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July 17, 2008

VIA HAND DELIVERY BY CSO

The Honorable Bruce M. Selya
Presiding Judge
United States Foreign Intelligence
Surveillance Court of Review
Washington, D.C.

Re: In re Directives to Yahoo! Inc. Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, No. 08-01

Dear Judge Selya:

Yahoo! hereby replies to the Government's letter regarding Warshak v. United States, 2008 WL 2698177 (6th Cir. July 11, 2008) (*en banc*).

Warshak does not support the Government's argument that Yahoo!'s Terms of Service ("TOS") diminish its users' expectation of privacy. In Warshak the court, *in dicta* mischaracterized Yahoo!'s TOS as allowing it to provide the government with user communications "on request." *Id.* at *5. The TOS actually provide for disclosure where Yahoo! is "required to do so by law..." or to "comply with legal process."¹ Therefore, users cannot reasonably believe that Yahoo! would share their information with Government authorities simply "on request." Importantly, the Warshak court never analyzed whether Yahoo!'s TOS reduced Warshak's privacy expectations because the case was resolved on ripeness grounds.

Nor does Warshak support the Government's ripeness argument here. In Warshak, the defendant sought to enjoin future *ex parte* searches after his conviction. The Sixth Circuit found the likelihood that "the government will conduct another *ex parte* search of his e-mails," was "exceedingly remote given that the reason the government kept these searches confidential—that they would jeopardize the ongoing investigation—no longer exists." *Id.* at *4. The court also noted that future searches could involve any service provider, and therefore the analysis of the provider's TOS could not properly be done in the abstract. *Id.*

¹ See Ex. A to Reply by Yahoo! to Supplemental Briefing at 10, n.16 (relevant TOS excerpt).


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By contrast, the surreptitious search of U.S. persons' Yahoo! accounts under the PAA is not an "exceedingly remote" possibility. Yahoo! receives [REDACTED] orders to gather communications, [REDACTED] for users whom the Government may not be able to identify beyond their email addresses. The possibility that those requests target some U.S. persons is significant. Moreover, in contrast to Warshak's ability to subsequently challenge future surveillance, Yahoo!'s challenge cannot ripen further. Under the PAA, Yahoo! can only challenge directives, not tasking orders. Unless the Court prohibits the targeting of U.S. persons communications now, the government can search accounts of U.S. persons under the existing directives later without facing a future challenge by Yahoo!.

Sincerely,



Marc J. Zwillinger

cc: Greg G. Garre
Acting Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

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MEMORANDUM

TO:

[REDACTED]

FROM:

Judge Selya

*BUS
RCH*

DATE:

August 22, 2008

SUBJECT:

In re Directives
No. 08-01 (FISCR)

Please deliver the enclosed opinion to the Clerk of Court to be filed under seal.