

Office of the Attorney General
Washington, D. C. 20530

November 17, 2009

The Honorable Nancy Pelosi
Speaker
U. S. House of Representatives
Washington, DC 20515

Re: *United States v. Lori Drew*, No. CR 08-582-GW (C.D. Cal.), 2009 WL 2872855

Dear Madam Speaker:

Pursuant to 28 U.S.C. § 530D, I am writing to advise you of our determination not to appeal from a district court's decision to set aside misdemeanor convictions under the Computer Fraud and Abuse Act ("CFAA") on constitutional grounds. The district court granted a judgment of acquittal based on its conclusion that "basing a CFAA misdemeanor violation [under] 18 U.S.C. §§ 1030(a)(2)(C) and 1030(e)(2)(A) upon the conscious violation of a website's terms of service runs afoul of the [due process] void-for-vagueness doctrine." The government filed a notice of appeal but plans to dismiss its appeal in this case. The government will of course continue to defend the constitutionality of the CFAA, notwithstanding the district court's as-applied decision in this case. A copy of the district court's decision is enclosed.

In September 2006, defendant Lori Drew and two others agreed on a scheme to use the social networking site "MySpace" to humiliate thirteen-year-old Megan Meier, a rival of Drew's daughter. Drew and her co-schemers created a false MySpace profile that appeared to belong to an attractive boy named "Josh Evans." They then contacted Megan Meier through the website using the "Josh Evans" identity and flirted with her. Later they had "Josh" tell Meier that he was moving away, then that he no longer liked her, and finally that "the world would be a better place without her in it." Following those events, Meier committed suicide.

Drew was charged with one count of conspiracy, in violation of 18 U.S.C. § 371, and three felony counts of unauthorized access to a protected computer, in violation of 18 U.S.C. § 1030(a)(2)(C). The indictment alleged that Drew's conduct in accessing the MySpace servers to send communications to Meier and to collect information about her was "unauthorized" and "in excess of authorization" under the terms of the statute because her actions violated the written terms of service for that website. The terms of service prohibited "criminal or tortious activity," which would include "using any information [from MySpace] in order to harass, abuse or harm another person," among other things.

Drew moved to dismiss the indictment, arguing that the statute as construed by the government was too vague to provide fair warning of what conduct was prohibited. The district court denied the motion, reasoning that because a felony violation of the statute required proof that the defendant intended to further a tortious act, the statute provided sufficient notice. The jury found Drew not guilty of the felony violations of Section 1030(a)(2)(C), but convicted her of the lesser-included misdemeanor violations, which do not require proof of an intent to commit a tortious act. The jury hung on the conspiracy count, which was later dismissed at the request of the government.

On August 28, 2009, the district court granted a defense motion for judgment of acquittal on the three remaining misdemeanor convictions. The court held that the statute as applied in this case was unconstitutionally vague, because it failed to give clear notice of the prohibited conduct and because it failed to properly constrain prosecutorial discretion. *United States v. Drew*, 2009 WL 2872855 (C.D. Cal. 2009). The court reasoned that, if a misdemeanor conviction could be based only on violations of a website's terms of service, ordinary citizens would not know when their conduct was criminal, and website owners would be allowed to define criminal conduct. The court also concluded that because websites' terms of service often prohibit a wide variety of both trivial and serious conduct, basing criminal charges on any intentional violation of terms of service would transform many unsuspecting Internet users into criminals "with absolutely no limitation of criteria as to which of the breaches should merit prosecution." *Id.*, 2009 WL 2872855 at *17.

Two weeks later, the Ninth Circuit Court of Appeals held in an unrelated case that an employee who was permitted to access certain financial records in the course of his employment did not violate Section 1030(a)(2) when he used a company computer to transmit those documents to his personal email account. *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1133-35 (9th Cir. 2009). The court warned against interpreting the CFAA's criminal liability provisions in unexpected ways, and it reasoned that "[i]f the employer has not rescinded the defendant's right to use the computer, the defendant would have no reason to know that making personal use of the company computer in breach of state law fiduciary duty to an employer would constitute a criminal violation of the CFAA." *Id.* at 1135.

The district court's decision in this case is limited to the misdemeanor provisions of the statute, and the court specifically found that felony violations of the statute in the same circumstances would comport with due process. The decision's reach is further limited because the ruling depends in part on what the district court described as the "expansive and elaborate scope" of the MySpace terms of service. Those considerations significantly limit the application of the court's reasoning. An appeal to the Ninth Circuit would expose the government to the risk of a broader constitutional ruling that constituted precedent in the Ninth Circuit, constraining further applications of the CFAA, including in felony cases. Furthermore, the Ninth Circuit's recent decision in *LVRC Holdings* presents a significant obstacle to a successful appeal. If the court of appeals were to conclude that Drew's use of the MySpace website was not "unauthorized" and that she would have had no reason to believe that violating MySpace's terms of service was criminal

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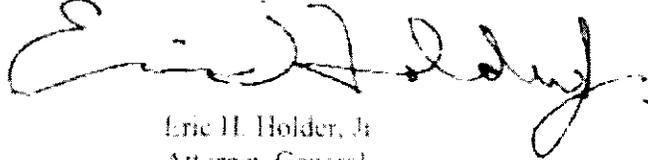
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conduct, as seems likely given *LIRC*, the court would have a basis for affirming the judgment of acquittal on statutory grounds without reaching any constitutional issue. Even a successful appeal of this judgment would likely only result in a probationary sentence. The dangers of taking an appeal, particularly to the prospects for future prosecutions under the CFAA, thus outweigh any realistic benefits of that action.

While we concluded that it was prudent to forego an appeal in this particular case, the Department of Justice will continue to vigorously enforce the Computer Fraud and Abuse Act and to defend its constitutionality in other cases.

Please let me know if we can be of further assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric H. Holder, Jr.", written in a cursive style.

Eric H. Holder, Jr.
Attorney General

Enclosure