UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

IN RE APPLICATION OF THE
UNITED STATES OF AMERICA FOR
AN ORDER PURSUANT TO
18 U.S.C. § 2703(d)

MISC. NO. 09Y080-CBS

Filed Under Seal

GOVERNMENT'S MOTION TO COMPEL COMPLIANCE WITH 2703(d) ORDER

The United States of America, by and through its attorneys, Assistant United States Attorney Pegeen Rhyne, and Nathan Judish, Senior Counsel, Computer Crime and Intellectual Property Section, United States Department of Justice, hereby moves this Court to issue an order compelling Yahoo! Inc. ("Yahoo") to provide the information specified in Attachment A to an Order previously issued to Yahoo by this Court pursuant to 18 U.S.C. § 2703(d). In support of this Motion, the United States avers and alleges as follows.

Statement of Facts

On December 2, 2009, the United States submitted an application to United States Magistrate Judge Shaffer for an order under 18 U.S.C. § 2703(d) (a "2703(d) order") requiring Yahoo to produce certain records and other information associated with specified e-mail accounts hosted by Yahoo ("the targeted accounts").[1] In its application, the United States stated that it was seeking to compel production of the "contents of electronic communications (not in electronic storage for less than 181 days)" in these targeted accounts. Application at ¶ 35. The

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[1]Exhibit 1 includes a copy of the original Order. In order to further protect the security of the underlying investigation, the United States will not name the targeted accounts in the body of this motion to compel. The government respectfully submits this motion and all attachments under seal, consistent with the underlying Application and Order.

application stated that the United States "does not seek access to electronic communications in 'electronic storage' for less than 181 days." Application at ¶ 8. The application further stated that "[c]ommunications not in 'electronic storage' include any e-mail communications received by the specified accounts that the owner or user of the account has already accessed, viewed, or downloaded." *Id.* The application cited several court decisions endorsing this interpretation of "electronic storage," but it also disclosed that in *Theofel v. Farey-Jones*, 359 F.3d 1066, 1075-76 (9th Cir. 2004), the Ninth Circuit had rejected this definition of "electronic storage" and instead interpreted "electronic storage" more broadly to include opened e-mail. *Id.*

On December 3, 2009, United States Magistrate Judge Shaffer signed an Order pursuant to 18 U.S.C. § 2703(d) requiring Yahoo to produce certain records and other information associated with the targeted accounts. This information included the "contents of electronic communications (not in electronic storage)" stored during specified dates. Attachment A to Exhibit 1. The order specified that "[c]ommunications not in 'electronic storage' include any e-mail communications received by the specified accounts that the owner or user of the account has already accessed, viewed, or downloaded. Thus, you are directed to disclose the contents of previously opened and sent e-mail stored in the accounts." *Id.* In issuing that Order, the Court found that the United States had offered "specific and articulable facts showing that there are reasonable grounds to believe that the records, other information, and the contents electronic communications sought are relevant and material to an ongoing criminal investigation." Exhibit 1.

Yahoo produced some of the information regarding the accounts specified by the Order, including the non-content information and the contents of communications greater than 180 days

old. However, Yahoo failed to produce the content of previously accessed, viewed, or downloaded e-mail stored for less than 181 days. Counsel for the United States contacted Yahoo in an attempt to obtain full compliance with the Order. Yu Jin Kang, Senior Supervisor of Legal Services for Yahoo, stated that Yahoo would not comply with the portion of the Order requiring Yahoo to produce content stored for less than 181 days. As a basis for Yahoo's refusal to comply with the Order, Kang relied upon Ninth Circuit law. *See Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004).

This Memorandum sets forth why this Court should require Yahoo to comply in full with the Court's December 3, 2009 Order.

