

2017-2625

UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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TS PATENTS LLC,  
*Plaintiff-Appellant*

v.

YAHOO! INC.,  
*Defendant-Appellee.*

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Appeal from the U.S. District Court for the Northern District of  
California Case No. 5:17-cv-01721-LHK (Judge Lucy H. Koh)

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**PLAINTIFF-APPELLANT TS PATENTS LLC'S  
PETITION FOR REHEARING EN BANC**

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## CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellant certifies the following:

1. The full name of every party or amicus represented by me is:

TS Patents LLC

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2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

*Not Applicable*

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3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

*Not Applicable*

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4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. See Fed. Cir. R. 47.4(a)(5) and 47.5(b).

Undersigned counsel is unaware of any case pending in this or any other court that will directly affect or be directly affected by this Court's decision in the pending appeal.

Date: August 23, 2018

/s/ Matthew J. Dowd

Signature of counsel

Matthew J. Dowd

Printed name of counsel

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## STATEMENT OF COUNSEL

Based on my professional judgment, I believe this appeal requires an answer to the following precedent-setting question of exceptional importance: When a U.S. patent—in particular, a patent issued after *Alice Corp. Pty Ltd. v. CLS Bank International*, 134 S. Ct. 2347 (2014)—states that the claimed computer-based invention yields technical improvements over existing systems, can a district court make factual findings contrary to the patent’s specification at the pleading stage and dismiss a complaint for patent infringement under Rule 12(b)(6)?

Based on my professional judgment, I believe the panel decision in this case is contrary to the following decisions of the precedent of this Court: *Berkheimer v. HP Inc.*, 881 F.3d 1360 (Fed. Cir. 2018); *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 890 F.3d 1354 (Fed. Cir. 2018); *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016); and *Amdocs (Israel) Ltd. v. Openet Telecom, Inc.*, 841 F.3d 1288 (Fed. Cir. 2016).

/s/ Matthew J. Dowd  
Attorney of Record for  
Plaintiff-Appellant TS Patents LLC



## INTRODUCTION

Patent-eligibility law is in flux. *See, e.g., Interval Licensing LLC v. AOL, Inc.*, 896 F.3d 1335, 1348 (Fed. Cir. 2018) (Plager, J., concurring-in-part and dissenting-in-part) (“The law . . . renders it near impossible to know with any certainty whether the invention is or is not patent eligible.”); *Berkheimer v. HP Inc.*, 890 F.3d 1369, 1376 (Fed. Cir. 2018) (Lourie, J., concurring in rehearing denial) (“I therefore believe that § 101 requires further authoritative treatment.”); *id.* at 1383 (Reyna, J, dissenting from rehearing denial) (“[T]he *Aatrix* and *Berkheimer* decisions upset established precedent and offer no guidance to the many questions they raise.”).

This Court has attempted to stabilize the law with dozens of patent-eligibility decisions, many of which refine the recent Supreme Court tests. Following that precedent, this Court recently confirmed that “[t]he question of whether a claim element or combination of elements is well-understood, routine and conventional to a skilled artisan in the relevant field is a question of fact. *Berkheimer*, 881 F.3d at 1368.

Here, prior to this Court’s guidance in *Berkheimer* and *Aatrix*, the district court made factual findings violative of the written description of

the four patents. Such factual findings are not permitted at the pleading stage. This Court’s affirmance without an opinion necessarily adopted the district court’s erroneous analysis. Rehearing can rectify the panel’s error and clarify the circumstances under which a district court can dismiss on the pleadings when the patents describe specific technical improvements of the claimed computer-based inventions.

## BACKGROUND

The four asserted patents<sup>1</sup> concern various systems providing concrete, technical improvements to the operation of networked computer environments, particularly computer networks operating over the Internet. The four patents protect some of independent inventor Sheng Tai Tsao’s many computer-based inventions.<sup>2</sup> Tsao developed the computer algorithms as far back as 2002—long before the adoption of many now-ubiquitous improvements to network-based computing.<sup>3</sup>

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<sup>1</sup> The four patents are: U.S. Patent Nos. 9,280,547 (“the ’547 patent”); 8,799,473 (“the ’473 patent”); 8,713,442 (“the ’442 patent”); and 8,396,891 (“the ’891 patent”). The ’547 and ’473 patents issued after the Supreme Court decided *Alice*.

