

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

BRIGHT RESPONSE, LLC
F/K/A POLARIS IP, LLC,

Plaintiff,

v.

GOOGLE INC., ET AL.,

Defendants.

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No. 2:07-cv-00371-CE

Jury Demanded

**DEFENDANT YAHOO! INC.'S MOTION FOR JUDGMENT AS A
MATTER OF LAW OF NON-INFRINGEMENT**

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 50, defendant Yahoo! Inc. (“Yahoo!”) hereby moves for entry of judgment as a matter of law that none of the asserted claims have been infringed literally or by doctrine of equivalents by any Yahoo! accused product. Plaintiff Bright Response (“Bright Response”) has failed to present substantial evidence to support its burden to prove patent infringement of dependent claims 30, 31, and 33. Bright Response’s infringement theory is deficient based upon Dr. Rhyne’s testimony that Yahoo!’s Sponsored Search product performs each step of the asserted claims.

Claims 30, 31, and 33 require the following steps be performed by Yahoo! Sponsored Search in order for Yahoo! to infringe the asserted claims:

- receiving the *non-interactive* electronic message from a source
- interpreting the electronic message using a rule base and *case base knowledge engine*;
- retrieving one or more *predetermined responses* corresponding to the interpretation of the electronic message from a repository for automatic delivery to the source;
- *classifying the electronic message* as at least one of (i) being able to be responded to automatically; and (ii) requiring assistance from a human operator; and
- *assigning a score to each stored case model* which is compared with the case model, the score increasing when at least one of the attributes and text match

the stored case model, and the score not increasing when at least one of the attributes and the text do not match the scored case model.

Claim 33 requires the additional step where a score is:

- *normalized by dividing the score by a maximum possible score for the stored case mode, where the maximum possible score is determined when all of the attributes and the text of the case model and the stored case model match.*

First, Yahoo!'s system does not *classify the electronic message* as at least one of (i) being able to be responded to automatically; and (ii) requiring assistance from a human operator. It was evident at trial that Yahoo! responds to search queries it receives automatically. Dr. Rhyne confirms that search results are returned from Yahoo! in less than a second, that the search results and a selection of ads are all prepared automatically, and that the claim construction does not define the term "response." (Trial Tr., vol. 2 (pm), 34, August 4, 2010.)

Second, Yahoo!'s Sponsored Search never *assigns a score to each stored case model*, or the stored advertisements and associated keywords, and therefore, cannot meet this limitation of "assigning a score to each case model." Indeed, even Dr. Rhyne admits that each stored case model must be scored, and admits that Yahoo! Sponsored Search does not assign a score to every ad in the database each time a query is received. (Trial Tr., vol. 2 (pm), 41-42, August 4, 2010.)

Third, Yahoo! Sponsored Search does not interpret the electronic message using a rule base *and case base knowledge engine*. It was uncontroverted at trial that in Yahoo! Sponsored Search does not employ a *case base knowledge engine*. Dr. Rhyne confirms that a search query is not compared to an exemplar set of queries, specifically in response to a question "in Yahoo!'s Sponsored Search, during the time between the user's entry of

the search query and the return of the ads, the user's query is not compared to any previously received search queries from a user.” (Trial Tr., vol. 2 (pm), 26-27, August 4, 2010.)

Fourth, Yahoo!’s system does not retrieve one or more *predetermined responses* corresponding to the interpretation of the electronic message. At trial, it was undisputed that Yahoo! Sponsored Search has no predetermined responses to retrieve. Dr. Rhyne admitted that the predetermined response in Yahoo!’s system is the set of advertisements returned to the source. (Trial Tr., vol. 2 (pm), 13–14, August 4, 2010.) Plaintiff failed to show that the set of advertisements returned by Yahoo! are predetermined – or “prepared prior to the receipt of the electronic message where the responses may be modified and/or altered based on the interpretation of the electronic message.” In fact, Dr. Rhyne testifies the opposite is true, that the “mixture of ads is not” prepared prior to the receipt of the search query. (Trial Tr., vol. 2 (pm), 13–15, August 4, 2010.)

