

1 **STATEMENT OF FACTS**

2 The charges in this case stem from edits to one paragraph of a story on the Los Angeles
3 Times website on December 14, 2010. That day, using the Los Angeles Times/Tribune
4 Company’s content management system (“CMS”), the user “ngarcia” allegedly altered a
5 paragraph of a latimes.com story. The article’s title and byline originally appeared as follows:

6 **Pressure builds in House to pass tax-cut package**

House Democratic leader Steny Hoyer sees ‘very good things’ in the tax- cut deal, which many representatives oppose. But with the bill set to clear the Senate, reluctant House Democrats are feeling the heat to pass it.

7 By Lisa Mascaro, Tribune Washington Bureau¹

8 After the minor edits by ngarcia, the article’s title and byline allegedly read:

9 **Pressure builds in House to elect CHIPPY 1337**

10 House Democratic leader Steny Hoyer sees ‘very good things’ in the deal cut which will
11 see uber skid Chippy 1337 take his rightful place, as head of the Senate, reluctant House
12 Democrats told to SUCK IT UP. By CHIPPYS NO 1 FAN, Tribune Washington Bureau²

13
14 The website administrators restored the original in less than an hour. For the foregoing,

15 Mr. Keys has been charged with one count of conspiracy to violate the Computer Fraud and
16 Abuse Act (“CFAA”), in violation of 18 U.S.C. §§ 371 and 1030(a)(5)(A); one count of
17 knowingly transmitting a code with the intent to cause damage to a protected computer in
18 violation of 18 U.S.C. § 1030(a)(5)(A); and one count of attempt to transmit a code with the
19 intent to cause damage to a protected computer in violation of 18 U.S.C. § 2 and 1030(a)(5)(A).
20 For this he faces a maximum sentence of 25 years in jail, \$750,000 in fines, 9 years of supervised
21 release, and criminal forfeiture. *U.S. v. Keys*, Superseding Indictment, 2:13-CR-00082 (Dec. 4,
22 2014) (ECF # 44).

¹ The original article is still available on the Los Angeles Times website, see Lisa Mascaro, *Pressure builds in house to pass tax-cut package*, <http://articles.latimes.com/2010/dec/14/news/la-pn-hoyer-tax-vote-20101215> (last visited Sept. 9, 2015).

1 GHK MANX, 2015 WL 3561671, at *3 (C.D. Cal. June 4, 2015) (excluding harm caused by
2 theft and use of trade secret customer list obtained from CFAA violation); *Farmers Ins. Exch. v.*
3 *Steele Ins. Agency, Inc.*, No. 2:13-CV-00784-MCE, 2013 WL 3872950, at *2 (E.D. Cal. July 25,
4 2013) (excluding harm caused by misuse of company’s proprietary information). Rather, to
5 allege a loss under the CFAA, “plaintiffs must identify impairment of or damage to the computer
6 system that was accessed without authorization.” *Farmers Ins. Exch. v. Steele Ins. Agency, Inc.*,
7 No. 2:13-CV-00784-MCE, 2013 WL 3872950, at *21 (E.D. Cal.’ July 25, 2013). Costs
8 associated with investigating business losses should also be excluded. *See Nexans Wires S.A. v.*
9 *Sark-USA, Inc.*, 166 F. App’x 559, 563 (2d Cir. 2006) (Excluding costs “incurred investigating
10 business losses unrelated to actual computers or computer services.”).

11 **II. Whether there is “Damage” under the CFAA**

12 To establish violation of 18 U.S.C. § 1030(a)(5)(A) the government must show Mr.
13 Keys “knowingly cause[d] the transmission of a program, information, code, or command, and
14 as a result of such conduct, intentionally caus[ed] damage without authorization, to a protected
15 computer.” *Id.* The CFAA defines “damage” as “any impairment to the integrity or availability
16 of data, a program, a system, or information.” 18 U.S.C. § 1030(e)(8). The relevant conduct that
17 allegedly caused the § 1030(a)(5)(A) damage was the brief edit to the LA Times website. The
18 brief edit does not qualify as as damage under the CFAA as the edit neither impaired the
19 integrity or availability of the edited data. The evidence at trial will show that as soon as the edits
20 were discovered restoring the original version of the story was as simple as pressing a button,
21 and that is what effectively occurred.

22 District courts across the country have sensibly held that where edited or deleted
23 information was backed up, or remained available in other locations, that the edits or deletions
24 did not constitute CFAA damage. *See Instant Tech., LLC v. DeFazio*, 40 F. Supp. 3d 989, 1019

1 (N.D. Ill. 2014) *aff'd*, 793 F.3d 748 (7th Cir. 2015) (holding there was no CFAA damage where
2 deleted information remained available in email trash folder and on another computer accessible
3 to the Plaintiff.); *Grant Mfg. & Alloying, Inc. v. McIlvain*, No. CIV.A. 10-1029, 2011 WL
4 4467767, at *8 (E.D. Pa. Sept. 23, 2011) *aff'd*, 499 F. App'x 157 (3d Cir. 2012) (holding that
5 because the records marked for deletion were still available and accessible there was no CFAA
6 damage); *Cheney v. IPD Analytics, L.L.C.*, No. 08-23188-CIV, 2009 WL 1298405, at *6 (S.D.
7 Fla. Apr. 16, 2009) (holding that the “deletion of files alone does not constitute damage. . . if the
8 deleted data is still available to the plaintiff through other means.”); *Dana Ltd. v. Am. Axle &
9 Mfg. Holdgins, Inc.*, No. 1:10-CV-450, 2012 WL 2524008, at *6 (W.D. Mich. June 29,
10 2012)(holding there was no CFAA damage where deleted files could be recovered).

11 This is as it should be and is what the Rule of Lenity requires. Otherwise, the definition
12 of damage under the CFAA becomes dangerously broad and would permit felony prosecutions
13 for editing Microsoft Word documents without someone’s permission, even though a saved
14 version of the document existed. And that is essentially what the government is prosecuting in
15 this case: the editing of a text file that a saved version existed for. This is not what the damage
16 provision of the CFAA was meant to address, as evidenced by its legislative history. The
17 legislative history of the CFAA states that where data can be returned to its “original condition . .
18 . arguably . . . neither the computer nor its information is damaged.” *See* S. REP. 104-357 at 11
19 (1996) (discussing the difference between CFAA loss and damage).

20 Because the edits Mr. Keys allegedly made to the LA Times website were quickly
21 restored to their original condition no damage can be alleged under the CFAA. Thus, the
22 government cannot establish that § 1030(a)(5)(A) has been violated.

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