<sup>2</sup> Tsao assigned his patents to TS Patents LLC, the company he created to commercialize his inventions.

<sup>3</sup> The patents’ earliest listed priority date is August 2002.

All four patents describe specific improved computer operations enabling a multi-user virtual online work environment, referred to as the “Web Based Computer User Work Environment” (“WCUWE”). The WCUWE operates on a computer network platform termed the “Central-Controlled Distributed Scalable Virtual Machine” (“CCDSVM”). *E.g.*, Appx062, 2:8–23. The patents claim priority to August 2002.

The four patents claim different aspects of the WCUWE. The ’547 patent claims a novel virtual folder structure made accessible to multiple users concurrently with reduced demands on the network. *E.g.*, Appx061, Fig.9. The invention creates, through a specific algorithm, a “multilayered item list” (“MLIL”) that mirrors the server’s folder structure. The MLIL embodies digital “nodes” that logically represent a layered resource structure. Appx063, 4:11–23; Appx067, 11:49–50. The network users access the MLIL (instead of actual folders and files on the server).

By creating and providing access to the MLIL, the claimed algorithm reduces network load and enables more efficient access to and operation of network folder structures, in keeping with the general framework of the WCUWE. Appx061, Fig.9. The MLIL’s digital nodes

enable the transmission far less data for each user request, compared to conventional techniques. Appx067–68, 12:61–13:2 (“[O]nly a small piece of information . . . needs to be retrieved or transmitted.”). Over fifteen years ago, this novel feature improved remote access to the server folder structures and overcame a problem with traditional web-based remote access.

The ’473 patent claims a server configured to enable multiple users to access resources on the central server. The server also processes certain requests in the “background” and invokes a “lock protection” with the multiple requests. Appx084, 9:20–10:4; Appx082, 6:45–46; Appx081, 3:16–18. Another critical element of the algorithm is storing information about user requests using a “user space task list,” which “represents simultaneous concurrent tasks and operations in the CCDSVM environment.” Appx080, 2:1–4. “Each entry on the user space task list can be used to store information of a task issued from the web-console.” Appx082, 6:6–8. When a task is requested, the algorithm creates a “thread . . . based on the console support software, where the thread will serve and carry this task in the background.” *Id.*, 6:43–45. The thread

“acquires a lock and stores the task information into a valid entry on a user level task list.” *Id.*, 6:45–46.

The '442 patent claims a computer algorithm directed to the virtual representation of server files to users over the network. *E.g.*, Appx099; Appx105, 2:4–14. Instead of transmitting the entire file—the norm in 2002—the '442 patent enabled a computer to transmit only the metadata to the server. Appx116, 23:33–37. By transmitting only metadata, the novel algorithm increased the computer's efficiency in processing data network requests, compared to conventional means in 2002. Appx105, 1:47–55. As the '442 patent explains, prior art systems had significant limitations due to “size and speed.” Appx105, 1:47–55. Tsao's invention solved these prior art problems “by introducing a ‘dynamic work space’ technology . . . within the frameworks of CCDSVM and the WCUWE.” Appx105, 1:67–2:3.

Key to the novel algorithm is using a “dynamic workspace” into which the server files' virtual representation is transmitted. Appx114, 19:39–40. The virtual representation is stored in fast memory, as opposed to slower, hard-disk space, thereby improving the computer's operation and the network environment. Appx111, 14:56–61.