Argument Summary

Yahoo's assertion that *Theofel* requires it to refuse to produce copies of previously opened subscriber e-mail in contravention of this Court's Order is unjustified. Section 2703 of the Stored Communications Act, 18 U.S.C. §§ 2701-2712 ("SCA"), permits the government to compel disclosure of previously opened e-mail pursuant to a 2703(d) order because previously opened e-mail does not fall within the scope of "electronic storage" as that term is defined in 18 U.S.C. § 2510(17).

The scope of "electronic storage" is critical to law enforcement because under § 2703(a) of the SCA, the government may compel production of electronic communications in "electronic storage" for less than 181 days only using a warrant based on probable cause. In contrast, § 2703(b) of the SCA allows the government to compel production of other stored communications that do not fall within the statutory definition of "electronic storage" using a subpoena or a 2703(d) order.

The statutory language, structure, and legislative history of the SCA make clear that previously opened subscriber e-mail is not in "electronic storage." "Electronic storage" means "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." 18 U.S.C. § 2510(17). Storage of previously opened e-mail does not fall within the subsection (A) of this definition because its storage is no longer temporary, intermediate, or incident to transmission. It does not fall within the subsection (B) of this definition because that subsection includes only copies of electronic communications stored by a service provider for its backup protection. Thus, previously opened e-mail is not in "electronic storage," and § 2703(b) allows the government to obtain a § 2703(d) order to compel its production. This Court should therefore require Yahoo to comply with the Order and produce the specified communications in the targeted accounts.

Argument

Section 2703 of the SCA sets forth the procedures that law enforcement officers must follow to compel disclosure of communications stored by an e-mail service provider. The structure of Section 2703 is based on Congress's determination that an e-mail service provider offers two conceptually distinct services to its customers. First, an e-mail provider transmits e-mail from one party to another, a service analogous to traditional mail service. Second – and unlike the traditional postal service – e-mail providers offer a storage service for e-mail that is no longer in the course of transmission. After a user sends or receives an e-mail, she may choose to have her service provider store a copy of the e-mail indefinitely on its servers. Congress

recognized that post-transmission e-mail stored "for later reference" was "subject to control by a third party computer operator." S. Rep. No. 99-541 (1986) at 3, reprinted in 1986 U.S.C.C.A.N. 3555, 3557.

In particular, the SCA distinguishes between the storage of e-mail incident to transmission and its post-transmission storage through a dichotomy between communications in "electronic storage" and communications stored by a "remote computing service." *See* 18 U.S.C. §§ 2510(17), 2711(2). In the SCA context, "electronic storage" has a narrow, statutorily defined meaning. It does not simply mean storage of information by electronic means. Instead, "electronic storage" is "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." 18 U.S.C. § 2510(17). The SCA defines "remote computing service" to mean "provision to the public of computer storage or processing services by means of an electronic communications system." 18 U.S.C. § 2711(2).

The SCA provides a higher level of privacy protection for communications in "electronic storage" than for communications held by a remote computing service. Section 2703(a) provides that "[a] government entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant . . ." (emphasis added). Thus, law enforcement can generally compel disclosures of e-

mail "in electronic storage" for less than 181 days only upon a showing of probable cause.[2] In contrast, § 2703(b)(1) allows law enforcement to compel a provider of "remote computing service" to disclose the contents of an electronic communication by means of a subpoena or a § 2703(d) order, as well as with a warrant.[3] Thus, prosecutors can obtain access to files stored with a remote computing service using a standard lower than probable cause.

As explained below, previously accessed e-mail stored by Yahoo on behalf of a customer is not in "electronic storage" because it is neither in temporary intermediate storage incident to transmission, nor is it held by a service provider for purposes of backup protection. Instead, such e-mail falls squarely within the SCA's definition of communications held by a remote computing service: Yahoo provides a storage service for such e-mail. *See* 18 U.S.C. § 2711(2). The Court can therefore order its production using a 2703(d) order. *See* 18 U.S.C. § 2703(b)(1)(B).