Fifth, Yahoo! Sponsored Search does not receive a *non-interactive* electronic message. It was undisputed at trial that in Yahoo! Sponsored Search interacts with the electronic message. Indeed, Dr. Rhyne confirms that Yahoo!’s system may interact with the electronic message before, that Yahoo!’s system does interact with the query that is sent by the source, and that Yahoo!’s system continues to interact after the query received by Yahoo! Sponsored Search. (Trial Tr., vol. 2 (pm), 5-6, 20-25, August 4, 2010.)

Sixth, Yahoo! Sponsored Search cannot meet the limitations of claim 33 because Sponsored Search does not normalize the scores using division. Dr. Rhyne admits that Yahoo! uses decision trees and does not use scores that are normalized by division. (Trial Tr., vol. 2 (pm), 70-72, August 4, 2010.)

Accordingly, no reasonable jury would have a legally sufficient evidentiary basis to find that Yahoo! Sponsored Search system (1) receives a non-interactive electronic message, (2) includes a case base knowledge engine, (3) provides predetermined responses, (4) classifies the electronic message, (5) scores each case, or (6) normalizes by dividing. Thus, Yahoo! requests that this Court hold that Bright Response failed to adduce substantial evidence of infringement, literally or under the doctrine of equivalents, and enter a judgment of no infringement in Yahoo!'s favor.

II. LEGAL STANDARD

Judgment as a matter of law (“JMOL”) is appropriate where “a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a *legally sufficient evidentiary basis* to find for the party on that issue” FED.

R. Civ. P. 50(a)(1). For a non-moving party to survive a JMOL motion,

there must be a conflict in *substantial evidence* to create a jury question. Substantial evidence is defined as evidence of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions. Consequently, a mere scintilla of evidence is *insufficient* to present a question for the jury.

Gaia Techs., Inc. v. Recycled Prods. Corp., 175 F.3d 365, 374 (5th Cir. 1999) (quoting *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (en banc)); *see also Price v. Marathon Cheese Corporation*, 119 F.3d 330, 333 (5th Cir. 1997).

III. ARGUMENT

Bright Response failed to adduce legally sufficient evidence of infringement of claims 30, 31, and 33 of the ‘947 patent. Yahoo! is therefore entitled to judgment as a matter of law because the accused Sponsored Search product is not capable of meeting each limitation of three accused claims of the ‘947 patent as construed by the Court. The

plaintiff failed to prove that Yahoo! Sponsored Search classifies the electronic message, assigns a score to each case model, includes a case base knowledge engine, provides predetermined responses, receives a non-interactive electronic message from the source, and normalizes by dividing the score.

A. BRIGHT RESPONSE DID NOT OFFER LEGALLY SUFFICIENT EVIDENCE TO SHOW YAHOO!’S SPONSORED SEARCH CLASSIFIES THE ELECTRONIC MESSAGE AS REQUIRED BY THE PATENT

Claims 30, 31, and 33 require “classifying the query as automatic or identified for human review,” of which the Court has construed “classifying the electronic message” as “determining whether the electronic message falls into one or more categories.” Plaintiff has not adduced substantial evidence to support its burden to prove that Yahoo! Sponsored Search classifies the query as automatic or identified for human review because Yahoo! Sponsored Search never identifies any query or ad for any type of response. Instead, Yahoo! Sponsored Search always responds to every query automatically, and Yahoo!’ Sponsored Search never identifies individual queries for human review.

Plaintiff has not adduced sufficient evidence to show Yahoo! Sponsored Search is entirely automatic. Dr. Rhyne’s testimony shows that Yahoo! cannot automatically respond if it doesn’t do (i) or (ii):

Q. Now, if Sponsored Search doesn't classify the electronic message as automatic or requiring human assistance -- and let's assume that to be the case for this hypothetical -- it wouldn't meet that classifying claim element, right?

A. Okay. Let me be sure I understand your question. If it doesn't do (i) and it also never does (ii), then I agree with you.

