

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

MYMAIL, LTD.,

Plaintiff,

v.

YAHOO!, INC.,

Defendant.

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Civil Action No. 2:16-cv-01000-JRG-RSP

Jury Trial Demanded

PLAINTIFF’S SECOND AMENDED COMPLAINT FOR PATENT INFRINGEMENT

Plaintiff MyMail, Ltd. files this Second Amended Complaint against Yahoo!, Inc. and alleges as follows.

PARTIES

1. Plaintiff MyMail, Ltd. (“MyMail”) is a Texas Limited Partnership with an office and place business at 5344 County Road 3901, Athens, TX 75752. MyMail was founded in 2003 as an intellectual property development and licensing company to provide secure, Internet-related services and efficient web page interaction to Internet service providers, mobile device manufacturers, network carriers, and Internet-related toolbar developers. MyMail’s toolbar patents disclose inventions that allow for the dynamic updating, changing, or modification of toolbar data from remote servers (the “MyMail Toolbar Technology”). Using the MyMail Toolbar Technology, toolbar providers can, for example, dynamically change elements, functions, and buttons on their toolbar(s) for specific targeted users based on use and individual searches. MyMail has successfully licensed the MyMail Toolbar Technology to toolbar providers.

2. Upon information and belief, Defendant Yahoo!, Inc. (“Yahoo”) is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 701 First Avenue, Sunnyvale, California 94089. Yahoo has been served with process through its registered agent, CT Corporation System, 1999 Bryan Street, Suite 900, Dallas, Texas 75201.

JURISDICTION AND VENUE

3. This is an action asserting claims for patent infringement arising under the patent laws of the United States of America, Title 35, United States Code. This also is an action for a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking a declaration that MyMail has not entered into any agreement with Yahoo that places any limitation on the amount of damages MyMail is entitled to resulting from Yahoo’s infringement of the asserted patent.

4. This Court has original jurisdiction over MyMail’s patent infringement claims asserted in this action pursuant to 28 U.S.C. §§ 1331, and 1338(a). This Court has original jurisdiction over MyMail’s claims asserted pursuant to the Declaratory Judgment Act pursuant to 28 U.S.C. § 1332(a), MyMail is a citizen of the State of Texas and Yahoo is a citizen of the states of California and Delaware, and the matter in controversy exceeds \$75,000 exclusive of interest and costs.

5. Yahoo is engaged in the business of publishing and distributing a browser plug-in called the Yahoo Toolbar that integrates with Microsoft Internet Explorer, Mozilla Firefox, and Google Chrome browsers to allow users to access Yahoo search, email, weather, and other functionalities from any web page location (the “Yahoo Toolbar”). The Yahoo Toolbar docks itself to a device’s browser when installed and sits atop the browser at all times. Yahoo

publishes, promotes, and distributes the Yahoo Toolbar to users in the United States, including users within this District.

6. Upon information and belief, Yahoo is subject to this Court's specific personal jurisdiction because it does business in the State of Texas and has (a) designated an agent for service of process in the State of Texas; and (b) has committed acts of infringement in the State of Texas as alleged below. In particular, upon information and belief, Yahoo is subject to the specific personal jurisdiction of this Court because MyMail's claims for patent infringement against Yahoo arise from its acts of infringement in the State of Texas. These acts of infringement include providing the infringing Yahoo Toolbar to users of the Yahoo Toolbar in the State of Texas, and causing the browser on a user device to display the Yahoo toolbar and perform the other functions of one or more claims of the asserted patent. Therefore, this Court has personal jurisdiction over the Defendant under the Texas long-arm statute, TEX. CIV. PRAC. & REM. CODE § 17.042.

7. Venue is proper in this District under 28 U.S.C. §§ 1391(b) and (c) and 1400(b). Upon information and belief, Yahoo has engaged in acts of infringement in the State of Texas described herein sufficient to subject it to personal jurisdiction in this District if the District were a separate State. Furthermore, venue is proper with respect to MyMail's request for a declaratory judgment pursuant to 28 U.S.C. §§ 1391(b) because a substantial part of the events or omissions giving rise to MyMail's request for that relief occurred in this District.

THE PATENT-IN-SUIT

8. On September 25, 2012, the United States Patent and Trademark Office issued United States Patent No. 8,275,863 (the "'863 Patent") entitled "Method of Modifying a Toolbar," a true copy of which is attached as Exhibit 1.

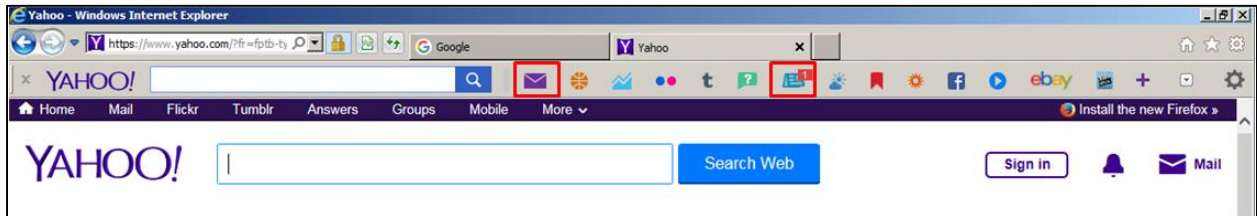
9. On April 28, 2015, the United States Patent and Trademark Office issued United States Patent No. 9,021,070 (the “’070 Patent”) entitled “Dynamically Modifying a Toolbar,” a true copy of which is attached as Exhibit 2. The ’070 Patent is a continuation of the ’863 Patent.

10. MyMail is the owner of the ’863 and ’070 Patents, and has the exclusive right to sue for and recover all past, present, and future damages for infringement of those patents.

