSTRUCTION OF THE STATUTE IS WRONG- NO CRIME* 17 *HAS BEEN COMMITTED*

18 The government's construction of §1030 is wrong, in that
19 the facts alleged in the indictment do not amount to a violation of
20 §1030, giving the government their best view of those facts. The
21 statute, in relevant part, has the following elements:

- 22
- 23 ♦ intentionally accessing a computer
 - 24 ♦ without authorization or exceeds authorization
 - 25 ♦ and obtains information
 - 26 ♦ from a protected computer
 - 27 ♦ involving interstate or foreign commerce

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The statute has not been violated by the conduct alleged in the indictment.

The failures are the lack of facts alleged that, if proven, would fulfill the government's obligation to prove an intentional accessing, and unauthorized accessing. As the defense contends in a companion motion to this one, the indictment alleges no facts supporting the claim that Lori Drew and/or others intentionally violated the TOS of MySpace. That is, it was their conscious object to have violated the TOS. This is a required element of §1030. U.S. v. Sablan 92 F.3d 865 (9th Cir. 1996).

The indictment also fails to allege that Ms. Drew and/or her co-conspirators were aware or had specific knowledge of the TOS for the "unauthorized" element of the offense. By the government's theory, defendant and others must intentionally access in an unauthorized manner a protected computer. Unless some type of strict liability is utilized, one must be aware of the TOS in order to violate it and therefore be "unauthorized". Again, no such facts are set out.

With no facts alleged on these two elements, the conduct that is alleged is simply not criminal.

B. EVEN IF THE GOVERNMENT'S CONSTRUCTION OF THE STATUTE IS CORRECT, THE INDICTMENT STILL MUST BE DISMISSED FOR VAGUENESS

"It is reasonable that a fair warning should be given to the world in language that the common world

1 will understand, of what the law intends to do if a certain
2 line is passed. To make the warning fair, so far as
3 possible the line should be clear.”
4

5 McBoyle v. U.S. 283 U.S. 25, 27 (1931), J. Holmes
6

7 An indictment must furnish the defendant with a sufficient
8 description of the charges against him to enable him to prepare his
9 defense, to ensure that the defendant is prosecuted on the basis of
10 facts presented to the grand jury, to enable him to plead jeopardy
11 against a later prosecution, and to inform the court of the facts
12 alleged so that it can determine the sufficiency of the charge.

13 Russell v. United States, 369 U.S. 749, 768 n. 15, (1962); U.S. v.
14 Resendez-Ponce 127 S.Ct. 782, 788 (2007); United States v. Keith
15 605 F.2d 462, 464 (9th Cir. 1979).

16 To perform these functions, the indictment must set forth the
17 elements of the offense charged and contain a statement of the
18 facts and circumstances that will inform the accused of the
19 specific offense with which he is charged. Hamling v. U.S. 418 U.S.
20 87 (1974); U.S. v. Cecil 608 F.2d 1294, 1296 (9th Cir. 1979).

21 The application of §1030 does not give the required “fair
22 warning”. The terms in the statute are vague, and a reasonable
23 person could never know whether their conduct violates the statute.
24 When the stakes involve potential federal prison time, the need for
25 the “fair warning” is all the greater.

26 1. “ACCESSING”
27
28

1 Federal statutes do not define "access". §1030, despite having
2 a large definitional section, fails to define "access". The meaning
3 of the term is not clear.

4 For example, if one sends an e-mail to a server, wishing to
5 log on to a password protected computer, and that computer sends
6 back an access page, is that "access"? "This would not access the
7 computer from a virtual perspective. As it would be something like
8 walking up to a locked door but not yet trying the key."

9 *Cybercrime's Scope: Interpreting "Access" and "Authorization" in*
10 *Computer Use Statutes*, Kerr, 78 N.Y.U.L.Rev. 1596 (2003).¹

11 It seems that different definitions can apply to different
12 factual scenarios. Courts have wrestled with the definition of
13 "access" in the computer world over the last few years. See, for
14 example, American Family Mut. Ins. Co. v. Rickman ___ F.Supp.2d
15 ___, 2008 WL 1805798, (N.D.Ohio, 2008), where the district court
16 examines, among other issues, "access" under the facts presented in
17 that case.

18 These uncertainties make the terms used in this indictment
19 vague. Any charging document must allege the offense or offenses
20 "with clearness, and all necessary certainty, to apprise the
21 accused of the crime with which he stands charged." U.S. v. Mills
22 32 U.S. (7 Pet.) 138, 142 (1833); U.S. v. Krasovich 819 F.2d 253,
23 254-55 (9th Cir. 1987). The indictment here fails this requirement.

24 2. "UNAUTHORIZED"

25
26 ¹ Professor Orin Kerr's article examines, inter alia, the various
27 approaches by different state and federal courts to the meaning of
28 "access". See p. 1616-1621. The definition of "without
authorization", "has proven to be elusive." EF Cultural Travel BV
v. Explorica 274 F.3d 577,582 (1st Cir. 2001), n. 10.

