259 F.R.D. 449
United States District Court,
C.D. California.

UNITED STATES of America, Plaintiff,
v.
Lori DREW, Defendant.

No. CR 08–0582–GW. | Aug. 28, 2009.

* * *

DECISION ON DEFENDANT'S F.R.CRIM.P. 29(c) MOTION

GEORGE H. WU, District Judge.

I. *INTRODUCTION*

This case raises the issue of whether (and/or when will) violations of an Internet website's terms of service constitute a crime under the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030. . . . [T]he question in the present motion . . . is whether an intentional breach of an Internet website's terms of service, without more, is sufficient to constitute a misdemeanor violation of the CFAA; and, if so, would the statute, as so interpreted, survive constitutional challenges on the grounds of vagueness and related doctrines.

*452 II. *BACKGROUND*

A. *Indictment*

In the Indictment, Drew was charged with one count of conspiracy in violation of 18 U.S.C. § 371 and three counts of violating a felony portion of the CFAA, *i.e.,* 18 U.S.C. §§ 1030(a)(2)(C) and 1030(c)(2)(B)(ii), which prohibit accessing a computer without authorization or in excess of authorization and obtaining information from a protected computer where the conduct involves an interstate or foreign communication and the offense is committed in furtherance of a crime or tortious act. *See* Doc. No. 1.

The Indictment included, *inter alia,* the following allegations (not all of which were established by the evidence at trial). Drew, a resident of O'Fallon, Missouri, entered into a conspiracy in which its members agreed to intentionally access a computer used in interstate commerce without (and/or in excess of) authorization in order to obtain information for the purpose of committing the tortious act of intentional infliction of emotional distress upon "M.T.M.," subsequently identified as Megan Meier ("Megan"). Megan was a 13 year old girl living in O'Fallon who had been a classmate of Drew's

daughter Sarah. *Id.* at ¶¶ 1–2, 14. Pursuant to the conspiracy, on or about September 20, 2006, the conspirators registered and set up a profile for a fictitious 16 year old male juvenile named "Josh Evans" on the www.My Space.com website ("MySpace"), and posted a photograph of a boy without that boy's knowledge or consent. *Id.* at ¶ 16. Such conduct violated My Space's terms of service. The conspirators contacted Megan through the MySpace network (on which she had her own profile) using the Josh Evans pseudonym and began to flirt with her over a number of days. *Id.* On or about October 7, 2006, the conspirators had "Josh" inform Megan that he was moving away. *Id.* On or about October 16, 2006, the conspirators had "Josh" tell Megan that he no longer liked her and that "the world would be a better place without her in it." *Id.* Later on that same day, after learning that Megan had killed herself, Drew caused the Josh Evans MySpace account to be deleted. *Id.*

B. ***Verdict***

* * *

The jury [found] Defendant "guilty" "of [on the dates specified in the Indictment] accessing a computer involved in interstate or foreign communication without authorization or in excess of authorization to obtain information in violation of Title 18, United States Code, Section 1030(a)(2)(C) . . . .

* * *

IV. ***DISCUSSION***

A. ***The Misdemeanor 18 U.S.C. § 1030(a)(2)(C) Crime Based on Violation of a Website's Terms of Service***

* * *

In this particular case, as conceded by the Government, the only basis for finding that Drew intentionally accessed MySpace's computer/servers without authorization and/or in excess of authorization was her and/or her co-conspirator's violations of the MSTOS by deliberately creating the false Josh Evans profile, posting a photograph of a juvenile without his permission and pretending to be a sixteen year old O'Fallon resident for the purpose of communicating with Megan. Therefore, if conscious violations of the My Space terms of service were not sufficient to satisfy the first element of the CFAA misdemeanor violation as per 18 U.S.C. §§ 1030(a)(2)(C) and 1030(b)(2)(A), Drew's Rule 29(c) motion would have to be granted on that basis alone. However, this Court concludes that an intentional breach of the MSTOS can potentially constitute accessing

the MySpace computer/server without authorization and/or in excess of authorization under the statute.

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B. *Contravention of the Void–for–Vagueness Doctrine*

1. Applicable Law

* * *

The void-for-vagueness doctrine has two prongs: 1) a definitional/notice sufficiency requirement and, more importantly, 2) a guideline setting element to govern law enforcement. In *Kolender v. Lawson,* 461 U.S. 352, 357–58, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), the Court explained that:

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.... Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith [v. Goguen],* 415 U.S. 566,] 574, 94 S.Ct. 1242 [1974]. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.* at 575, 94 S.Ct. 1242. [Footnote and citations omitted.]

To avoid contraving the void-for-vagueness doctrine, the criminal statute must contain "relatively clear guidelines as to prohibited conduct" and provide "objective criteria" to evaluate whether a crime has been committed. *Gonzales v. Carhart,* 550 U.S. 124, 149, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007).