The '891 patent is similar to the '442 patent. Claim 1 of the '891 patent is directed to a computing device configured to create multiple individual “private” and “common” sections containing information about which files can be shared and unlocked—without having to transmit the entire files over the network. Specifically, claim 1 recites a computing device configured to:

(i) display a user interface to each of a first user and a second user to share information, wherein each of the user interfaces comprises, for each of the first and second users, (a) a private section configured to display information about files or folders available for the user to share and (b) a common section configured to display information about files or folders shared with the user;

(ii) share a file or folder selected, from the available files or folders, by the first user with the second user by (a) allowing the first user to identify the file or folder in the private section on the first user's interface, which is not viewable by the second user, (b) unlocking a protection mechanism of the file or folder to allow access to the second user, (c) storing information about the file or folder, without the content of the file or folder, in a common work place accessible to both the first user and the second user, and (d) displaying information about the file or folder in the common section on the second user's interface, wherein the second user can access the file or folder through the displayed information; and

(iii) stop sharing of a file or folder to the second user that the first user has previously shared with the second user by (a) deleting information about the file or folder displayed in the common section on the second user's interface, (b) deleting information about the file or folder that has been stored in the

common work place, and (c) locking the protection mechanism to rescind access to the second user.

Appx150–151, 28:42 to 29:5.

The '891 patent improves network computer functionality by storing and transmitting the “information” instead of the “content” of the file or folder. Appx145,18:17–34; Appx146, 19:20–42, 20:37–54. “Information,” as defined by the specification, includes “the system name where the file or folder resided, the name[] and path of the file or folder, the owner of file or folder, the time stamps, the size of the file and so on without limitation.” Appx145, 18:12–16.

The '891 patent also explains that posting and unposting a file without physically moving or deleting the file from the server is a major technical advance over the prior art:

Also, for example, un-posting a previous posted a file or folder information with WCUWE of CCDSVM does not delete the file or file-folder information nor does [it] delete the corresponding physical file or file-folder in user's private workspace while the delete operation with said existing Internet group communication model will completely delete a[n] uploaded file in a group. The dynamic workspace of this invention represents the beauty of the combined security protection of information and flexibility and efficiency of online meeting provided by WCUWE of CCDSVM to each users and groups in online meeting.

Appx147, 21:21–31. The ’891 patent’s novel algorithm enabled the networked computing devices to improve the overall network’s operation because no large, data-intensive files had to be transmitted, saved, or deleted for the sharing and un-sharing. *E.g.*, Appx141, 9:3–13. In 2002, this improvement yielded a significant reduction in network data load, and it improved technical performance. Appx137, 1:65–2:14.

In sum, Tsao’s four patented inventions generated specific technical improvements to networked computer environments. These improvements are essential advantages of the claimed invention.

The district court ruled that each patent is invalid under 35 U.S.C. § 101. Appx001–046. The district court applied *Alice* and ruled that each representative claim (1) is directed to an abstract idea and (2) fails to recite an inventive concept. With respect to *Alice* Step Two, the district court focused primarily on whether the claims recite generic computer components. While the court did look at the “ordered combination of claim elements,” it focused again on generic components, concluding that “there is no non-conventional and non-generic arrangement of known, conventional pieces.” *E.g.*, Appx031.



The district court's decision issued before this Court's decisions in *Berkheimer* and *Aatrix*. TS Patents appealed the ruling to this Court, which reviewed the decision *de novo* but affirmed without an opinion.

## REASONS FOR GRANTING THE PETITION

### I. **En Banc Review Is Necessary To Clarify If A District Court Can Dismiss Under Rule 12(b)(6) When A Patent Discloses Specific Technical Improvements For The Claimed Invention**

Review is necessary to clarify if a district court can dismiss an infringement complaint on the pleadings when the asserted patents contain clear factual statements identifying technical improvements to networked computer operation. When a patent asserts technical improvements to a claimed computer network—asserted improvements grounded in historical facts—a district should not be permitted to invalidate a patent at the pleading stage.

Four non-controversial legal doctrines compel this conclusion: (1) At the pleading stage, the factual assertions in the complaint and the patent about technical improvements are taken as true; (2) whether a combination of elements and its technical improvements are routine and conventional is a fact question; (3) a patent, especially one issued after

*Alice*, must be presumed valid; and (4) only clear and convincing evidence can invalidate a patent.

First, the Court is well-aware of the procedural protections afforded litigants under Rule 12(b)(6). *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). Factual allegations are true, disputed issues are construed in the complainant’s favor, *United States v. Mississippi*, 380 U.S. 128, 143 (1965), and “all reasonable inferences are drawn in favor of the complainant,” *Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1161 (Fed. Cir. 1993). These procedural protections ensure that courts invalidate patents—and encroach on agency action—only after considering actual evidence of invalidity.