I. Previously accessed e-mail is not in "electronic storage" as defined by § 2510(17)(A)

"Electronic storage" is defined to mean "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any

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[2] E-mail in "electronic storage" for more than 180 days can be obtained by the government pursuant to a subpoena or 2703(d) order. See 18 U.S.C. § 2703(a) (stating that such communications can be compelled "by the means available under subsection (b) of this section"). Congress recognized that such e-mail "is closer to a regular business record maintained by a third party and, therefore, deserving of a different standard of protection" than e-mail in electronic storage for less than 181 days. H.R. Rep. No. 99-647, at 68 (1986). Yahoo complied with the provision in this Court's order calling for production of e-mail more than 180 days old, and this portion of the Court's order is not in dispute.

[3] If the government uses a subpoena or a § 2703(d) order, it is required by § 2703(b)(1)(B) to give prior notice to the subscriber or to comply with delayed notice procedures set forth in § 2705(a). A 2703(d) order requires the government to offer "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d).

storage of such communication by an electronic communication service for purposes of backup protection of such communication." 18 U.S.C. § 2510(17). Courts have unanimously agreed that previously opened e-mail messages stored by a service provider for a customer do not fall within the scope of the first component of this definition, as such e-mail messages are not in "temporary, intermediate storage," and they are not stored incident to transmission. *See, e.g., Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 114 (3d Cir. 2004) (stating that e-mail in post-transmission storage was not in "temporary, intermediate storage"); *United States v. Weaver*, 636 F. Supp. 2d 769, 771 (C.D. Ill. 2009) ("Because the emails here have been opened, they are not in temporary intermediate storage incidental to electronic transmission."). Similarly, in *Snow v. DIRECTV, Inc.*, 2005 WL 1226158, at *3 (M.D. Fla. May 9, 2005), the court held that information stored on a website was not in "electronic storage" because communications are in "electronic storage" when "stored for a limited time in the middle of a transmission, *i.e.* when an electronic communication service temporarily stores a communication while waiting to deliver it." Even *Theofel*, the case Yahoo relies upon in refusing to comply with the Court's order, did not dispute that post-transmission storage of email was not "temporary, intermediate storage." *See Theofel*, 359 F.3d at 1075. *See also In re Doubleclick Inc. Privacy Litigation*, 154 F. Supp. 2d 497, 511-13 (S.D.N.Y. 2001) (emphasizing that "electronic storage" should have a narrow interpretation based on statutory interpretation and legislative intent).

An example illustrates how the "intermediate storage" portion of the definition of "electronic storage" works in practice. Suppose Sender@hotmail.com sends an e-mail to Recipient@yahoo.com. When the e-mail is sent, it will stream across the Internet until it reaches Yahoo's servers, and a copy is stored in Recipient's inbox. Before Recipient accesses the e-mail,

it is in "electronic storage" in Recipient's inbox because it is being stored at an intermediate point incident to its ultimate transmission to Recipient. Once Recipient retrieves the e-mail, he can delete the message or continue to store it with Yahoo. If he continues to store it with Yahoo, it is no longer in temporary, intermediate storage incident to transmission. Instead, Yahoo is merely storing the e-mail for Recipient. At that point, Yahoo is providing remote computing service for Recipient with respect to the e-mail message from Sender.

II. Previously accessed e-mail does not fall within the scope of § 2510(17)(B)

A. E-mail stored by an ISP to protect against system failure is stored "for purposes of backup protection"

Previously accessed Yahoo e-mail also does not fall within the scope of § 2510(17)(B), the "backup" subsection of the definition of electronic storage. By its terms, this subsection is restricted only to storage "by an electronic communication service for purposes of backup protection." This definition encompasses backup copies made by an electronic communication service to protect against system failure.

