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“MYSFACE MOM” ASKS COURT NOT TO STRETCH FEDERAL CRIME BEYOND CONGRESS’ INTENT

by WILLIAM TASCH

When a person engages in indisputably despicable behavior, and a child dies as a result, does it matter if she is convicted under a statute that was never intended to cover the particular situation? This is the question that George Wu, Federal District Judge in the Central District of California, must confront in the case of a Missouri woman whose severe cyber-bullying drove a 13-year-old girl to suicide.

The woman, Lori Drew, and Ashley Grills, an 18-year-old family friend, opened a MySpace account posing as a 16-year-old boy named “Josh Evans.”¹

The account was opened solely for the purpose of harassing the victim, Megan Meier, who had gotten in a tiff with Drew's daughter at school.² Drew and Grills, as "Josh," flirted with Meier and lured her into an online relationship.³ About a month later, "Josh" broke off the relationship and turned vindictive.⁴ Shortly after receiving a message from Josh telling her that "the world would be a better place without you," Meier hanged herself.⁵

Prosecutors in Missouri investigated the incident, but concluded that Drew and Grills' conduct was not prohibited under the state's criminal code.⁶ "We did not have a charge to fit it," Lt. Craig McGuire, the spokesman for the local sheriff's department told the *Suburban Journals* newspaper.⁷ "I don't know that anybody can sit down and say, 'This is why this young girl took her life.'"⁸

Later, Thomas P. O'Brien, United States Attorney in the district of California where MySpace servers are located, found a charge.⁹ His office indicted Drew under the Computer Fraud and Abuse Act (CFAA).¹⁰ The CFAA was intended to extend and more clearly define crimes prohibiting malicious computer hacking.¹¹ Drew's conduct was illegal access of a computer system under the CFAA, O'Brien argued, because Drew had accessed MySpace servers using a false identity, which is in violation of MySpace terms of service.¹² The jury found Drew guilty on this theory.¹³ Now the judge must decide whether, as a matter of law, the verdict can stand.¹⁴

The case has incited widespread debate, and raised questions about how far a court should stretch a statute to cover unpredicted circumstances begging for recognition under the law.¹⁵ Many are satisfied that Drew's conviction now makes her eligible for a 20 year maximum sentence, and are willing to overlook the fact that the statute was not originally intended to apply to her situation.¹⁶

Many legal scholars, however, worry about the precedent that Drew's conviction might set. According to the prosecution's theory of the case, anyone who has misrepresented any information about themselves in a website registration form would be guilty of a federal crime. It would be illegal to violate the terms of service of a website, essentially giving individual websites the ability to define crimes under the Act. This, the scholars argue, could not have been Congress' intent.¹⁷

UNAUTHORIZED ACCESS?

Congress passed the CFAA in 1986 to equip prosecutors with the power to punish malicious computer hackers seeking sensitive data from computer systems.¹⁸ The Senate Judiciary Committee report recommending passage clarified that the law was aimed at “a new type of criminal—one who uses computers to steal, to defraud, and to abuse the property of others.”¹⁹

The provisions relevant to the Drew case remain the same as they were in 1986.²⁰ The jury convicted Drew of “intentionally access[ing] a computer without authorization or exceed[ing] authorized access, and thereby obtain[ing]. . . information from any” computer used in interstate commerce or communication.²¹ Drew accessed MySpace servers without authorization, the indictment alleged, by using MySpace in violation of MySpace Terms of Service (TOS). The TOS require, *inter alia*, MySpace users to give truthful registration information and to refrain from harassing behavior.²²

The indictment further alleged that Drew’s violation of the CFAA was done in furtherance of a tortious act, namely, intentional infliction of emotional distress.²³ This would upgrade the crime to a felony.²⁴

The judge instructed the jury that “access without authorization” “means to access a computer without the approval, permission or sanction of the computer’s owner.”²⁵ The jury convicted Drew of unauthorized access, though it did not find her violation to be in furtherance of intentional infliction of emotional distress.²⁶

After the trial and the jury’s decision, Judge Wu agreed to hear a post-verdict Rule 29 motion for judgment of acquittal.²⁷ He considers this motion currently.