YAHOO’S INFRINGEMENT OF THE ’070 PATENT

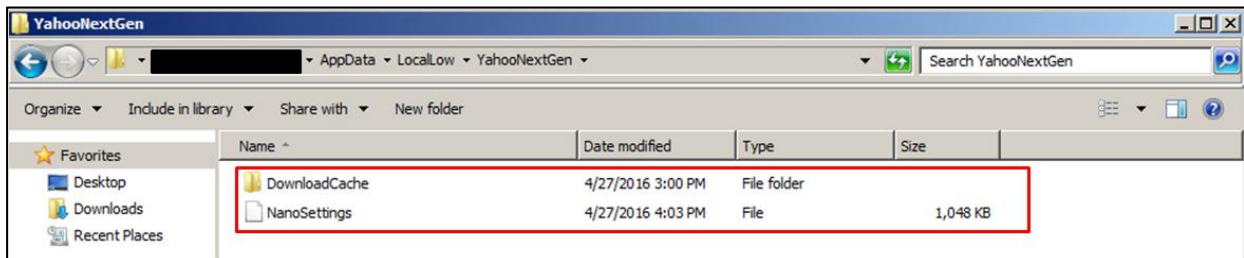
11. The Yahoo Toolbar software causes a toolbar to be displayed on a user Internet device (i.e., a device that can communicate with other devices via the Internet) that includes toolbar buttons. For example, the Yahoo Toolbar displayed on a user Internet device includes the “Mail” and “News” buttons indicated in FIGURE 1.

FIGURE 1



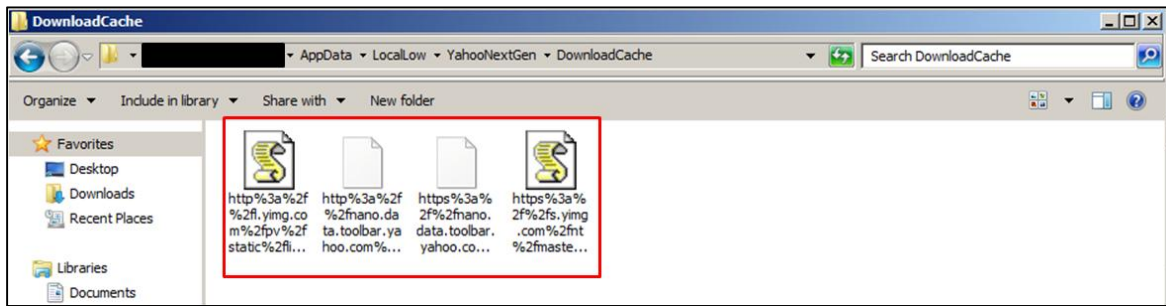
12. The toolbar buttons on the Yahoo Toolbar are defined by toolbar data stored in one or more toolbar-defining databases. In particular, the toolbar buttons on the Yahoo Toolbar are defined by toolbar data as indicated in FIGURE 2 below stored in the “AppData/LocalLow/YahooNexGen” folder on the user Internet device.

FIGURE 2



13. The toolbar buttons are also defined by toolbar data as indicated below in FIGURE 3 stored in the “AppData/LocalLow/YahooNexGen/DownloadCache” folder on the user Internet device.

FIGURE 3



14. As shown below in FIGURES 4–6, the toolbar buttons are also defined by toolbar data stored in the Windows System Registry on the user Internet device.