(Trial Tr., vol. 2 (pm), 28-29, August 4, 2010.) Dr. Rhyne concocted a circular argument regarding Yahoo!'s system and justified it like so:

Q. So my question is: Isn't it possible that you could have a system that automatically tries to respond to every query without doing any classification of the queries as they come in?

A. Well, if -- if it responds -- if it's able to respond automatically to every query that comes in, then it has classified every query that came in as being able to be responded to automatically. And that, to me, meets the limitations of that part of Claim 28.

Q. And you don't find that answer to be circular?

A. It has some degree of circularity to it, but -- so, as my kids would say.

(Trial Tr., vol. 2 (pm), 32, August 4, 2010.)

Plaintiff also failed to prove any human review of individual search queries received by Yahoo! Sponsored Search:

Q. Now, the only Yahoo! system that you identified in your direct testimony as having human involvement is Yahoo!'s Traffic Protection system, correct?

A. Yes, sir.

Q. But the Traffic Protection system analyzes data only after the return of the search results in the advertisements, correct?

A. Yes.

...

Q. Well, isn't it your opinion that anything that happens in the Defendants' accused systems, after they return search results and ads, is irrelevant to your analysis for those claims, correct?

A. I made that statement in one of my reports, but I was specifically dealing with interactivity and non-interactivity.

(Trial Tr., vol. 2 (pm), 35-36, August 4, 2010.)

Dr. Rhyne admits that search results and ads are sent back from Yahoo! to the source in less than a second and that both are prepared automatically.

Q. Those search results and ads that get sent back from Yahoo!, they're sent back using less than a second, correct?

A. Yes.

Q. And the search results are prepared and a selection of the ads is all prepared automatically, correct?

A. Yes.

Q. And the Court's claim construction doesn't define the response as advertisements, does it?

A. No.

(Trial Tr., vol. 2 (pm), 32, August 4, 2010.)

Plaintiff failed to show that Yahoo! flags or tags its search queries, and therefore, lacks evidence to show classification:

Q. Now, Yahoo!'s Sponsored Search system does not mark or flag any individual queries, does it?

A. Only as a member of a set. I discussed that in explaining my Doctrine of Equivalents opinion, but it doesn't do any individual queries all by themselves.

Q. In fact, you don't have any evidence that Yahoo!'s Sponsored Search system has ever marked or identified any particular or specific search query as requiring assistance from a human operator?

A. Yes.

(Trial Tr., vol. 2 (pm), 27-28, August 4, 2010.)

No reasonable juror could find that the limitation requiring classifying the query as automatic or identified for human review in claims 30, 31, and 33 is met by Yahoo! Sponsored Search.

B. BRIGHT RESPONSE DID NOT OFFER LEGALLY SUFFICIENT EVIDENCE TO SHOW YAHOO!'S SPONSORED SEARCH SCORES EACH EXEMPLAR CASE

Claims 30, 31, and 33 require that each exemplar case be scored. The Court has not construed an exemplar case. Plaintiff failed to present substantial evidence to support its burden to prove that Yahoo!'s Sponsored Search system scores each exemplar case. Yahoo's system does not score each ad in its ad database. Instead, Yahoo!'s system removes millions of ads from the set of possible ads down to approximately a dozen ads before the Sponsored Search system scores any ads. No reasonable juror could find that the limitation requiring that each exemplar case be scored in claims 30, 31, and 33 is met by Yahoo! Sponsored Search.

Indeed, Bright Response's own expert, Dr. Rhyne, testified that Yahoo!'s Sponsored Search does not satisfy the claim element for scoring:

Q. So if the Yahoo!'s Sponsored Search system doesn't assign a score to each scored case -- each stored case model as is required by these claims, there can't be any infringement, right?

A. Not literal infringement; that's correct.

(Trial Tr., vol 2 (pm), August 4, 2010 at 41:11-15.)

Q. Now, Yahoo!'s Sponsored Search system does not assign a score to every ad in the database each time a search query is received, correct?

A. Yes.

(Trial Tr., vol 2, August 4, 2010 at 38:8-11.)