Moreover, at the pleadings stage, ambiguities in written documents are construed in favor of the non-moving party. *See Avocent Huntsville Corp. v. Aten Int’l Co.*, 552 F.3d 1324, 1329 (Fed. Cir. 2008) (for a motion to dismiss, construing affidavits in the light most favorable to the

non-moving party).<sup>4</sup> This reasoning applies equally to a patent’s factual statements that have duly withstood agency review.

Second, this Court recently held that “[t]he question of whether a claim element or combination of elements is well-understood, routine and conventional to a skilled artisan in the relevant field is a question of fact.” *Berkheimer*, 881 F.3d at 1368. This holding confirms earlier decisions explaining that patent eligibility frequently involves underlying questions of fact. *E.g.*, *Mortg. Grader, Inc. v. First Choice Loan Servs. Inc.*, 811 F.3d 1314, 1325 (Fed. Cir. 2016); *Accenture Global Servs., GmbH v. Guidewire Software, Inc.*, 728 F.3d 1336, 1340–41 (Fed. Cir. 2013) (“Patent eligibility under § 101 presents an issue of law that . . . may contain underlying factual issues.”).

Third, a patent is presumed valid under 35 U.S.C. § 282. *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 95 (2011). The patent challenger therefore bears the burden to prove invalidity. When resolving factual

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<sup>4</sup> This general legal principle is not unique to the Federal Circuit. *See Luitpold Pharms., Inc. v. Ed. Geistlich Söhne A.G. Für Chemische Industrie*, 784 F.3d 78, 86 (2d Cir. 2015); *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 235–36 (1st Cir. 2013); *188 LLC v. Trinity Indus., Inc.*, 300 F.3d 730, 737 (7th Cir. 2002).

disputes, the patent challenger must offer factual evidence if it wants the court to rule against the patent owner on a factual matter relating to validity. And the presumption applies with particular weight for patents issued after *Alice*.

Fourth, a court can invalidate a patent only when presented with clear and convincing evidence. *i4i*, 564 U.S. at 99–108. Under the settled understanding of “presumed valid,” a defendant seeking to invalidate a patent bears “a heavy burden of persuasion,’ requiring proof of the defense by clear and convincing evidence.” *Id.* at 102 (quoting *Radio Corp. of Am. v. Radio Eng’g Labs. Inc.*, 293 U.S. 1, 8 (1934)).

Taken together, in the face of factual disputes, one can rarely square a Rule 12(b)(6) dismissal with the rule’s procedural protections, the statutory presumption of validity, and the clear and convincing evidence standard.

Despite these clear legal principals, this Court’s decisions have been mixed. There is conflict on whether claim construction is necessary at the pleadings stage. *Compare Genetic Techs. Ltd. v. Merial LLC*, 818 F.3d 1369, 1374 (Fed. Cir. 2016), *with Bancorp Servs., LLC v. Sun Live Assurance Co. of Canada (U.S.)*, 687 F.3d 1266, 1273–74 (Fed. Cir. 2012).

Other uncertainty exists about the presumption of validity. *Compare MySpace, Inc. v. GraphOn Corp.*, 672 F.3d 1250, 1258–59 (Fed. Cir. 2012), *with Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 720–21 (Fed. Cir. 2014) (Mayer, J., concurring).

Worse yet, the conflicting precedent encourages courts to focus on the “gist” of an invention rather than the claim language and factual evidence. Too frequently a court proceeds on an incomplete factual record, contravening the objectives of the legal doctrines discussed above.

In this case, the legal confusion led the district court to incorrectly dismiss the complaint under Rule 12(b)(6). Appellant respectfully submits that the panel erred in not reversing and remanding because, at the pleading stage, the four asserted patents are plausibly directed to specific technical improvements.

## **II. The Four Patents Describe Specific Technological Improvements That Pass Muster Under *Alice* Step Two And Should Have Survived A Motion To Dismiss**

The four patents disclose specific improvements to networked computing functions. Those specific advances to network functionality qualify as technical improvements that transform the claimed ordered operation into patent-eligible subject matter.