* * *

2. Definitional/Actual Notice Deficiencies

The pivotal issue herein is whether basing a CFAA misdemeanor violation as per 18 U.S.C. §§ 1030(a)(2)(C) . . . upon the conscious violation of a website's terms of service runs afoul of the void-for-vagueness doctrine. This Court concludes that it does primarily because of the absence of minimal guidelines to govern law enforcement, but also because of actual notice deficiencies.

* * *

First, an initial inquiry is whether the statute, as it is written, provides sufficient notice. Here, the language of section 1030(a)(2)(C) does not explicitly state (nor does it implicitly suggest) that the CFAA has "criminalized breaches of contract" in the context of website terms of service. Normally, breaches of contract are not the subject of criminal prosecution. Thus, while "ordinary people" might expect to be exposed to civil liabilities for violating a contractual provision, they would not expect criminal penalties.[23] *Id.* This would especially be the case where the services provided by MySpace are in essence offered at no cost to the users and, hence, there is no specter of the users "defrauding" MySpace in any monetary sense.[24]

Second, if a website's terms of service controls what is "authorized" and what is "exceeding authorization"—which in turn governs whether an individual's accessing information or services on the website is criminal or not, section 1030(a)(2)(C) would be unacceptably vague because it is unclear whether any or all violations of terms of service will render the access unauthorized, or whether only certain ones will. For example, in the present case, MySpace's terms of service prohibits a member from engaging in a multitude of activities on the website, including such conduct as "criminal or tortious ***465** activity," "gambling," "advertising to ... any Member to buy or sell any products," "transmit[ting] any chain letters," "covering or obscuring the banner advertisements on your personal profile page," "disclosing your password to any third party," *etc. See* Exhibit 3 at 5. The MSTOS does not specify which precise terms of service, when breached, will result in a termination of MySpace's authorization for the visitor/member to access the website. If *any* violation of *any* term of service is held to make the access unauthorized, that strategy would probably resolve this particular vagueness issue; but it would, in turn, render the statute incredibly overbroad and contravene the second prong of the void-for-vagueness doctrine as to setting guidelines to govern law enforcement.[25]

Third, by utilizing violations of the terms of service as the basis for the section 1030(a)(2)(C) crime, that approach makes the website owner-in essence-the party who ultimately defines the criminal conduct. This will lead to further vagueness problems. The owner's description of a term of service might itself be so vague as to make the visitor or member reasonably unsure of what the term of service covers. For example, the MSTOS prohibits members from posting in "band and filmmaker profiles ... sexually suggestive imagery or any other unfair ... [c]ontent intended to draw traffic to the profile." Exhibit 3 at 4. It is unclear what "sexually suggestive imagery" and "unfair content" mean. Moreover, website owners can establish terms where either the scope or the application of the provision are to be decided by them *ad hoc* and/or pursuant to undelineated standards. For example, the MSTOS provides that what constitutes "prohibited content" on the website is determined "in the sole discretion of MySpace.com...." *Id.* Additionally, terms of service may allow the website owner to

unilaterally amend and/or add to the terms with minimal notice to users. *See, e.g., id.* at 1.

Fourth, because terms of service are essentially a contractual means for setting the scope of authorized access, a level of indefiniteness arises from the necessary application of contract law in general and/or other contractual requirements within the applicable terms of service to any criminal prosecution. For example, the MSTOS has a provision wherein "any dispute" between MySpace and a visitor/member/user arising out of the terms of service is subject to arbitration upon the demand of either party. Before a breach of a term of service can be found and/or the effect of that breach upon MySpace's ability to terminate the visitor/member/user's access to the site can be determined, the issue would be subject to arbitration. Thus, a question arises as to whether a finding of unauthorized access or in excess of authorized access can be made without arbitration.

Furthermore, under California law, a material breach of the MSTOS by a user/member does not automatically discharge the contract, but merely "excuses the injured party's performance, and gives him or her the election ***466** of certain remedies." 1 Witkin, *Summary of California Law (Tenth Ed.): Contracts* § 853 at 940 (2008). Those remedies include rescission and restitution, damages, specific performance, injunction, declaratory relief, *etc. Id.* The contract can also specify particular remedies and consequences in the event of a breach which are in addition to or a substitution for those otherwise afforded by law. *Id.* at § 855 at 942. The MSTOS does provide that: "MySpace.com reserves the right, in its sole discretion ... to restrict, suspend, or terminate your access to all or part of the services at any time, for any or no reason, with or without prior notice, and without liability." Exhibit 3 at 2. However, there is no provision which expressly states that a breach of the MSTOS automatically results in the termination of authorization to access the website. Indeed, the MSTOS cryptically states: "you are only authorized to use the Services ... if you *agree to* abide by all applicable laws and to this Agreement." *Id.* at 1 (emphasis added).