Based upon this testimony alone, Yahoo! should be granted judgment as a matter of law. Bright Response offered no evidence that Yahoo! scores every ad, as required by claims 30, 31 and 33. To the contrary, Bright Response offered testimony that Yahoo! does not score every ad and making this element ripe for judgment as a matter of law.

C. BRIGHT RESPONSE DID NOT OFFER LEGALLY SUFFICIENT EVIDENCE TO SHOW YAHOO!'S SPONSORED SEARCH PROVIDES A CASE BASE KNOWLEDGE ENGINE

Claims 30, 31, and 33 require a “case base knowledge engine,” which the Court has construed as “a knowledge engine that processes electronic messages by comparing them to a stored set of exemplar cases.” (Dkt. 369 at 11.) Plaintiff has not adduced substantial evidence to support its burden to prove that Yahoo! uses a case base knowledge engine, as construed by the Court, because Yahoo! Sponsored Search only compares queries to advertisements, and Yahoo! Sponsored Search never compares queries to a set of exemplar queries. The limited evidence and the testimony of Dr. Rhyne shows that Yahoo! Sponsored Search does not meet the limitation of case base knowledge engine.

Plaintiff failed to establish evidence as to what, in Yahoo! Sponsored Search, constitutes an exemplar case. Dr. Rhyne’s testimony is constantly evolving. In one instance, Dr. Rhyne initially testified that exemplar cases were the advertisements in the Sponsored Search system:

Q. So the entire set of ads are all exemplars?

A. I think of each one of them as being an example of what one might respond to for a given query.

(Trial Tr., vol. 2 (pm), 25, August 4, 2010.) An advertisement is not an exemplar case. In this Court’s order on August 2, 2010, the Court explained that it is “inclined to agree . . . that an advertisement is not a case.” (Dkt. 566 at 5.) Dr. Rhyne also testifies at trial that search queries are not advertisements and are not an exemplar set of cases that come from the same or similar source:

Q. Now, search queries are not advertisements, are they?

A. No.

Q. And ads are submitted by advertisers?

A. Yes.

Q. And search queries are submitted by users?

A. Yes.

(Trial Tr., vol. 2 (pm), 26, August 4, 2010.) Yahoo! agrees with the Court's inclination.

At trial, however, Dr. Rhyne testified that exemplar cases are keywords and geo-targeting information:

Q. So you're alleging that Yahoo! meets this claim limitation by comparing search queries to a set of advertisements?

A. No. For the exemplar queries, as I've carefully said in my direct testimony, the comparison between the keywords of the advertisement and the keywords identified by the advertiser for the advertisement as well as, of course, attributes go. I also pointed to the geo-targeting limitation.

(Trial Tr., vol. 2 (pm), 25-26, August 4, 2010.) An exemplar case, as required by claims 30, 31, and 33, must be scored in order to meet all the limitations. Yahoo! does not score keywords or geo-targeting limitations; it only scores a subset of advertisements in its Sponsored Search System. Dr. Rhyne's new definition does not constitute an exemplar case because neither keywords, nor geo-targeting limitations are scored to meet the elements of claims 30, 31, and 33.

Moreover, Plaintiff failed to adduce substantial evidence as to whether Yahoo! Sponsored Search has a case base knowledge engine. Dr. Rhyne admitted that in all the Yahoo! documents he reviewed, he didn't see any mention of a case-based knowledge engine. (Trial Tr., vol. 2 (pm), 10, August 4, 2010.) Indeed, Dr. Rhyne admits had he found a citation to a Yahoo! document that mentions a case base knowledge engine, he would have

included it in his report. (*Id.*) Dr. Rhyne found no Yahoo! document that mentioned such a knowledge engine.

No reasonable juror could find that the “case base knowledge engine” limitation of claims 30, 31, and 33 is met by Yahoo! Sponsored Search.