Comparing *Berkheimer's* reasoning with the district court's conclusions highlights the need for rehearing.<sup>5</sup> In *Berkheimer*, this Court accepted, as a factual matter, patentee's position that "the claimed combination improves computer functionality through the elimination of redundancy and the one-to-many editing feature, which provides inventive concepts." 881 F.3d at 1369. The Court continued: "[T]he specification describes an inventive feature that stores parsed data in a purportedly unconventional manner." *Id.* This alleged inventive feature "eliminates redundancies, improves system efficiency, reduces storage requirements, and enables a single edit to a stored object to propagate throughout all documents linked to that object." *Id.* There was no use of novel computer hardware or software.

The claims here differ little from the ones surviving summary judgment in *Berkheimer*. Tsao's four patents claim specific algorithms that, in the words of *Berkheimer*, "improve[] system efficiency" and "reduce[] storage requirements." This should have been enough to survive summary dismissal.

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<sup>5</sup> The district court's decision also conflicts with similar reasoning in *Amdocs* and *Enfish*.

Starting with the '547 patent, Tsao explains that “users can efficiently access and manage files and folders in file systems from a web-browser . . . of an associated computing system [*i.e.*, networked computer] on the fly without caching anything for the file system.” Appx067, 12:57–60. The capability to “efficiently access and manage files and folders” across a network, “without caching anything for the file system,” was a specific advance over systems of 2002.<sup>6</sup>

The '547 patent also identifies a specific technical problem solved by the claimed invention. At the time, there was “an unprecedented challenge” of how to enable “multiple concurrent users to effectively simultaneously display, view or operate an item list in a single web-browser for the available resources or data.” Appx064, 5:45–50. The patent also explains that “[s]upporting a file system to be accessed by users from a network has always been a challenge to many vendors.” Appx067, 12:48–50. The '547 patent provides a technical advance over then-existing systems, but the district court opinion did not address the

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<sup>6</sup> “Caching” is a term of art referring to “temporarily storing recently used information.” See Citrix, *What is Caching?*, at <https://www.citrix.com/glossary/caching.html>. The district court’s opinion does not address this specific advance of the claimed invention.

technical advances attributable to the ordered combination of elements in claim 1 of the '547 patent.

Rather than consider the technical advance, the district court incorrectly limited its analysis to whether the claims recited specific language relating to “network efficiency.” The proper question, as *Berkheimer* stated, is whether the claims “contain limitations directed to the arguably unconventional inventive concept described in the specification.” 881 F.3d at 1370. And the '547 patent claims clear that hurdle.

The asserted improvements flow from the ordering of specific claim elements, in particular, the “first per user-session hierarchical list” and the specific steps of “updating the folder structure” and “updating the first hierarchical list.” *See* Appx069, claim 1. The combined steps enable a remote user to access information about the server folder system without forcing the server to transmit the entire files, thereby conserving network resources. The algorithm also requires updating the folder structure on the server itself. These specific steps, in the recited order,



yield the specific technical advances, as noted above, in a computer network environment.<sup>7</sup>

The '473 patent similarly discloses a specific technical solution for solving the problem of web browser blocking. The '473 patent claims a specific combination of a “user level task list” and a “thread lock” to prevent interference between two concurrent online tasks. Appx080, 2:35–54.

The '473 patent also identifies specific deficiencies in the then-existing technology. *See* Appx072, Abstract (“The traditional web based computer system does not support web based multitasking.”). Indeed, in 2002, when a user submitted a task to a network server, the user had to wait for the web server to finish a first task before submitting another task. *Id.*; Appx080, 2:18–23 (“[T]he traditional server or web server does not support multiple concurrent tasks or operations . . .”).

The '473 patent claims a combination of a user level task list for storing information about the tasks and the invocation of a thread lock,

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<sup>7</sup> Again, the question under Rule 12(b)(6) is only whether the technical advances are plausible, not whether they have been satisfactorily proven. The defendant bears the burden of producing evidence to disprove the technical advances stated in the patent.

thereby enabling web-based multitasking, which the prior art could not do, and eliminating user waiting. *E.g.*, Appx082, 6:1–3, 7:2–4.