1 Nowhere in the statute is the term "unauthorized" defined. The
2 government claims that a violation of the TOS makes access
3 unauthorized, and therefore criminal. Surely the government will
4 concede that, standing alone, a violation of a TOS is not a
5 criminal act. The government's theory in the indictment fails to
6 set out how the next step, from TOS violation to §1030 criminal law
7 violation, occurs.

8 Basing a lack of authorization on a violation of TOS presents
9 multiple problems. Are *all* TOS violations enough to render the
10 accessing unauthorized, or only material breaches? Must the terms
11 of the TOS be reasonable? What if these terms are racist, illegal
12 themselves or call for violence? Does the violation of such TOS's
13 still render access unauthorized? These questions render the term
14 "unauthorized" hopelessly vague.

15 3. *ARBITRARY AND DISCRIMINATORY ENFORCEMENT*

16 This statute is also impermissibly vague because it fails to
17 establish standards for the police and public that are sufficient
18 to guard against the arbitrary deprivation of liberty interests.
19 City of Chicago v. Morales, supra. If the government's view of
20 §1030 is correct, millions of Americans violate the statute every
21 day, and may or may not be subjected to prosecution.

22 The government, in its zeal to charge Lori Drew with
23 *something, anything,*² has tried to criminalize everyday, ordinary
24 conduct: wayward or misuse of a social network Website. After this
25 statute has been on the books 22 years, the government has chosen
26

27 ² Both the local prosecutors in St. Louis and the U.S. Attorneys
28 Office in St. Louis looked at these facts and decided that no crime
had been committed. See attached Exh. "A".

1 to indict only Lori Drew for this type of alleged conduct, proving
2 that this is arbitrary enforcement of §1030. The government's
3 interpretation of this statute "could potentially make millions of
4 Americans criminally liable for the way they send e-mails and surf
5 the Web." *Cybercrime's Scope: Interpreting "Access" and*
6 *"Authorization" in Computer Use Statutes*, supra at p. 1599.

7 The vagueness of the terms in the statute is what allows the
8 government to twist these facts to try to show a violation of
9 §1030.

10 *4. DUE PROCESS/NOTICE*

11 In today's world, it is difficult, if not impossible, for a
12 typical computer user to know whether or not he or she is in
13 compliance with detailed TOS such as MySpace. Like rental car
14 agreements, few if any people read them in the first place. Those
15 who do carefully review the TOS agreement are hard-pressed to
16 understand the terms without a law degree.

17 The problem is compounded by what the government's theory
18 tries to do here. They maintain that *any* violation of these
19 detailed TOS makes access to the site unauthorized, and therefore
20 criminal. This flatly violates any notion of due process under the
21 constitution, and thrusts most computer users into potential
22 criminal conduct. The government's theory is therefore both vague
23 and ripe for discriminatory enforcement. Either evil corrupts the
24 statute and requires dismissal of this indictment.

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1 IV. CONCLUSION

2 The conduct alleged in the indictment is not criminal. The
3 government does not allege facts that, if proven, amount to a
4 violation of §1030.

5 Even if the government's view of §1030 and these facts is
6 correct, the indictment still must be dismissed. A fundamental
7 purpose of a criminal law is to describe harmful conduct and then
8 **clearly** and **directly** proscribe it. As set out above, vague terms
9 "fail to provide the kind of notice that will enable ordinary
10 people to understand what conduct it prohibits." City of Chicago v.
11 Morales, supra at p. 56.

12 The lack of criminal conduct and the vague terms of the
13 indictment require dismissal.

14
15
16 Dated: July 23, 2008

17 San Clemente, California

s./ H. Dean Steward

H. Dean Steward
Counsel for Defendant
Lori Drew

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE

Date: 03/21/2007

To: St. Louis

From: St. Louis

Squad 8 / St. Charles RA

Contact: SA [REDACTED]

Approved By: [REDACTED]

Drafted By: [REDACTED]

Case ID #: [REDACTED]

Title: LORI DREW;

ASHLEY GRILLS;

[REDACTED]
O'FALLON, MISSOURI;

INTERNET EXTORTION/CYBER STALKING

Synopsis: Close Case.

Details: On 03/20/2007, SA [REDACTED] met with AUSA [REDACTED] regarding the captioned case. During the meeting, it was decided that the captioned case should be declined for federal prosecution.

In the opinion of AUSA [REDACTED] and SA [REDACTED] the captioned case did not meet all the elements required with regards to the two federal violations being considered.

There are no out standing leads in this case and there is no bulky evidence to return.

St. Louis considers this case closed.

♦♦

080bcc02.ec

Exhibit "A"

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 H. Dean Steward

21 H. Dean Steward
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