In this context, it is useful to consider what the term "backup" meant to the drafters of the SCA. In 1986, providers of electronic communication service commonly stored copies of files to protect against system failure. It would have made little sense for Congress to have provided strong protections to e-mail stored during the course of transmission while providing little protection for the backup copies of those same e-mails that the service providers made while transmitting them. Thus, Congress crafted § 2510(17) to protect backup copies made of e-mail being stored incident to transmission, as well as the e-mail communications themselves while in transmission. For example, the House Report on the SCA states:

> The Committee recognized that electronically stored communications can be of two types. The first type of stored communications are those associated with transmission and incident thereto. The second type of storage is of a back-up variety. Back up protection preserves the integrity of the electronic communication system and to some extent preserves the property of the users of such a system.

H.R. Rep. No. 99-647, at 68 (1986).[4] By including backup protections within the definition of "electronic storage," Congress ensured that backups made of communications in storage incident to transmission would receive the same degree of protection as the underlying communications.

The language of § 2704 of the SCA further confirms that the "backup" provision of § 2510(17)(B) is limited to copies made by service providers. Section 2704, which was drafted contemporaneously with § 2510(17)(B), provides that a subpoena or court order may include a provision requiring a service provider to "create a backup copy" of the contents of targeted electronic communications. 18 U.S.C. § 2704(a)(1). This language demonstrates that the drafters of the SCA understood a "backup copy" to mean a duplicate copy made by a service provider to ensure preservation of a file. This conclusion is further strengthened by the discussion of § 2704 in the House Report on the SCA, which noted that "if a service [provider] maintains back-up copies as part of its regular business activities, it does not have to create a new copy." H.R. Rep. No. 99-647, at 70 (1986). This passage shows that the drafters of the SCA

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[4] Contemporaneous accounts of the drafting of the SCA also demonstrate that the "backup" component of § 2510(17) refers to backup copies made by e-mail service providers to protect their systems. For example, a January 1986 article in the Washington Post noted that "The key sticking point in the current [SCA] negotiations has been the privacy rights of electronic mail. Justice Department officials have told the electronic mail industry that their service is different from paper mail in more than just the obvious: They keep copies of electronic letters as a backup against a system 'crash' and for billing." Patrick E. Tyler, "*Electronic Messages And Privacy Rights Congress, Justice Department Debating What Protections Computer Mail Will Enjoy*," Washington Post, Jan. 20, 1986, at A17.

understood "backup" in the traditional limited sense: copies made by an electronic communication service to ensure system integrity.

This interpretation of the backup portion of the definition of "electronic storage" has been adopted by at least four district courts, three in circumstances indistinguishable from this case. *See United States v. Weaver*, 636 F. Supp. 2d 769, 772-73 (C.D. Ill. 2009); *In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d)* at 1-2, (D. Utah Mar. 10, 2009) (hereinafter, "Utah Order") (Attached as Exhibit 2); *In re Grand Jury Subpoena Issued Pursuant to 18 U.S.C. Section 2703(b)(1)(B)* at 5-7, (M.D. Ga. Apr. 29, 2005) (hereinafter, "Georgia Order") (attached as Exhibit 3); *Fraser v. Nationwide Mut. Ins. Co.*, 135 F. Supp. 2d 623, 636 (E.D. Pa. 2001), *aff'd in part on other grounds* 352 F.3d 107, 114 (3d Cir. 2004). In the Illinois, Utah, and Georgia cases, the government obtained a 2703(d) order or a subpoena for the content of opened or sent e-mail stored by Microsoft Hotmail. In each case, Microsoft refused to comply, citing the Ninth Circuit's holding in *Theofel*. In each case, the court rejected Microsoft's argument and ordered production of the e-mail. *See Weaver*, 636 F. Supp. 2d at 773 ("Previously opened emails stored by Microsoft for Hotmail users are not in electronic storage, and the Government can obtain copies of such emails using a trial subpoena."); Utah Order at 2 (ordering Microsoft to produce "the content of previously accessed, viewed, or downloaded e-mail stored for less than 181 days"); Georgia Order at 7 (holding that the targeted e-mails "are not in 'electronic storage'" and that Homail therefore "may be compelled to produce the emails through a grand jury subpoena.").