FIGURE 4

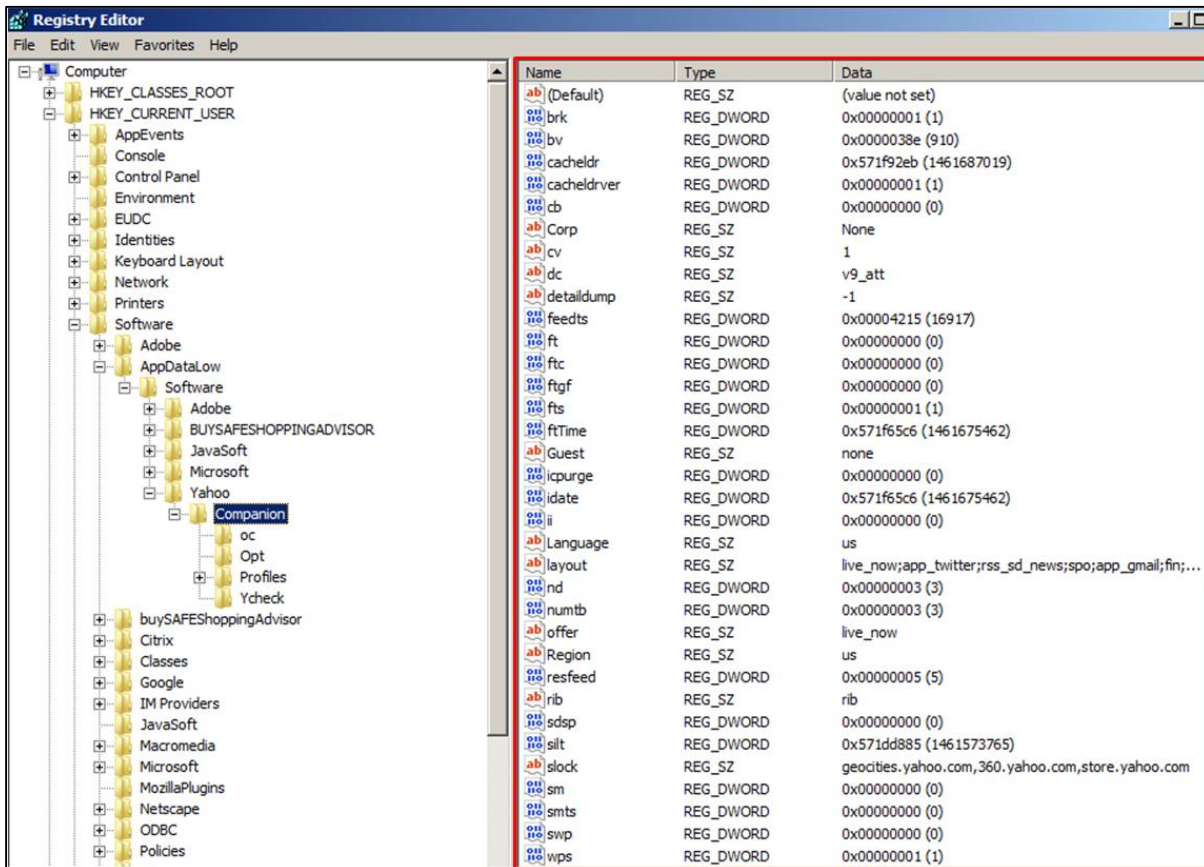


FIGURE 5

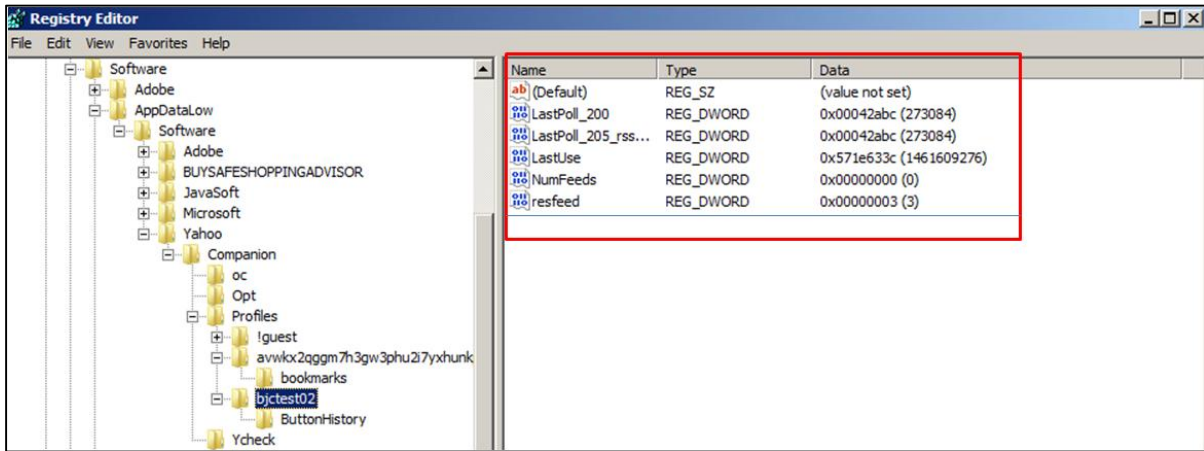
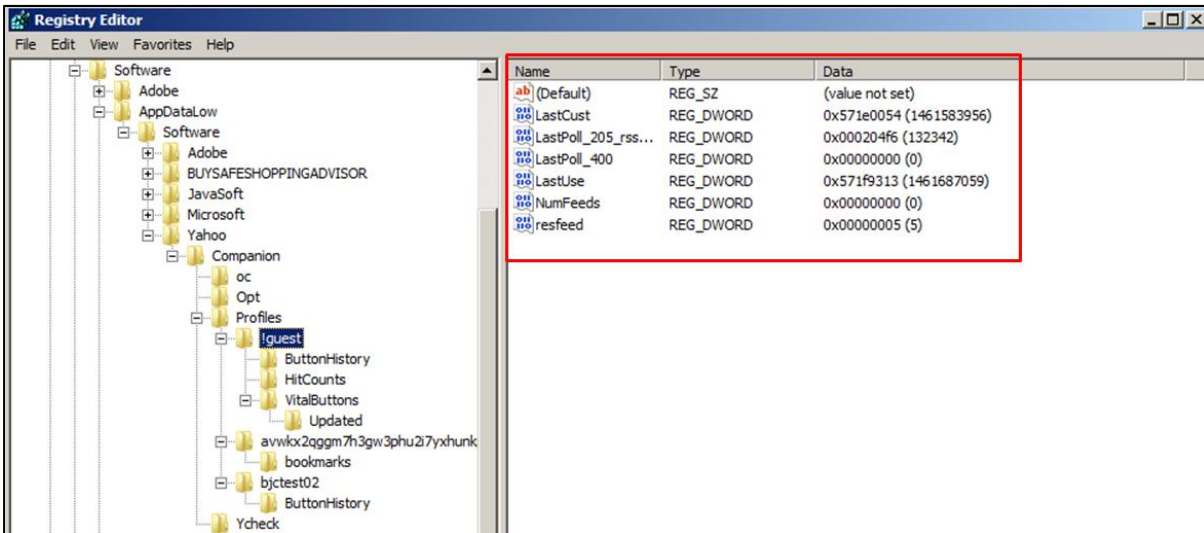


FIGURE 6



15. The “AppData/LocalLow/YahooNexGen” and “AppData/LocalLow/YahooNexGen/DownloadCache” folders, and the Windows System Registry constitute toolbar-defining databases of the user Internet device.

16. The toolbar data of the Yahoo Toolbar comprises a plurality of toolbar button attributes associated with the one or more toolbar buttons of the toolbar. For example, as shown below in FIGURE 7, the toolbar data in the “NanoSettings” file in the

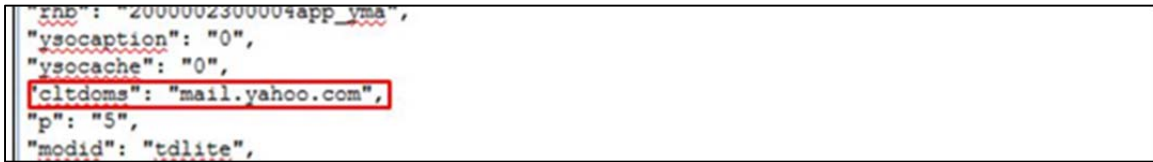
“AppData/LocalLow/YahooNexGen” folder on the user Internet machine includes a plurality of toolbar button attributes associated with one or more toolbar buttons of the toolbar:

FIGURE 7

```
{
  "e": [
    "Y!",
    "Mail",
    "u0002",
    "",
    "u00014u0001178060853/app_yma_tdu0001https://mail.yahoo.com?.intl=us",
    "90119",
    "",
    "4096",
    "",
    "",
    "",
    "",
    "",
    {
      "noapbstateico": "1",
      "alrt": "200",
      "ultid": "app_yma_td",
      "ehb": "2000002340004app_yma0004000430003300004yma",
      "pev": "200",
      "of": "ff:arial%20narrow;fs:8;c:#ffffff;ec:#54524a;ef:3;",
      "ysoncok": "1",
      "ov": "4\"J",
      "icon_apb": "g/yma_apb2.png",
      "n_st": "2",
      "awp": "2000002*.mail.yahoo.com00032010002*.mail.yahoo.com",
      "vsovscroll": "hidden",
      "vsosecure": "1",
      "at": "%25YahooMail",
      "vsoid": "@td td-applet-mail",
      "id": "yma",
      "vsologin": "1",
      "t": "2",
      "icongalaxy": "e/mail_refresh_new.png",
      "exp": "ad",
      "vsowidth": "500",
      "ov": "#AE 200 blob count;",
      "rhh": "2000002300004app_yma",
      "ysccaption": "0",
      "ysocache": "0",
      "cltdoms": "mail.yahoo.com",
      "p": "5",
      "modid": "tdlite",
      "gKrp": "grp_fav",
      "vsctdparam": "{toolbar:0,gmail:0,woeid:$WOEID,signedin:$SIGNEDIN}",
      "yscheight": "335"
    }
  ],
}
```

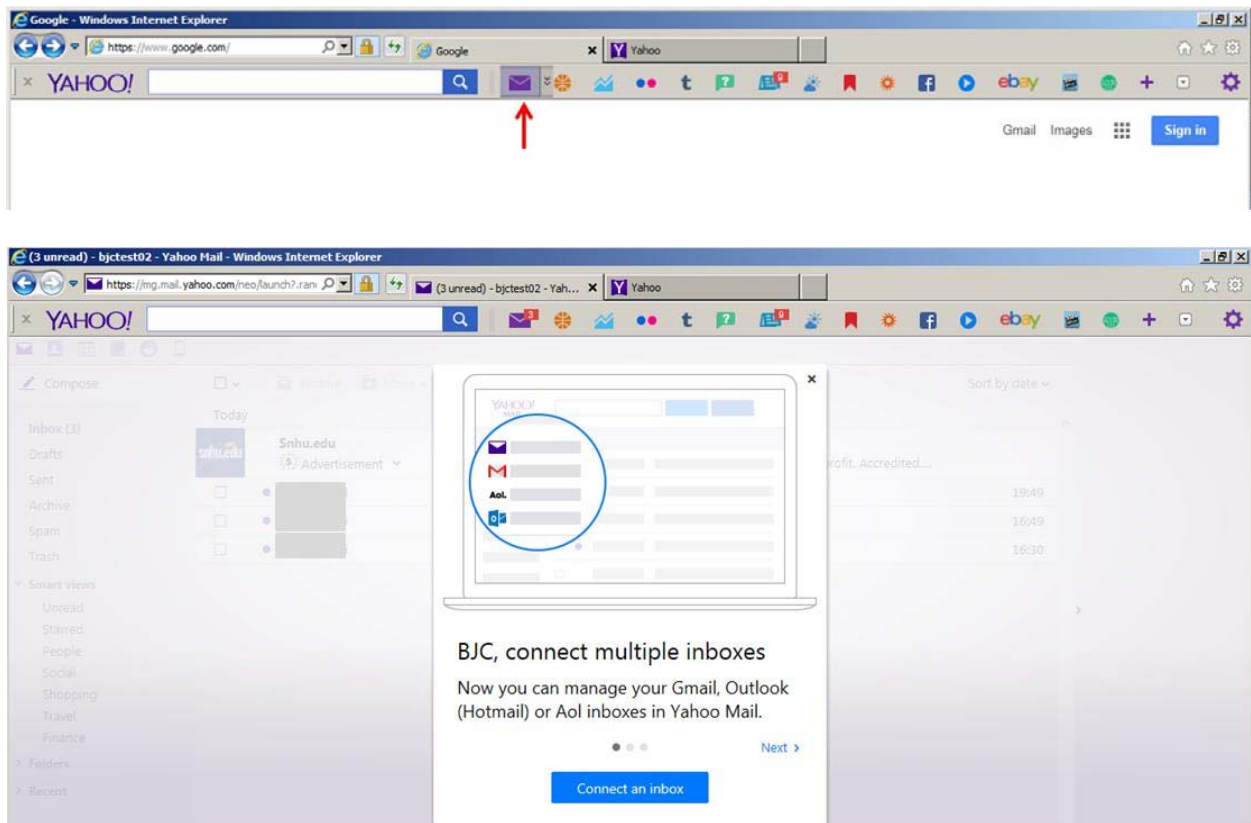
17. At least one of the toolbar button attributes (for example, in the “NanoSettings” toolbar data) identifies a function to be performed by a specific toolbar button upon actuation of the toolbar button. For example, as shown in FIGURE 8 below, the “cltdoms” toolbar button attribute includes the following function to be performed when the “Mail” button is actuated:

FIGURE 8



18. When the “Mail” button on the Yahoo Toolbar is actuated, as shown below in FIGURE 9, the user’s mailbox is displayed:

FIGURE 9



19. The Yahoo Toolbar performs a method for dynamically modifying a toolbar. For example, as shown below in FIGURE 10, the Yahoo Toolbar communicates with a server at IP Address 98.137.201.165, to dynamically modify the Yahoo Toolbar by, for example, updating the unread mail count that is displayed on the Yahoo Toolbar:

FIGURE 10

#	ClientBeginR...	X-HostIP	X-ClientIP	Result	Protocol	Host	URL
4695	19:51:59.833	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v2/alert?v=YNanoIE_10.1.0.192&t=14617669185148.tguid=9E92302B-234A-4A88-9596-3DCA0533227C...