3. The Absence of Minimal Guidelines to Govern Law Enforcement

Treating a violation of a website's terms of service, without more, to be sufficient to constitute "intentionally access[ing] a computer without authorization or exceed[ing] authorized access" would result in transforming section 1030(a)(2)(C) into an overwhelmingly overbroad enactment that would convert a multitude of otherwise innocent Internet users into misdemeanant criminals. . . . Where the website's terms of use only authorizes utilization of its services/applications upon agreement to abide by those terms (as, for example, the MSTOS does herein), any violation of any such provision can serve as a basis for finding access unauthorized and/or in excess of authorization.

One need only look to the MSTOS terms of service to see the expansive and elaborate scope of such provisions whose breach engenders the potential for criminal prosecution.

Obvious examples of such breadth would include: 1) the lonely-heart who submits intentionally inaccurate data about his or her age, height and/or physical appearance, which contravenes the MSTOS prohibition against providing "information that you know is false or misleading"; 2) the student who posts candid photographs of classmates without their permission, which breaches the MSTOS provision covering "a photograph of another person that you have posted without that person's consent"; and/or 3) the exasperated parent who sends out a group message to neighborhood friends entreating them to purchase his or her daughter's girl scout cookies, which transgresses the MSTOS rule against "advertising to, or solicitation of, any Member to buy or sell any products or services through the Services." *See* Exhibit 3 at 4. However, one need not consider hypotheticals to demonstrate the problem. In this case, Megan (who was then 13 years old) had her own profile on MySpace, which was in clear violation of the MSTOS which requires that users be "14 years of age or older." *Id.* at 2. No one would seriously suggest that Megan's conduct was criminal or should be subject to criminal prosecution.

Given the incredibly broad sweep of 18 U.S.C. §§ 1030(a)(2)(C) . . . , should conscious violations of a website's terms of service be deemed sufficient by themselves to constitute accessing without authorization or exceeding authorized access, the question arises as to whether Congress has "establish[ed] minimal guidelines to govern law enforcement." *Kolender,* 461 U.S. at 358, 103 S.Ct. 1855; *see also City of Chicago v. Morales,* 527 U.S. 41, 60, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999). Section 1030(a)(2)(C) does not set forth "clear guidelines" or "objective criteria" as to the prohibited conduct in the Internet/website or similar contexts. *See generally Posters 'N' Things, Ltd.,* 511 U.S. at 525–26, 114 S.Ct. 1747. For instance, section 1030(a)(2)(C) is not limited to instances where the website owner contacts law enforcement to complain about an individual's unauthorized access or exceeding permitted access on the site.[29] Nor is there any ***467** requirement that there be any actual loss or damage suffered by the website or that there be a violation of privacy interests.

The Government argues that section 1030(a)(2)(C) has a scienter requirement which dispels any definitional vagueness and/or dearth of guidelines . . . .

* * *

Here, the Government's position is that the "intentional" requirement is met simply by a conscious violation of a website's terms of service. The problem with that view is that it basically eliminates any limiting and/or guiding effect of the scienter element. It is unclear that every intentional breach of a website's terms of service would be or should be held to be equivalent to an intent to access the site without authorization or in excess of authorization. This is especially the case with MySpace and similar Internet venues which are publically available for access and use. *See generally BoardFirst*, 2007 WL 4823761 at *14–15, 2007 U.S. Dist. LEXIS 96230 at *43. However, if every such breach does qualify, then there is absolutely no limitation or criteria as to which of the breaches

should merit criminal prosecution. All manner of situations will be covered from the more serious (*e.g.* posting child pornography) to the more trivial (*e.g.* posting a picture of friends without their permission). All can be prosecuted. Given the "standardless sweep" that results, federal law enforcement entities would be improperly free "to pursue their personal predilections." *Kolender,* 461 U.S. at 358, 103 S.Ct. 1855 (citing *Smith v. Goguen,* 415 U.S. 566, 575, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974)).

In sum, if any conscious breach of a website's terms of service is held to be sufficient by itself to constitute intentionally accessing a computer without authorization or in excess of authorization, the result will be that section 1030(a)(2)(C) becomes a law "that affords too much discretion to the police and too little notice to citizens who wish to use the [Internet]." *City of Chicago,* 527 U.S. at 64, 119 S.Ct. 1849.

468 V. *CONCLUSION

For the reasons stated above, the Defendant's motion under F.R.Crim.P. 29(c) is GRANTED.

Footnotes

[24] Also, it is noted here that virtually all of the decisions which have found a breach of a website's terms of service to be a sufficient basis to establish a section 1030(a)(2)(C) violation have been in civil actions, not criminal cases.

[25] Another uncertainty is whether, once a user breaches a term of service, is every subsequent accessing of the website by him or her without authorization or in excess of authorization.

[29] Here, the prosecution was not initiated based on a complaint or notification from MySpace to law enforcement officials.