The district court in *Fraser* also endorsed this more tailored interpretation of "electronic storage." In *Fraser*, an employee sued his employer after the employer retrieved his previously

accessed e-mail. The district court held that such e-mails were not in "backup" storage under § 2510(17)(B):

> Part (B) of the definition refers to what I previously defined as back-up protection storage, which protects the communication in the event the system crashes before transmission is complete. The phrase "for purposes of backup protection of such communication" in the statutory definition makes clear that messages that are in post-transmission storage, after transmission is complete, are not covered by part (B) of the definition of "electronic storage".

Fraser, 135 F. Supp. 2d at 636. *Fraser* is correct: the "backup" portion of the definition of "electronic storage" refers to copies made by an ISP to ensure system integrity, and it does not include files archived with an ISP by a customer. Thus, previously opened e-mail is not in "electronic storage."

B. The Ninth Circuit's expansive interpretation of "backup protection" is inconsistent with the language and structure of the SCA, as well as other cases interpreting the SCA

The more tailored interpretation of "electronic storage" was erroneously rejected by the Ninth Circuit in *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004), the case that Yahoo relies upon for its refusal to produce the contents of opened e-mail in the targeted accounts. In *Theofel*, the Ninth Circuit held that certain e-mail messages were in electronic storage regardless of whether they had been previously accessed because it concluded that those messages fell within the backup portion of the definition of "electronic storage." *Id.* at 1077. The Ninth Circuit's decision, however, is contrary to the SCA's language, structure, and legislative history, and it obliterates the SCA's distinction between communications in electronic storage and communications in a remote computing service. This Court is not bound by the decision in

Theofel and should decline to follow its holding.[5]

Theofel arose out of a discovery dispute in a commercial litigation. Farey-Jones, the defendant in the commercial litigation, subpoenaed an ISP which provided e-mail to a corporation associated with the *Theofel* plaintiffs. The subpoena contained no limits based on time or scope. After some e-mail was produced by the ISP and reviewed by Farey-Jones, a magistrate quashed the subpoena, finding it "massively overbroad" and "patently unlawful." *Id.* at 1071-72. Following the quashing of the subpoena, the plaintiffs brought suit against Farey-Jones under § 2707 of the SCA for a violation of § 2701, which provides criminal penalties and civil liability for one who "intentionally accesses without authorization a facility through which an electronic communication service is provided . . . and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage." 18 U.S.C. § 2701 (emphasis added).

After the district court dismissed the SCA claim, the Ninth Circuit reversed. One issue addressed by the Ninth Circuit was whether the e-mail messages accessed by Farey-Jones fell outside the scope of § 2701 because they were not "in electronic storage." Although the Ninth Circuit did not dispute that previously accessed e-mail was not in temporary, intermediate storage within the meaning of § 2510(17)(A), it insisted that previously accessed e-mail fell within the scope of the "backup" portion of the definition of "electronic storage":

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[5]In addition, the SCA makes doubly clear that Yahoo cannot be held liable in a civil suit in the Ninth Circuit for compliance with this Court's order. First, 18 U.S.C. § 2703(e) specifies that "[n]o cause of action shall lie in any court against any provider . . . for providing information, facilities, or assistance in accordance with the terms of a court order . . . under this chapter." Second, 18 U.S.C. § 2707(e)(1) provides a "complete defense to any civil or criminal action brought under this chapter or any other law" when a provider relies in good faith on a court order.

> An obvious purpose for storing a message on an ISP's server after delivery is to provide a second copy of the message in the event that the user needs to download it again--if, for example, the message is accidentally erased from the user's own computer. The ISP copy of the message functions as a "backup" for the user. Notably, nothing in the Act requires that the backup protection be for the benefit of the ISP rather than the user. Storage under these circumstances thus literally falls within the statutory definition.