USING WEBSITE TERMS OF SERVICE TO DELINEATE THE SCOPE OF CRIMINAL LAW

Drew’s legal team focuses its argument on the limits that courts have traditionally placed when a crime is defined as committing an act without consent or authorization.²⁸ Orin Kerr, a George Washington University Law Professor and former Justice Department technology crime prosecutor, volunteered to

represent Drew as post-verdict counsel *pro bono*.²⁹ In his supplemental brief, Kerr argues that “[a] website Terms of Service can define the contract between owner and user, but it does not define the scope of criminal law.”³⁰ The contrary holding risks rendering millions of internet users into federal criminals, Kerr cautioned.³¹

In response, the Government asserts that the plain terms of the CFAA support the verdict, and pointed to a number of cases where lower courts have held that exceeding the computer system owner’s TOS constituted “unauthorized access,” giving rise to civil liability under the CFAA.³² The government further argued that Drew’s reference to the millions of TOS violations which occur on a daily basis essentially boils down to an “everybody does it” argument which the court should not endorse.³³

Outside the courtroom, the legal opposition to Drew’s verdict bred controversy and occasionally emotional outrage. Some observers believe the verdict should be upheld because it had a positive result. Parry Aftab, an attorney who advocates for online child safety, told MSNBC that it was “about time that there was some justice” coming out of the circumstances surrounding Meier’s death.³⁴

Meier’s mother herself has spoken out in support of the prosecution. The day of the indictment, the elder Meier recounted disappointment when the local prosecutor in Missouri brought no charges, and expressed gratitude that “some court system finally sees that there is some criminal justice here.”³⁵

Numerous policy and legal analysts warn, however, that upholding Drew’s conviction could set dangerous precedent. “Drew’s conduct was irresponsible, but it was not criminal,” writes Andrew M. Grossman, Senior Legal Analyst at the Heritage Foundation.³⁶

Matthew L. Levine, a former federal prosecutor and current defense attorney, told the Associated Press: “[u]nfortunately, there’s not a law that covers every bad thing in the world. It’s a bad idea to use laws that have very different purpose.”³⁷ The fear is that the Government’s theory allows website operators, rather than legislatures, to define criminal conduct under the CFAA.

CREATIVE LEGAL SOLUTIONS IN A LEGISLATION VACUUM

Despite disagreements about whether CFAA should be construed to prohibit Drew's conduct, most agree that there "ought to be a law" more squarely addressed at cyber-bullying. Indeed, Meier's home state of Missouri has since adopted such a law, but a similar bill introduced in Congress was quietly defeated last year.³⁸

In the absence of nationwide legislative protection, the attorneys general from 49 states and the District of Columbia entered agreements with officials from MySpace and Facebook last year which require the adoption of more robust child-protection measures.³⁹ Under the agreements, the companies must more actively police malicious user activity occurring on their sites.⁴⁰ MySpace and Facebook are also required to erect technical barriers on their sites which, *inter alia*, prevent children's profiles from being searched and ensure that children cannot register as adults.⁴¹

Though most agree these steps are beneficial, they do not offer perfect protection. For those that circumvent the counter-measures, the sites can do little more than ban the individual from further use. The sites can cooperate with prosecuting authorities to punish the individual, but, as Drew's case illustrates, these authorities need the right legislation in place in order to be successful. Where legislators have not taken action, prosecutors, judges, and regulators must do what they can with the authority they have, and may be asked again to risk stretching that authority to the breaking point.

NOTES

1 Jennifer Steinhauer, *Woman Indicted in MySpace Suicide Case*, N.Y. TIMES, May 16, 2008, available at <http://www.nytimes.com/2008/05/16/us/16myspace.html>. Joann Brady, *Exclusive: Teen Talks About Her Role in Web Hoax that Led to Suicide*, GOOD MORNING AM., Apr. 1, 2008, <http://abcnews.go.com/GMA/story?id=4560582&page=1>. Grills, who herself had to be hospitalized for attempting suicide after Meier's death, later agreed to testify for the government against Drew.