20. The Yahoo Toolbar performs a method for dynamically modifying a toolbar using a remote source accessible through a network. For example, as shown below in FIGURE 11, the Yahoo Toolbar uses a remote source, such as the remote source with IP address 98.137.201.165, to dynamically modify the Yahoo Toolbar by, for example, updating the latest unread mail count:

FIGURE 11

#	ClientBeginR...	X-HostIP	X-ClientIP	Result	Protocol	Host	URL
4695	19:51:59.833	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v2/alert?v=YNanoIE_10.1.0.192&t=14617669185148.tguid=9E92302B-234A-4A88-9596-3DCA0533227C...

21. The Yahoo Toolbar establishes a connection between a network and a user Internet device initiated by the user Internet device. For example, as shown below in FIGURE 12, a connection is established with a user Internet device such as the user’s personal computer, at IP address 127.0.0.1. The connection is initiated by the user Internet device as shown below when the user Internet device sends a “GET” request:

FIGURE 12

#	ClientBeginR...	X-HostIP	X-ClientIP	Result	Protocol	Host	URL
22	16:31:29.800	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v1/feed?&.pc=tyc-sc&.dc=tyc-sc&.a=0&.ta=cgnone,ccus,cius,cvYNanoIE_10.1.0.1'
40	16:31:34.065	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v2/alert?v=YNanoIE_10.1.0.192&t=1461754891835&.tguid=9E92302B-234A-4A88-
42	16:31:34.652	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v1/feed?&.pc=tyc-sc&.dc=tyc-sc&.a=0&.ta=cgnone,ccus,cius,cvYNanoIE_10.1.0.1'
49	16:31:37.890	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v2/alert?v=YNanoIE_10.1.0.192&t=1461754895344&.tguid=9E92302B-234A-4A88-
227	16:47:20.227	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v2/alert?v=YNanoIE_10.1.0.192&t=1461755839261&.tguid=9E92302B-234A-4A88-
555	17:06:17.105	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v2/alert?v=YNanoIE_10.1.0.192&t=1461756975652&.tguid=9E92302B-234A-4A88-
2506	17:16:37.607	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v1/feed?&.pc=tyc-sc&.dc=tyc-sc&.a=0&.ta=cgnone,ccus,cius,cvYNanoIE_10.1.0.1'
2515	17:16:39.911	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v2/alert?v=YNanoIE_10.1.0.192&t=1461757598415&.tguid=9E92302B-234A-4A88-
4695	19:51:59.833	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v2/alert?v=YNanoIE_10.1.0.192&t=14617669185148.tguid=9E92302B-234A-4A88-
4951	20:10:18.878	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v2/alert?v=YNanoIE_10.1.0.192&t=1461768017725&.tguid=9E92302B-234A-4A88-
5175	20:22:38.965	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v1/feed?&.pc=tyc-sc&.dc=tyc-sc&.a=0&.ta=cgnone,ccus,cius,cvYNanoIE_10.1.0.1'
5180	20:22:39.797	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v1/feed?&.pc=tyc-sc&.dc=tyc-sc&.a=0&.ta=cgnone,ccus,cius,cvYNanoIE_10.1.0.1'
5203	20:22:43.739	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v2/alert?v=YNanoIE_10.1.0.192&t=1461768760085&.tguid=9E92302B-234A-4A88-
5206	20:22:44.770	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v2/alert?v=YNanoIE_10.1.0.192&t=1461768761417&.tguid=9E92302B-234A-4A88-
5281	20:23:42.602	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v1/feed?&.pc=tyc-sc&.dc=tyc-sc&.a=0&.ta=cgnone,ccus,cius,cvYNanoIE_10.1.0.1'
5290	20:23:46.028	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v2/alert?v=YNanoIE_10.1.0.192&t=1461768823462&.tguid=9E92302B-234A-4A88-
6025	21:22:19.139	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v2/alert?v=YNanoIE_10.1.0.192&t=1461772337396&.tguid=9E92302B-234A-4A88-
6442	21:31:03.178	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v2/alert?v=YNanoIE_10.1.0.192&t=1461772862805&.tguid=9E92302B-234A-4A88-
6889	21:33:22.952	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/gkxy/v1/feed?&.pc=tyc-sc&.dc=tyc-sc&.a=0&.ta=cgnone,ccus,cius,cvYNanoIE_10.1.0.1'

22. The Yahoo Toolbar further receives at the remote source information associated with the toolbar data stored in toolbar-defining databases of the user Internet device. For

example, as shown below in FIGURES 13–14, the remote source at IP address 98.137.201.165 receives an HTTP “GET” request from the user Internet device containing information associated with the toolbar data stored in the one or more toolbar-defining databases of the user Internet device. Upon information and belief, the encoded data indicated by the red box below includes information associated with the toolbar data stored in the one or more toolbar-defining databases of the user Internet device:

FIGURE 13

#	ClientBeginR...	X-HostIP	X-ClientIP	Result	Protocol	Host	URL
4695	19:51:59.833	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/glxy/v2/alert?v=YNanoE_10.1.0.192&t=1461766918514&tguid=9E92302B-234A-4A88-9596-3DCA0533227C&ta=egnone.cc.cus.cvYNanoE_10.1.0.192.cja.cbrik_ids=200.205.400.&onumb=N2oqocZEMJ&rsbtrns=rs_ad_news HTTP/1.1

FIGURE 14

The screenshot shows the 'Request Headers' and 'Cookies' sections of a web browser's developer tools. The 'Cookies' section is highlighted with a red box and contains the following cookies:

- AO**: u=1
- B**: apm97dbi1siq, b=4, d=7ZXQOMlpYEJgBuYf.zp.dhA--, i=qrpVdhycakmVarz4q1, s=lr
- CP**: br=, optck=0, pc=tyc-cc, tguid=9E92302B-234A-4A88-9596-3DCA0533227C, v=100100
- F**: a=RE72vOAMvS94KWdQycGvowUjTuFrT4.3DqR.RhNr250kapISysYcQjWukUJYmwDRs-, b=50TQ, d=3fZcx.p9vFLBLCl3m6y5dEOJtc8dZHfFqM2ubQ-
- PH**: I=en-GB
- SSL**: kv=0, s=Tg2OK64RYf8gy9qO_Sy90q74_CvoUYMoI5E0thY9M8OQHfivP9y556oe037SH8l3skf2Zbt18eUBe8mvA--, v=1
- T**: a=QAE, d=cwBTVRZMJ5BRJXhNely4TURnd0SEVTBPVEUz7mnpMUJnL50BYQFRQUJ8ZvFEVUJzQzJNRFI3M0NLUJVJNzdaTTQ3S1pMQQFzY2KATVxd1RUaFfQzvoSempTRiFLRJRb3ccx2V4sy0BYWks=EAABiflyYM_BakozeLL4WKSZQ---E, sk=DAAZJmb2Jd46V, z=cJDXbc2vMXBw581qQa34yNjEYmWY2NDI2N083MzIzTjYwMUJ
- ucs**: fs=1, lnct=1461749424
- Y**: intl=us, iz=, l=0Imansg66cx76mtf7ks8xon7kdafv41jn89b99/o, lg=en-US, n=0dgo09ccand, p=n2o0000012000000, r=10a, v=1
- YLS**: n=1, p=1, v=1
- YP**: d=AEBAEMEYCIQD2EHID3bizVxlaMneOGVshCrG45FT27Lpt.Aa_PvIthAKGgw4ITRkpPrseM_G3F25g63Dv6WJlA0T9ucUO1oMhAA--v=AwAAAY, ypcdb=54386f2e75c332bb2c4863edf3db86a

The 'Transport' section at the bottom shows the host as 'us.data.toolbar.yahoo.com'.

23. The Yahoo Toolbar further sends from the remote source via the network to the user Internet device the updated toolbar data to be stored in the toolbar-defining databases of the user Internet device. For example, as shown below in Figures 15–16, the remote source at IP address 98.137.201.165 sends the user Internet device updated toolbar data in the form of one or more application/octet-stream messages containing the updated toolbar data:

FIGURE 15

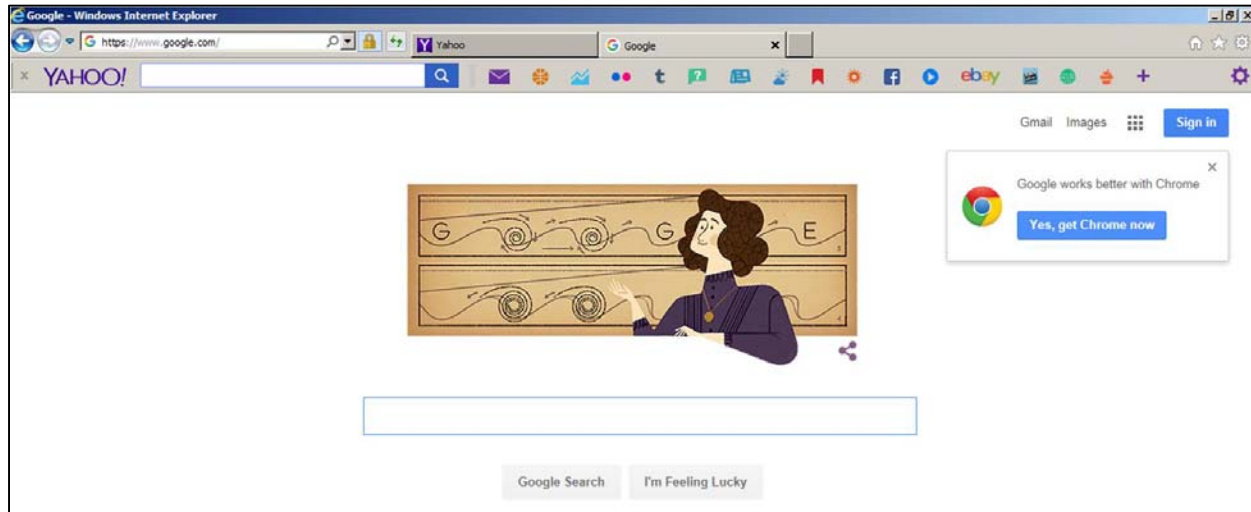
#	ClientBeginR...	X-HostIP	X-ClientIP	Result	Protocol	Host	URL
4695	19:51:59.833	98.137.201.165	127.0.0.1	200	HTTPS	us.data.toolbar.yahoo.com	/glxy/v2/alert?v=YNanoIE_10.1.0.192&t=1461766918514&.tguid=9E92302B-234A-4A88-9596-3DCA0533227C...

FIGURE 16



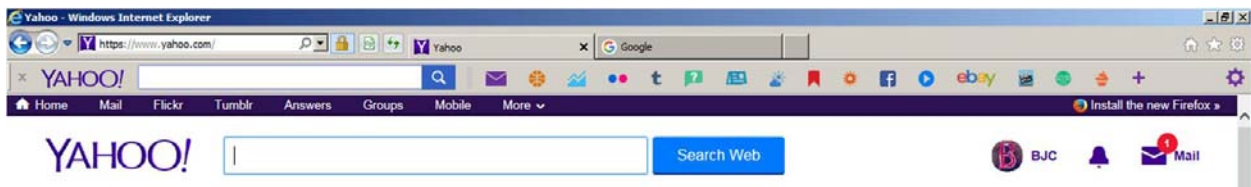
24. As shown below in FIGURE 17, the Yahoo Toolbar displays the toolbar as defined by the updated toolbar data, such as the latest unread mail count, while one or more first webpages of, for example, the Google website are being displayed on the user Internet device.