Theofel, 359 F.3d at 1075. *See also Bailey v. Bailey*, 2008 WL 324156, at *6 (E.D. Mich. Feb. 6, 2008) (following *Theofel*).

The Ninth Circuit's holding is incorrect, and this court should reject it. As an initial matter, there is no way for a service provider to determine conclusively whether a previously opened e-mail on its servers is a backup for a copy of the e-mail stored by a user on his computer, or whether the user is storing that e-mail with the provider as the only copy. A service provider simply cannot know whether the underlying e-mail remains stored on the user's computer. This fact is fatal for the Ninth Circuit's approach. Indeed, even the Ninth Circuit recognized that "[w]here the underlying message has expired in the normal course, any copy is no longer performing any backup function." *Theofel*, 359 F.3d at 1076. Thus, if the user chooses to have Yahoo continue to store the only copy of an e-mail, it simply cannot be stored for purposes of "backup protection" under § 2510(17)(B), even under the Ninth Circuit's own reasoning. This Court should reject the Ninth Circuit's reasoning in *Theofel* because it confuses "backup protection" with ordinary storage of a file.

In addition, as the court in *Weaver* explained, *Theofel* likely does not apply to a web-based e-mail service. *Theofel* "relies on the assumption that users download emails from an ISP's server to their own computers. That is how many email systems work, but a Hotmail account is web-based and remote." *Weaver*, 636 F. Supp. 2d at 772 (internal quotation marks

omitted). In general, "if Hotmail users save a message, they generally leave it on the Hotmail server and return to Hotmail via the web to access it on subsequent occasions." *Id.* "Users of web-based email systems, such as Hotmail, default to saving their messages only to the remote system."[6] *Id.* But as *Theofel* acknowledged, if a remote computing service is "the only place a user stores his messages, in that case, the messages are not stored for backup protection." *Theofel*, 359 F.3d at 1077. As a result, "[t]he distinction between web-based email and other email systems makes *Theofel* largely inapplicable" to web-based email. *Weaver*, 636 F. Supp. 2d at 772. This reasoning from *Weaver* regarding Hotmail is equally applicable to Yahoo, another web-based e-mail service.

Significantly, under the Ninth Circuit's approach to "electronic storage," backups made by a service provider to protect against system failure receive limited protection from the SCA. Providers of electronic communication service may make backups of their system and archive these backups for long periods of time. According to the Ninth Circuit's reasoning, an e-mail message included in such a backup is in "electronic storage" only until the underlying message is deleted: "Where the underlying message has expired in the normal course, any copy is no longer performing any backup function." *Theofel*, 359 F.3d at 1076. Thus, under *Theofel*, a user who has deleted an e-mail message will be unprotected from disclosure of copies of the e-mail which had been made previously for purposes of backup protection. In contrast, the United States believes that if a service provider makes backup copies of e-mail being stored incident to transmission, such storage will remain in "electronic storage" pursuant to § 2510(17)(B).

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[6]As *Weaver* notes, a user of a web-based e-mail service may be able to configure her account and computer such that the messages will be automatically downloaded to her computer, but this is not the default. *See Weaver*, 636 F. Supp. 2d at 772.

Theofel's broad interpretation of "electronic storage" was explicitly rejected by *Weaver*, the Utah Order, and the Georgia Order. *See Weaver*, 636 F. Supp. 2d at 773 ("to the extent *Theofel* is on-point, the Court finds it unpersuasive"); Utah Order at 1 (finding *Theofel* "to be unpersuasive"); Georgia Order at 6-7 ("this Court chooses not to follow the Ninth Circuit interpretation of this statutory scheme"). *See also* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1217 & 1217 n.61 (2004) (explaining why "*Theofel* is quite implausible and hard to square with the statutory text").