2 Steinhauer, *supra* note 1; Brody, *supra* note 1.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Prosecutor closes case on Internet suicide: Says no laws apply to bring charges*, CHI. TRIB., Dec. 4, 2007, at 4.

- 7 Steve Pokin, *'My Space' Hoax ends with suicide of Dardenne Prarie teen*, SUBURBAN JOURNALS, Nov. 11, 2007, available at http://suburbanjournals.stltoday.com/articles/2007/11/11/news/sj2tn20071110-1111stc_pokin_1.ii1.txt.
- 8 *Id.*
- 9 See Indictment at 1-10, United States v. Lori Drew, No. CR-08-582-GW (C.D. Cal. 2008), available at <http://news.findlaw.com/nytimes/docs/cyberlaw/usdrew51508ind.pdf>.
- 10 *Id.*
- 11 See S. COMM. ON THE JUDICIARY, COMPUTER FRAUD AND ABUSE ACT OF 1986, S. Rep. No. 99-432 (1986), reprinted in 1986 U.S.C.C.A.N. 2479, 2479-80 [hereinafter SENATE JUDICIARY COMMITTEE CFAA REPORT] (explaining that the CFAA was being passed in response to a number of high profile and highly damaging computer hacking attempts which seemed to present a growing danger to government and financial computer systems); William J. Hughes, *Computer Crime Isn't a Game*, WASH. POST, Jul. 15, 1986, at A19.
- 12 Indictment, *supra* note 9, at 8-10.
- 13 Government's Response to Defendant's Supplement to Rule 29 Motion at 1, United States v. Lori Drew, No. CR-08-582-GW (C.D. Cal. 2008), available at <http://volokh.com/files/DrewResponse.pdf>.
- 14 Supplement to Rule 29 Motion, United States v. Lori Drew at 2, No. CR-08-582-GW (C.D. Cal. 2008), available at <http://volokh.com/files/Supplement29.pdf>.
- 15 Don Aucoin, *Control p's + q's*, BOSTON GLOBE, Feb. 21, 2009, available at http://www.boston.com/lifestyle/articles/2009/02/21/control_ps_qs/?page=1; see also Leslie Harris, *You May Already Be a Criminal*, ABC NEWS, May 22, 2008, available at <http://abcnews.go.com/Technology/story?id=4903596&page=1>; ANDREW M. GROSSMAN, THE HERITAGE FOUNDATION, *THE MYSPACE SUICIDE: A CASE STUDY IN OVERCRIMINALIZATION*, 2-3 (2008).
- 16 See, e.g. *Breaking News* (MSNBC television broadcast May 15, 2008) (interview with Parry Aftab, who advocated in favor of the ruling).
- 17 See, e.g., GROSSMAN, *supra* note 15.
- 18 Hughes, *supra* note 11; SENATE JUDICIARY COMMITTEE CFAA REPORT, *supra* note 11, at 2479-80.
- 19 See S. COMM. ON THE JUDICIARY, COMPUTER FRAUD AND ABUSE ACT OF 1986, S. Rep. No. 99-432 (1986), reprinted in 1986 U.S.C.C.A.N. 2479, 2479-80 (explaining that CFAA was being passed in response to a number of high profile and highly damaging computer hacking attempts that seemed to present a growing danger to government and financial computer systems).
- 20 *Id.* at 2480.
- 21 18 U.S.C. § 1030(a)(2)(c), (e)(2)(b) (2006).
- 22 Indictment, *supra* note 9, at 4-5. The prosecutor also included a conspiracy charge, charging that Drew, her daughter, and her daughter's friend had committed the alleged crimes as co-conspirators. *Id.* at 1-8. This charge was later dismissed after the jury failed to reach a verdict on it. Joel Currier, *Prosecutor Dismisses Felony Charge Against Lori Drew in MySpace Case*, ST. LOUIS-DISPATCH, Dec. 31, 2008, available at <http://www.stltoday.com/stltoday/news/stories.nsf/stcharles/story/B0C034B2BD4F2FBC862575300071D769?OpenDocument>.
- 23 Indictment, *supra* note 9, at 10.
- 24 18 U.S.C. § 1030(c)(2)(b)(ii).
- 25 Government's Response to Defendant's Supplement to Rule 29 Motion, *supra* note 13 at 4.
- 26 Chris Ayres, *'MySpace Bully' Lori Drew Escapes Felony Charges over Suicide of Megan Meier*, TIMES (LONDON), Nov. 27, 2008, available at http://technology.timesonline.co.uk/tol/news/tech_and_web/the_web/article5246833.ece.

