

# Internet Law: breach of website TOS is civil not criminal offence

A common-sense decision by a US District Judge has resulted in an Order that breaching the terms of service of a website is a matter for the civil not the criminal law. Unfortunately, he has also muddied the waters for he has left the door open for convictions on more serious charges on similar facts.

A case brought against Lori Drew alleged that the way she used her MySpace account was tantamount to unauthorised access to the servers hosting the website and that, as a result, she was guilty of computer crime - in effect hacking.

Drew had been convicted in a court of first instance but when the Jury convicted her, His Honour Judge George H Wu said that he could find nothing in the Computer Fraud and Abuse Act that turned acting in breach of the agreement between a website owner and a user turn from conduct to which civil law penalties applied into a criminal act. He said that he intended to further review the law and may reject the Jury's decision. He has now done that: in effect directing the Jury to acquit albeit after the finding had been made but before it was entered into the Court record.

The power to review the sentences arose because the Jury did not convict of the offences on the charge sheet, but of lesser charges. In such circumstances, it is always open to the Judge to consider whether the necessary elements of those lesser charges have been made out. In this case, HHJ Wu decided they had not.

The case sought to adopt a parallel from the physical world. For example, if a person enters premises with the owner's permission subject to conditions and breaks those conditions, then the permission to be present may be withdrawn. That will result in the person's continued presence being an act of trespass, which is a tort not a criminal act. In some jurisdictions, there is an offence of criminal trespass - but that is generally reserved for those who enter with criminal intent.

But the Drew case was much more complicated: Drew, her daughter and a female employee, Ashley Grills, created a MySpace account in the name of "Josh Evans." Prosecutors alleged that they used that account to form an on-line friendship between Megan Meier and the fictional Josh. The intent, originally, was said to be because Drew and her daughter thought Meier was making negative comments about Drew's daughter on-line. At some point, one of the group ( it was later give in evidence that it was Grills) wrote to the effect "the world would be a better place without you." Shortly after that, Meier hanged herself. Whatever the group did, they did not receive any warnings from Facebook nor was the account suspended. Therefore

their permission to be on the site was not withdrawn - even though it had been obtained by the use of a fictitious identity. The fact that they acted unpleasantly towards another MySpace user was no different to the boor in a bar who annoys everyone but doesn't get thrown out.

Grills offered evidence in return for immunity from prosecution. But her evidence was that no one in the group actually read MySpace's terms of service - even though they must tick a box to confirm that they have done so when registering. Those terms required, amongst other things, that accounts must be opened in the user's real identity and that users must not "solicit" information from minors nor use the service in a way which is detrimental to other users: in effect agree to no bullying or cyber-stalking.

At first instance, the Jury found that each time she entered the site intending to make unpleasant comments amounted to unauthorised access. HHJ Wu says that "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 authorisation."

There is no doubt that 50 year old Lori Drew was thoroughly nasty to 13 year old Megan Meier. She was charged with four charges of a felony but the jury found her guilty of three lesser charges. It was that that caused Wu the problems, he said in Court. He said that he was satisfied that the felony law covered the conduct and he would not have considered over-ruling the Jury and would have sentenced Drew.

The various participants in the drama are (were) all residents of Missouri. But the case was brought in California because MySpace has its servers there.

HHJ Wu said that he would have had no problems with the felony charges because Drew's did have unauthorised access because of the false identity and that she did breach the terms by entering the site for the purpose of committing an act amounting to a tort.

His problem, he said, was that the lesser charges, misdemeanours, were not phrased with sufficient clarity and as such he considered them constitutionally unsupportable.

When saying that he was troubled by the jury's decision, HHJ Wu said "It basically leaves it up to a website owner to determine what is a crime. And therefore it criminalizes what would be a breach of contract."

Unfortunately, what appears to be a common-sense and appropriate decision has been clouded by his comments, *obiter*, that he would not have reached the same conclusion in relation to the felony charges.