This Court should reject *Theofel* and confirm that the "backup" portion of "electronic storage" is limited to storage by an ISP for its own actual backup protection. It does not include more general storage of files by an ISP on behalf of a customer, based on the possibility that such storage could potentially provide a second copy of a file stored on a user's computer.

III. The More Tailored Interpretation of "Electronic Storage" Is Confirmed by the SCA's Legislative History

The SCA's legislative history confirms that previously accessed e-mail is not in "electronic storage." In the course of considering the prohibitions on voluntary disclosure by network service providers of customer communications contained in § 2702 of the SCA, the drafters of the SCA in 1986 explicitly considered what would happen when a recipient of e-mail kept a copy of the e-mail on his ISP's server after receipt:

> Sometimes the addressee, having requested and received a message, chooses to leave it in storage on the service for re-access at a later time. The Committee intends that, in leaving the message in storage, the addressee should be considered the subscriber or user from whom the system received the communication for storage, and that such communication should continue to be covered by section 2702(a)(2).

H.R. Rep. No. 99-647, at 65 (1986) (emphasis added). Critically, § 2702(a)(2) prohibits disclosure of communications stored by a remote computing service rather than communications in "electronic storage" in an electronic communication service (which are covered by § 2702(a)(1)). The House Report in effect says the following: when a customer opens an e-mail message and leaves a copy on the ISP server, the copy is subsequently treated as a communication maintained by a remote computing service.[7]

Subsequent legislative history confirms Congress's continued understanding that a previously delivered e-mail maintained by an ISP is not in electronic storage. In 2000, Congress considered and rejected amending the definition of electronic storage to include "any storage of an electronic communication by an electronic communication service without regard to whether the communication has been accessed by the intended recipient." H.R. Rep. No. 106-932, at 7 (2000) (emphasis added). The drafters of this amendment understood that previously accessed e-mail did not fall within the scope of § 2510(17).

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[7] In *Theofel*, the Ninth Circuit focused on the word "continue" in this passage, speculating that its usage implied that § 2702(a)(2) applied to both opened and unopened e-mail. The Ninth Circuit then concluded that this passage from the House Report supported its broad interpretation of "electronic storage," because "[i]f section 2702(a)(2) applies to e-mail even before access, the committee could not have been identifying an exclusive source of protection." *Theofel*, 359 F.3d at 1077. However, the Ninth Circuit has misunderstood the House Report. It is clear that § 2702(a)(1), which protects communications in "electronic storage," protects e-mail before access by its recipient. However, § 2702(a)(2) cannot protect e-mail before it has been accessed, as it protects only communications maintained "solely for the purpose of providing storage or computer processing services," not transmission service. *See* 18 U.S.C. § 2702(a)(2)(B). Thus, the House Report is describing how the different components of § 2702 protect unopened and opened e-mail. First, § 2702(a)(1) protects unopened e-mail, and § 2702(a)(2) in turn provides continued protection for the e-mail after it has been accessed. Thus, e-mail before access is in electronic storage, and accessed e-mail is maintained by a remote computing service.

In addition, the House Report on the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), demonstrated Congress's narrow understanding of the term "electronic storage." In the course of discussing an amendment to the SCA allowing for nationwide service of § 2703(a) warrants, the Report states that "2703(a) requires a search warrant to compel service providers to disclose unopened e-mails." H.R. Rep. No. 107-236(I), at 57 (2001) (emphasis added). Because warrants under § 2703(a) are required only for electronic communications in "electronic storage," this statement is further evidence that Congress did not intend opened e-mail to fall within the scope of "electronic storage."

Conclusion

For the foregoing reasons, this Court should hold that previously accessed subscriber e-mail stored by a service provider is not in "electronic storage" within the scope of 18 U.S.C. § 2510(17). Consequently, this Court should issue an order requiring Yahoo to comply with the entirety of the Court's December 3, 2009 Order and produce the communications specified in Exhibit 1.

Respectfully submitted this 4th day of March, 2010.

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