

ORIGINAL
FILED
2013 OCT 25 P 12:54
RICHARD W. WICKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

1 Daniel C. Girard (State Bar No. 114826)
2 dcg@girardgibbs.com
3 Matthew B. George (State Bar No. 239322)
4 mbg@girardgibbs.com
5 Heidi H. Kalscheur (State Bar No. 287993)
6 hhk@girardgibbs.com
7 GIRARD GIBBS LLP
8 601 California Street, 14th Floor
9 San Francisco, California 94104
10 Telephone: (415) 981-4800
11 Facsimile: (415) 981-4846

Attorneys for Plaintiffs

HRL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CV 13 4980

14 ERIC HOLLAND and CODY BAKER,
15 on behalf of themselves and all others similarly
16 situated,

Plaintiffs,

vs.

18 YAHOO! INC.,

19 Defendant.

Case No. _____

CLASS ACTION COMPLAINT FOR:

- (1) Violation of California's Invasion of Privacy Act (Cal. Penal Code §§ 630 *et seq.*)
- (2) Violation of the Electronic Communications Privacy Act (18 U.S.C. §§ 2510 *et seq.*)

DEMAND FOR JURY TRIAL

28

1 **INTRODUCTION**

2 1. Yahoo! Inc. (“Yahoo”) is a leading internet company that provides web-based services,
3 including Yahoo! Mail, to millions of users. In exchange for using Yahoo’s “free” services, Yahoo
4 catalogues personal and confidential information and turns profit by selling that information for targeted
5 advertising. Over time, Yahoo has developed technology that increasingly encroaches on consumers’
6 privacy rights by monitoring and recording confidential communications without making adequate
7 disclosures of its conduct so that consumers are even aware that their rights are being violated.
8 Moreover, Yahoo not only reviews the contents of its own users’ correspondence, but also scans
9 incoming email from non-Yahoo users and uses all of the data it gathers to sell advertising and other
10 content based on the information it collects. As a result, Yahoo is violating state and federal privacy
11 laws that have been enacted to prohibit the abuses this type of technology can have in intercepting
12 electronic communications.

13 2. Plaintiffs Eric Holland and Cody Baker bring this class action lawsuit against Yahoo for
14 its violation of consumers’ state and federal privacy rights that are designed to protect citizens from
15 invasions of their private, privileged, and confidential communications. Through this proposed class
16 action, Plaintiffs Holland and Baker request relief from the Court in the form of damages on behalf of
17 themselves and the proposed class, injunctive and declaratory relief to curb or prohibit Yahoo’s conduct
18 complained of herein, and any other relief the Court deems appropriate.

19 **PARTIES**

20 3. Plaintiff Holland is a resident of Derry, New Hampshire.

21 4. Plaintiff Baker is a resident of Brooklyn, New York.

22 5. Defendant Yahoo! Inc. is a Delaware corporation with its principal place of business at
23 701 First Avenue, Sunnyvale, California 94089. Yahoo does business throughout the State of California
24 and the United States.

25 **JURISDICTION AND VENUE**

26 6. This Court has original jurisdiction pursuant to the Class Action Fairness Act, 28 U.S.C.
27 § 1332(d), because (a) at least one member of the putative class is a citizen of a state different from
28 Defendant, (b) the amount in controversy exceeds \$5,000,000, exclusive of interest and costs, (c) the

1 proposed class consists of more than 100 class members, and (d) none of the exceptions under the
2 subsection apply to this action.

3 7. Venue is proper in this District under 28 U.S.C. § 1391(b) because Yahoo maintains its
4 headquarters and principal place of business in this District and a substantial part of the events giving
5 rise to Plaintiffs' Complaint occurred in this District.

6 **INTRADISTRICT ASSIGNMENT**

7 8. Assignment is proper to the San Jose division of this District under Local Rule 3-2(c), as
8 a substantial part of the events and omissions giving rise to Plaintiffs' claims occurred in Santa Clara
9 County, and Yahoo is headquartered in Santa Clara County.

10 **COMMON FACTUAL ALLEGATIONS**
11 **The ECPA and CIPA**

12 9. Congress enacted the Electronic Communications Privacy Act of 1986 ("ECPA"), 18
13 U.S.C. §§ 2510 *et seq.*, to update the existing federal wiretapping law to include new forms of electronic
14 communications, including new "electronic mail" technology. At the time, the use of email was
15 primarily for business purposes, but its use was expanding and projected to grow. The Senate Report on
16 the ECPA stated that its purpose was to "clarify federal privacy protections and standards in light of
17 dramatic changes in new computer and telecommunications technologies." The Senate Committee on
18 the Judiciary also noted that it was "increasingly possible for private parties to intercept the personal or
19 proprietary communications of others." As a result, the ECPA protects citizens from unwanted
20 invasions of their electronic communications, such as email or instant messaging. In order to enforce
21 the ECPA's privacy protections, Congress authorized private citizens to bring civil actions for damages,
22 injunctive relief, and attorneys' fees. The ECPA provides that any person harmed may be awarded
23 damages in the amount of \$100 per day for each violation, or \$10,000, whichever is greater.

