

# THE NATIONAL LAW JOURNAL

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NEWS FOR THE PROFESSION

MONDAY, SEPTEMBER 8, 2008

An incisivemedia publication

## BUSINESS INFORMATION

### Web Site Terms of Use

By Nick Akerman

**W**EB SITE TERMS of use have taken center stage with the recent press reports of the indictment of Lori Drew by a Los Angeles federal grand jury for violating the federal Computer Fraud and Abuse Act (CFAA), 18 U.S.C. 1030. Drew, 49, is charged with breaching MySpace's terms of service by tormenting and harassing a 13-year-old girl who, as a result, committed suicide. Terms of use, like those predicated by the Drew prosecution, are ubiquitous on the Internet. They are created by a Web site owner and purport to restrict how the public can use a Web site to obtain information, to purchase goods or services or to participate in Web-based social networking.

What is not readily apparent from the Drew case is that it is not just the U.S. Department of Justice that can employ the CFAA to enforce a Web site's terms of use. The CFAA also provides for a civil remedy for companies victimized by violations of the statute, § 1030(g). This article will examine how Web site terms of use, in conjunction with the CFAA, provide broad legal protections to companies and their Web site users.

The CFAA is particularly well-suited to enforcing terms of use. Four of the seven violations of the CFAA upon which a civil action can be based outlaw accessing a "protected computer without authorization, or exceeding authorized access." §§ 1030(a)(2), (a)(4), 5(A)(ii) and 5(A)(iii). The CFAA has been interpreted broadly to include a Web site. Most significantly, the CFAA permits a Web site owner in its



terms of use to "spell out explicitly what is forbidden" or not authorized access on its Web site. *EF Cultural Travel B.V. v. Zefer Corp.*, 318 F.3d 58, 63 (1st Cir. 2003). This is because the "CFAA...is primarily a statute imposing limits on access and enhancing control by information providers." Id.

#### Absence of terms of use cost one plaintiff the case

Thus, a Web site owner can protect itself against competitors from using its Web site to gain a competitive advantage. *Business Info. Sys. v. Prof'l Governmental Research & Solutions*, No. Civ.A. 1:02CV00017, 2003 WL 23960534 (W.D. Va. Dec. 16, 2003), is a classic example in which the Web site owner could have protected itself from a competitor through terms of use. The litigants in that case were competitors "in the business of making scanned county land records available to subscribers of their respective website." Id. at \*1. The defendant's president, using his own name, subscribed to the plaintiff's Web site and received a username and password through which he provided his customers with content from the competing BIS Web site.

The court found no violation of the CFAA because the defendants' access and use of BIS' data was not "unauthor-

ized," pointing out that BIS "placed no restrictions on its users as to how they could make use of the information that they retrieved from BIS's website." Id. at \*7. The court recognized that "if BIS wanted to restrict its users in their abilities to make unfettered use of the records they were accessing then it could have done so easily through its terms and conditions of usage." Id.

In *Southwest Airlines Co. v. Farechase Inc.*, 318 F. Supp 2d 435 (N.D. Texas 2004), Southwest Airlines Co. did restrict its users in their ability to use the data on its Web site, "Southwest.com, from which it 'provides proprietary fare, route, and schedule information to its actual and potential customers in an interactive format.'" Id. at 437. The defendant, Farechase Inc., licensed software that was used by a third party to "access, search, and obtain data from Southwest.-com by 'sending out a robot, spider, or other automated scraping device across the Internet'" for the purpose of allowing "corporate travelers to search for airline fare, as well as various features designed for corporate travel." Id. The court found that "unauthorized access" had been sufficiently alleged because the Web site's terms of use "prohibited the use of 'any deep-link, page scrape, robot, spider or other automatic device, program, algorithm or methodology which does the same things.'" Id. at 439.

Similarly, *Register.com v. Verio Inc.*, 126 F. Supp. 2d 238, 245 (S.D.N.Y. 2000), affirmed on other grounds, 356 F.3d 393 (2d Cir. 2004), upheld terms of use to restrict competitive use of a Web site. Register.com, an accredited domain-name registrar, was required to permit online access to names and contract information for its customers "to provide

**Nick Akerman** is a partner in the New York office of *Dorsey & Whitney* who specializes in the protection of trade secrets and computer data.