FIGURE 17



25. As shown below in FIGURE 18, the Yahoo Toolbar persistently displays the toolbar with the updated toolbar data, such as the latest unread mail count, while one or more second webpages of, for example, the Yahoo website are being displayed on the user Internet device:

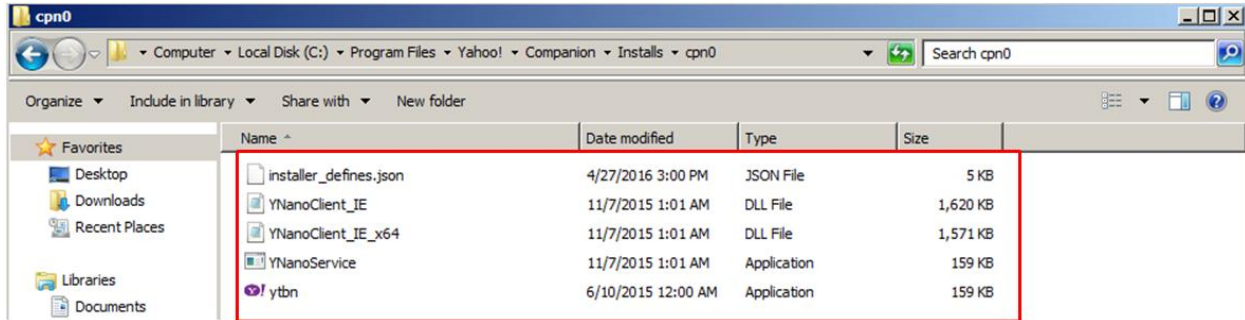
FIGURE 18



26. The Yahoo Toolbar is stored in at least one computer-readable memory device such as, for example, the hard drive of the user Internet device, and comprises computer-executable instructions that perform a method for dynamically modifying a toolbar.

27. The computer-executable instructions of the Yahoo Toolbar, for example, “YNanoClient_IE.dll” are embodied in computer readable memory at “C:\Program Files\Yahoo!\Companion\Installs\cpn0” as shown below in FIGURE 19:

FIGURE 19



28. The Yahoo Toolbar integrates with a browser, such as Internet Explorer, on a device capable of communicating with other devices over a network such as a user Internet Device.

29. The Yahoo Toolbar performs each of the functions described in one or more claims of the '070 Patent, including the functions described above. In particular, the Yahoo Toolbar software embedded in the browser of the user Internet device and remotely located, such as on a server remote from the user Internet device, instruct these devices to perform these functions. The Yahoo Toolbar, therefore, directs and controls the functions of the user Internet device and the remote device(s) that perform the functions described above.

30. During Yahoo's development, promotion, maintenance and upgrading of the Yahoo Toolbar, Yahoo extensively tested and evaluated the operation of the toolbar.

31. To the extent any third party performs any of the functions described above, the performance of such functions is attributable to the Yahoo Toolbar because it directs and controls the performance of those functions.

CLAIM 1 – INFRINGEMENT OF U.S. PATENT NO. 9,021,070

32. Plaintiff incorporates paragraphs 1 through 31 as though fully set forth herein.

33. Upon information and belief, Yahoo has been and is now directly infringing one or more claims of the '070 Patent by using the Yahoo Toolbar (including use for testing purposes) in the United States in violation of 35 U.S.C. § 271(a).

34. Plaintiff has been damaged by Yahoo's infringing activities.

35. Plaintiff adopts and incorporates herein Exhibit 4 to Plaintiff's First Amended Complaint showing how the Yahoo Toolbar infringes at least Claims 1–9, 12, 13, and 15–22 of the '070 Patent.

36. In October 2012, MyMail sent Yahoo several communications identifying the '863 Patent—the parent patent of the '070 Patent—and providing Yahoo with information showing how the Yahoo Toolbar infringed various claims of the '863 Patent. In connection with these communications, MyMail proposed that Yahoo execute a license for a portfolio of MyMail patents, including the '863 Patent.

37. In order to facilitate discussions between MyMail and Yahoo, the parties entered into a non-disclosure agreement and, pursuant to that agreement, MyMail provided additional information about the scope of MyMail's invention disclosed in the '863 Patent and its applicability to the Yahoo Toolbar as well as proposed terms for a license to the MyMail patent portfolio.

38. MyMail continued their discussions regarding the MyMail patent portfolio and, in particular, the '863 Patent, during 2013. During these discussions, MyMail provided Yahoo with information explaining why Yahoo's arguments suggesting that it did not infringe the '863 Patent or that the '863 Patent was invalid had no merit. MyMail also pointed out to Yahoo that it had continuing patent applications based upon the application leading to the '863 Patent that

would likely issue soon and covered the Yahoo Toolbar. Among these continuing applications was the application which became the '070 Patent.

39. After these discussions, Yahoo decided not to license any of MyMail's patents.

40. On November 14, 2014, Benjamin Hattenbach ("Hattenbach"), Yahoo's outside counsel in this lawsuit, filed a Petition for *Inter Partes* Review on behalf of a company called Conduit (the "Conduit IPR") challenging the patentability of the '863 Patent. During the Conduit IPR, MyMail submitted substantial arguments and evidence showing that the invention disclosed and claimed in the '863 Patent was novel over the prior art. Hattenbach, Yahoo's counsel, was aware of the evidence and arguments showing this fact. The Conduit IPR was settled prior to a final ruling on the merits.

41. Upon information and belief, at some point in time prior to the filing of this lawsuit, Yahoo became aware of the '070 Patent, which is a continuation of the '863 Patent.

42. Yahoo, after becoming aware of the '070 Patent, retained Hattenbach and his firm to represent it in this action.

43. Yahoo, after becoming aware of the '070 Patent, intentionally continued to use and provide the Yahoo Toolbar in the United States. Yahoo continued to knowingly engage in this infringing conduct with the knowledge of the facts MyMail provided to it in 2012 and 2013 showing that the Yahoo Toolbar infringed the related '863 Patent, and with the knowledge of the facts provided to it by MyMail in 2012 and 2013 as well as the information acquired by Yahoo's counsel in the Conduit IPR that the '863 Patent was valid and enforceable. Yahoo knew or should have known, based on its knowledge of these facts, that it infringed the '070 Patent and that this patent was valid and enforceable. Yahoo nevertheless willfully continued to infringe the '070 Patent with complete disregard of MyMail's patent rights. Yahoo's knowing and

intentional infringement of the '070 Patent constitutes willful and egregious infringement behavior.