D. BRIGHT RESPONSE DID NOT OFFER LEGALLY SUFFICIENT EVIDENCE TO SHOW YAHOO!’S SPONSORED SEARCH PROVIDES PREDETERMINED RESPONSES

Claims 30, 31, and 33 require a “predetermined response,” which the Court has construed as “responses prepared prior to the receipt of the electronic message. The responses may be modified and/or altered based on the interpretation of the electronic message.” (Dkt. 369 at 12.) Plaintiff failed to present substantial evidence to support its burden to prove that Yahoo! Sponsored Search has a predetermined response, as construed by the Court, because Yahoo! Sponsored Search only responds with a set of dynamically chosen advertisements and contains no way to predetermine which ad will be served prior to receiving the electronic message.

Dr. Rhyne admits that if Yahoo! fails to meet the limitation 28(c), then Yahoo! cannot infringe 30, 31, or 33. (Trial Tr., vol. 2 (pm), 12, August 4, 2010.) Dr. Rhyne initially testified, after careful consideration, that the predetermined response to a search query is a set of ads:

Q. And in this section, are you identifying what you think are the predetermined responses in the Yahoo! and Google accused systems?

A. Yes.

Q. And so in both the Yahoo! and Google accused systems, it's the set of advertisements that are returned in response to the search queries that is the quote response, correct?

A. Let me look at the claim language again just to be sure.

Yes.

(Trial Tr., vol. 2 (pm), 14, August 4, 2010.) Dr. Rhyne, at trial, agreed that the advertisements included in the response are not predetermined:

Q. In fact, in the Yahoo!'s Sponsored Search system, the set of ads that are -- that are returned are not determined until after the receipt of the search query?

A. By set, you mean the particular -- that there are 10 or 11 of them, taking all the numbers of that set, yes, sir, that's correct.

Q. That set of advertisements is always sent together, correct?

A. I think there may be more ads than they can actually get on the screen. I'm not sure if there's like 10 or 11 of them. But that set, as many of them as they can put on the screen, it's sent at one time.

(Trial Tr., vol. 2 (pm), 14-15, August 4, 2010.) The set of advertisements, admitted by Dr. Rhyne as the response, are not chosen or known prior to the receipt of the search query. In fact, Dr. Rhyne admits that the set of ads, are not determined until after the receipt of the search query. (*Id.*)

No reasonable juror could find that the “predetermined response” limitation of claims 30, 31, and 33 is met by Yahoo! Sponsored Search.

E. BRIGHT RESPONSE DID NOT OFFER LEGALLY SUFFICIENT EVIDENCE TO SHOW YAHOO!'S SPONSORED SEARCH RECEIVES A NON-INTERACTIVE ELECTRONIC MESSAGE

Claims 30, 31, and 33 require an electronic message that is “non-interactive,” which this Court has construed as “an electronic message in which the sender does not provide any additional information after the message has been received.” (Dkt. 369 at 9.) Plaintiff failed to present substantial evidence to support its burden to prove that an electronic message received by Yahoo! is non-interactive, because all the evidence establishes that Yahoo!'s system is interactive.

As an initial matter, Dr. Rhyne agrees that clicking on an ad is an interactive, and does not include, in his infringement analysis, any clicks on ads after the responses to the query are returned. (Trial Tr., vol. 2 (pm), 6, August 4, 2010.) Dr. Rhyne also agrees that Yahoo! has a Search Assist function which suggests alternate queries as the search query is entered. (Trial Tr., vol. 2 (pm), 20, August 4, 2010.) Dr. Rhyne admits that there may be other signals besides the messages that are coming back. (Trial Tr., vol. 2 (pm), 21, August 4, 2010.)

(Trial Tr., vol. 2 (pm), 23-24, August 4, 2010.) Dr. Rhyne admits that an electronic message is sent back to the server and a response is received by the source, as Google is receiving the search query, before the search button has been clicked on a browser. (Trial Tr., vol. 2 (pm), 137, August 6, 2010.) Indeed, when the user finishes entering the last letter of a word, before the search button is clicked on the browser, Dr. Rhyne admits that the whole word still goes to Google, and Google responds automatically with ten more suggestions. (Trial Tr., vol. 2 (pm), 138, August 6, 2010.) Dr. Rhyne even admits that the same string of characters, whether or not the search button is clicked, is getting sent to Google and is responded to by an automatic response. (Trial Tr., vol. 2 (pm), 139, August 6, 2010.) Yahoo! has the Search Assist function, and therefore, cannot meet the *non-interactive* definition of the electronic message.