27 Posting of Kim Zetter to Threat Level, <http://blog.wired.com/27bstroke6/2008/11/loridrew-pla-4.html> (Nov. 21, 2008, 18:19:18 EST) (Wired Magazine blog).

28 Supplement to Rule 29 Motion, *supra* note 14.

29 Kerr is a recurring contributor to the well-known Volokh Conspiracy blog. In a humorous illustration of his view of the jury verdict, Kerr posted new terms of use for visitors of the Volokh Conspiracy— “[a]ny accessing the Volokh Conspiracy in a way that violates these terms is unauthorized, and according to the Justice Department is a federal crime that can lead to your arrest and imprisonment for up to one year for every visit to the blog”:

1. You will not post comments that are abusive, profane, or irrelevant. Civil and relevant comments only, as indicated by our comment policy.

2. You are not an employee of the U.S. government. Yes, that includes postal service employees, law clerks, judges, and interns. We’re a libertarian-leaning blog, and we’re for the private sector only. Government types, keep out.

3. Your middle name is not “Ralph.” I’ve always thought Ralph was a funny name, and even odder as a middle name. No one with the middle name “Ralph” is welcome here.

4. You’re super nice. We have strict civility rules here, and this blog is only for people who are super nice. If you are not super nice, as judged by me, your visit to this blog is unauthorized.

5. You have never visited Alaska. Okay, this one is totally arbitrary, but it’s our blog and we can keep out who we want. Alaska visitors are out, too.

Posting of Orin Kerr to The Volokh Conspiracy, http://volokh.com/archives/archive_2008_11_23-2008_11_29.shtml#1227896387 (Nov. 28, 2008, 13:19 EST).

30 Supplement to Rule 29 Motion, *supra* note 14, at 7-8. For the enforceability of website user agreements, known as “clickwrap” and “browwrap” agreements, *see* James J. Tracy, Student Comment, *Browwrap Agreements: Register.com, Inc. v. Verio, Inc.*, 11 B.U. J. SCI. & TECH. L. 164 (2005) (reporting that clickwrap agreements, where users must click to acknowledge agreement before the website allows entry, have generally been enforced, but “most courts have refused to enforce browwrap agreements,” which purport to be binding without seeking any affirmative acknowledgement of consent from the user).

31 Supplement to Rule 29 Motion, *supra* note 14, at 7-8. The brief pointed out that even the founder of MySpace, Tom Anderson, had lied in his registration by entering a younger age than he was. *Id.*

32 Government’s Response to Defendant’s Supplement to Rule 29 Motion, *supra* note 13, at 4-12.

33 *Id.* at 18-21.

34 *Breaking News* (MSNBC television broadcast May 15, 2008).

35 *Id.*

36 GROSSMAN, *supra* note 15, at 2.

37 Greg Risling, *Mom guilty of lesser charges in MySpace teenage boy hoax*, THE OREGONIAN, Nov. 27, 2008.

38 *Law Signed to Ban Cyber-Bullying*, L.A. TIMES, July 1, 2008, Pt. A, Pg. 13; Govtrack.us, *H.R. 6123: Megan Meier Cyberbullying Prevention Act*, <http://www.govtrack.us/congress/bill.xpd?bill=h110-6123>.

39 Caroline McCarthy, *After long negotiations, Facebook agrees to safety plan with state AGs*, CNET.COM, http://news.cnet.com/8301-13577_3-9939058-36.html.

40 *Id.*

41 *Id.*