CLAIM 2 – CLAIM FOR DECLARATORY JUDGMENT

44. On December 9, 2016, Yahoo filed its Answer and Counterclaims to First Amended Complaint. In addition to denying infringement of the asserted MyMail patents and asserting that those patents are invalid, Yahoo's Answer and Counterclaims asserted a defense entitled "Contractual Damages Limitation" which alleged that "Plaintiff's claim is barred or limited by contractual obligations and/or contractual limitations on liability." Although Yahoo's Answer and Counterclaims did not allege which contracts supposedly contained such obligations and limitations, Yahoo' counsel acknowledged that the alleged contracts are the online Yahoo Terms of Service and Yahoo Toolbar Software License (collectively the "Yahoo Agreements"). This defense asserts that the limitation of liability provisions in the Yahoo Agreements (the "Limitation of Liability provisions") preclude MyMail's patent infringement claims or restrict the damages MyMail can recover based on those claims.

45. MyMail has taken the position that it did not enter into any agreements with Yahoo imposing any contractual limitation on its damages for patent infringement. MyMail requested that Yahoo's Contractual Damages Limitation be stricken, but Yahoo opposed the striking of that defense.

46. On January 4, 2017, MyMail's counsel requested Yahoo to provide an explanation regarding the factual basis for Yahoo's asserted Contractual Damages Limitation defense. Yahoo did not respond for over two weeks and then merely stated in a conclusory fashion that Yahoo's pleading of this defense "at least raises a colorable basis for Yahoo's contractual defense."

47. On April 19, 2017, MyMail filed a Motion for Partial Summary Judgment with respect to Yahoo's Contractual Damages Limitation defense. MyMail's motion asserted that there was no evidence that MyMail entered into any of the agreements Yahoo has asserted contain provisions purportedly limiting MyMail's damages relating to its claims for patent infringement, and that the Limitation of Liability provisions contained in those agreements did not impose any limitation on MyMail's patent infringement damages.

48. On May 3, 2017—the deadline for Yahoo to respond to MyMail's Motion for Partial Summary Judgment—Yahoo responded by filing an amended answer to MyMail's First Amended Complaint, withdrawing the Contractual Damages Limitation defense without prejudice and asserting that this action rendered MyMail's pending motion moot. Yahoo further asserted that it was conducting discovery in a related lawsuit pending in California to gather evidence to show that MyMail entered into the agreements with Yahoo that contain the Limitation of Liability provisions. Yahoo's response to MyMail's Motion for Partial Summary Judgment completely ignored MyMail's argument that even if MyMail had entered into the Yahoo Agreements, the Limitation of Liability provisions therein do not restrict MyMail's patent infringement damages. Thus, it is evident that Yahoo did not have any factual basis for its Contractual Damages Limitation defense and, in order to evade judicial review of this baseless defense, withdrew it only temporarily so that Yahoo could reassert the defense once it completed certain discovery.

49. Yahoo's temporary withdrawal of its Contractual Damages Limitation defense without prejudice demonstrates a high likelihood that Yahoo intends to reassert this defense against MyMail in the near future, and that the withdrawal is mere litigation posturing.

50. Yahoo's attempt to reserve the right to reassert the Contractual Damages Limitation defense casts a cloud over the value of MyMail's patent rights, and prevents MyMail from extinguishing that baseless defense through proper motion practice.

51. Thus, an actual controversy continues to exist between MyMail and Yahoo regarding whether MyMail entered into the Yahoo Agreement containing the Limitation of Liability provisions, and whether those provisions operate to restrict MyMail's patent infringement damages.

52. MyMail requests the Court to enter a declaratory judgment that MyMail did not enter into any contracts containing any limitation of liability provisions and, even if it did, such provisions do not restrict MyMail's patent infringement damages. Only by doing so can the Court lift the cloud of uncertainty over the value of its patent infringement claims against Yahoo resulting from Yahoo's continuing threat to reassert its Contractual Damages Limitation defense.

DEMAND FOR JURY TRIAL

53. Plaintiff, pursuant to Rule 38 of the Federal Rules of Civil Procedure, requests a trial by jury of any issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests the following relief:

1. A judgment in favor of Plaintiff that Yahoo has directly infringed one or more claims of the '070 Patent;
2. A judgment and order requiring Yahoo to pay Plaintiff damages adequate to compensate for infringement under 35 U.S.C. § 284, which damages in no event shall be less than a reasonable royalty for the use made of the inventions of the '070 Patent, including pre- and post-judgment interest and costs, including expenses and disbursements;

3. A judgment imposing enhanced damages against Yahoo for its willful infringement of the '070 Patent in accordance with 35 U.S.C. § 284;

4. A judgment finding that this is an exceptional case in view of Yahoo's willful infringement of the '070 Patent and awarding MyMail its reasonable attorneys' fees in accordance with 35 U.S.C. § 285;

5. A judgment declaring that MyMail did not enter into any agreement with Yahoo containing any limitation of liability provisions, and that the limitation liability provisions in the Yahoo Terms of Service and Toolbar Software License do not impose any restriction on MyMail's damages for Yahoo's patent infringement; and

6. Any and all such further necessary relief as the Court may deem just and proper under the circumstances.

Dated: May 10, 2107

Respectfully submitted,

BUETHER JOE & CARPENTER, LLC

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**ATTORNEYS FOR PLAINTIFF
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a) on this 10th day of May, 2017. Any other counsel of record will be served by facsimile transmission and first class mail.

/s/ Eric W. Buether
Eric W. Buether