Furthermore, Dr. Rhyne admits that the non-interactivity period is limited to the time between when the user hits enter:

Q. It's your opinion that the asserted claims require that the non-interactivity of the electronic message is limited to the time between when the user hits enter, or carriage return as you said, on that search query, and then the search results and advertisements are returned back to the user, right?

A. Looking at that sentence, I think I have overstated it there. That's a larger period than I think the actual period required by Judge Everingham's construction of non-interactive activity. But it appeared what the claim really deals with is inside that period.

But for the point that I was making in the validity report, which is a different subject that I dealt with, that's not an incorrect statement. It just extends the period longer than I think the claim actually requires.

Dr. Rhyne also agrees that a click is an interaction and provides feedback as it is received by Yahoo!:

Q. Now, the phrase non-interactive electronic message appears in all the asserted claims, correct, through Claim 26?

A. Yes.

Q. Now, isn't it true that after a user submits a search request to Yahoo!, they can click on an advertisement provided by Yahoo!'s Sponsored Search?

A. Yes.

Q. And that click is an interaction, correct?

A. Yes.

Q. And the click is received by Yahoo!, right?

A. Yes.

(Trial Tr., vol. 2 (pm), 23-24, August 4, 2010.)

For all these reasons, no reasonable juror could find that the “non-interactive” limitation of claims 30, 31, and 33 is met by Yahoo! Sponsored Search.

F. BRIGHT RESPONSE DID NOT OFFER LEGALLY SUFFICIENT EVIDENCE TO SHOW YAHOO!'S SPONSORED SEARCH NORMALIZES EACH SCORE BY DIVIDING THE SCORE BY A MAXIMUM POSSIBLE SCORE

Claims 33 requires each score is normalized by dividing the score by a maximum possible score for the stored case model. Parties have agreed that “wherein each score is normalized by dividing the score by a maximum possible score for the stored case model” means “wherein each match score is divided by the maximum possible score for

the stored case model.” (Dkt. 369.) Plaintiff failed to present substantial evidence to support its burden to prove that each score is normalized by dividing. Dr. Rhyne testimony was simple conjecture using Ashvin Kannan, a Yahoo! engineer’s testimony:

“And then he was asked: So, theoretically, a score of 1 for the overall relevancy score would mean that it's exactly relevant?

And he said: Yes.

So what they've done is they've normalized those sums of all the leaf nodes so they fall between 0 and 1. I believe I recollect correctly that he was asked a little more about that, and he said: Well, I could make it be between 0 and 5 or 0 and 3 or something like that, but they make it be between 0 and 1.

But what that means is, they've got to go through every possible combination of adding up all those leaf nodes that they might reach at the bottom of this complex 2 or 300 trees and find out what's the biggest value that they're ever going to get when they add up all the combinations of leaf nodes, and then they've got to come back and divide by that number to scale it back into a 0-to-1 range, okay?

So they have normalized it such that the biggest score you could ever get is 1, which means it's exactly relevant. And that, to me, is the way they've normalized so that every time they add up those leaf node values on the relevancy score, they get a range no bigger than 1.

And it's been scaled so that the biggest they could ever get was 1, and they've just divided it out.

If it came out to be 5, they'll divide everything by 5 so that it will scale back to be 1.”

(Trial Tr., vol. 2 (pm), 70-72, August 4, 2010.) Dr. Rhyne cites no evidence to support his testimony except that Mr. Kannan’s deposition transcript disclosed that Yahoo! uses decision trees, which have leaf nodes, and keeps its calculated overall relevancy scores between 0 and 1. Dr. Rhyne cannot point to particular source code or particular parts of Mr. Kannan’s deposition where he says that Yahoo! *normalizes* using *division*.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record via the Court's CM/ECF system this 7th day of August, 2010.

/s/ Jennifer H. Doan
Jennifer H. Doan