Next, the '442 patent also describes specific technical improvements produced by its claimed algorithm. The specification describes the then-existing method of transmitting a file or folder by email or Skype and noted the limitation in “size and speed.” Appx105, 1:47–55. There was a “need in the art to provide a faster, more secure, volume information exchange over the Web.” Appx105, 1:57–58.

The '442 patent continued, explaining how its novel algorithm solves the existing problem “by introducing a ‘dynamic work space’ technology . . . within the frameworks of CCDSVM and the WCUWE.” Appx105, 1:67–2:3.

The district court dismissed this argument, without the benefit of *Berkheimer* and *Aatrix*. The district court asserted that “[s]imply because a claimed invention offers benefits within a particular technological environment does not mean that it improves technology itself.” Appx035.

But that conclusion conflicts with *Berkheimer* and *Aatrix*. In both cases, asserted patent claims survived even though there was no

specialized computer technology. Moreover, the district court failed to recognize that the factual assertions in the patent about technological improvements over the prior art must be presumed true at the pleadings stage.

As such, the '891 patent should have survived dismissal for similar reasons as the '442 patent.<sup>8</sup>

Finally, many have extolled the efficiency of pleadings-stage dismissals. No doubt, quick dismissals benefit companies unfairly accused of infringing overly broad, plainly invalid patents. Rule 12(b)(6) dismissal can be the preferred resolution in the absence of factual disputes.

Quick dismissals often sweep too broadly, however. Courts cannot create a patent-law exception to Rule 12(b)(6)'s protections and disregard the presumption of validity and the clear and convincing evidence standard. Historical facts must be proven with competent evidence.

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<sup>8</sup> Importantly, with a reversal here, the defendant will still have an opportunity to introduce competent evidence challenging the asserted technical improvements of the claimed inventions.

Otherwise, decisions about what was or was not conventional years ago are left to hindsight-infected recollections.

Rather than create an unsupportable exception to Rule 12(b)(6), trial courts can order limited discovery and limited motion practice to ascertain the facts underlying patent eligibility. With competent evidence, courts can make the fact findings necessary to decide the patent-eligibility of computer-based inventions without exposing litigants to unduly burdensome discovery.

### **III. Conclusion**

Based on the foregoing, the Court should grant the petition for rehearing.

Date: August 23, 2018

Respectfully submitted,

*/s/ Matthew J. Dowd*

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*Counsel for Plaintiff-Appellant*

# **ADDENDUM**

NOTE: This disposition is nonprecedential.

**United States Court of Appeals  
for the Federal Circuit**

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**TS PATENTS LLC,**  
*Plaintiff-Appellant*

v.

**YAHOO! INC.,**  
*Defendant-Appellee*

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2017-2625

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Appeal from the United States District Court for the Northern District of California in No. 5:17-cv-01721-LHK, Judge Lucy H. Koh.

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**JUDGMENT**

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J. JAMES LI, LiLaw, Inc., Los Altos, CA, argued for plaintiff-appellant.

JASON C. WHITE, Morgan, Lewis & Bockius LLP, Chicago, IL, argued for defendant-appellee. Also represented by COREY RAY HOUMAND, WALTER SCOTT TESTER, Palo Alto, CA.

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THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (PROST, *Chief Judge*, NEWMAN and  
LINN, *Circuit Judges*).

**AFFIRMED. See Fed. Cir. R. 36.**

ENTERED BY ORDER OF THE COURT

July 17, 2018

Date

/s/ Peter R. Marksteiner

Peter R. Marksteiner

Clerk of Court

## CERTIFICATE OF COMPLIANCE

This petition complies with the word-length limitation of Federal Circuit Rule 35(a)(b)(2)(A). This brief contains 3,892 words, excluding the portions set forth in Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 35(c).

This petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). The petition has been prepared in a proportionally spaced typeface using Microsoft® Word and 14-point Century font.

*/s/ Matthew J. Dowd*

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Dated: August 23, 2018



## CERTIFICATE OF SERVICE

I hereby certify that on this day, August 23, 2018, the foregoing was electronically filed and therefore served electronically via the court's ECF/CM system on all counsel of record.

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