24 10. The state of California has also long recognized the privacy rights of its citizens, which
25 are well rooted in California's Constitution. Cal. Const. Art 1, § 1. California has enacted many laws
26 regulating citizens' right to privacy, including California Invasion of Privacy Act ("CIPA"), California
27 Penal Code §§ 630, *et seq.* Similar to the ECPA, California recognized that technological advances
28 allowed eavesdropping on private communications and were an "invasion of privacy" that was "a

1 serious threat to the free exercise of personal liberties [that] cannot be tolerated in a free and civilized
2 society.” By enforcing its Constitutional rights through the CIPA, California made it clear that an
3 individual’s right to privacy must be balanced against technological developments. Much like the
4 ECPA, California also grants citizens a private right of action to recover in court for violations of the
5 law. Under CIPA, any person who is injured by a violation of the statute may recover \$5,000 or three
6 times his or her actual damages, whichever is greater. A plaintiff may also seek injunctive relief to
7 prohibit future violations.

8 **Yahoo! Mail**

9 11. Founded in 1994, Yahoo!, Inc. provides internet-based services across its Yahoo.com
10 platform, including the popular Yahoo! Mail email service that was launched in 1997 with the first
11 version of “Yahoo! Mail Classic.” The “Yahoo! Mail Classic” interface was available to users until
12 2013, when all Yahoo users were migrated to “Yahoo! Mail.”

13 12. Yahoo supports its “free” Yahoo! Mail services by selling advertising that is delivered
14 directly to users through the interfaces on their computer screens or mobile devices. Yahoo is able to
15 charge premium prices for its advertisements because Yahoo has developed and employed advanced
16 technology that can review and analyze the contents of users’ email and instant messages and match
17 advertisers to their targeted demographics based on information culled from these communications. For
18 example, Yahoo profits from its intrusive technology by selling advertisers services such as “Smart
19 Ads” that Yahoo claims use a “powerful combination of industry-leading, dynamic creative and
20 unmatched Yahoo user data.” Yahoo reportedly derives 75% of its entire revenue from advertisements
21 which drives its increasingly aggressive business practices to take as much consumer data it can in order
22 to maximize profits.

23 13. On its website, Yahoo provides its “Terms of Service” and “Privacy Policy” that
24 purportedly govern the use of Yahoo’s products, including Yahoo! Mail. Yahoo’s Privacy Policy states
25 that Yahoo collects and shares information with its “trusted partners” in order to “customize the
26 advertising and content [users] see.” Yahoo states in its fine print that “[w]hen you use the new Yahoo
27 Mail our automated systems scan and analyze all incoming and outgoing communications content sent
28

1 and received from your account.” Yahoo admits to categorizing this information “for immediate and
2 future use.”

3 14. Over time, Yahoo has become increasingly aggressive in its use of consumers’
4 information. Now, Yahoo scans and analyzes each and every email sent to Yahoo! Mail users, including
5 those sent from non-Yahoo! Mail users who: (1) are not on notice of Yahoo’s Terms of Service or
6 Privacy Policy; and (2) have no knowledge that their communications to Yahoo! Mail users will be
7 scanned, intercepted, stored, analyzed, and used for Yahoo’s profit.

8 15. As email replaces traditional mail as the primary means of written communication in the
9 digital age, consumers have a reasonable expectation of privacy in their email. Among other things,
10 consumers share sensitive financial information through email. Banks, retailers, and investment
11 advisors share receipts, account information, bank statements and other reports with customers via
12 email. Doctors and lawyers also routinely communicate privileged and sensitive information with their
13 patients and clients over email. Email has become increasingly confidential and sensitive to the point
14 that many email service providers like Microsoft reportedly require court-ordered search warrants before
15 turning over the contents of a citizen’s email account to law enforcement.

16 16. Consumers regularly send emails through Yahoo that contain personal, confidential,
17 privileged, financial, health, or other private information in which they have a reasonable expectation of
18 privacy. Accordingly, Yahoo’s conduct alleged herein intrudes on the legally recognized privacy of
19 these consumers in violation of the ECPA and CIPA.

20 **PLAINTIFFS’ EXPERIENCES**

21 17. Plaintiff Holland is a resident of Derry, New Hampshire. Plaintiff Holland has held an
22 @aol.com address for approximately 15 years. His @aol.com address has been his primary email
23 address for email communications in which he has a reasonable expectation of privacy.

24 18. Throughout the time period he has held his @aol.com email address, Plaintiff Holland
25 has regularly corresponded with Yahoo! Mail users through their @yahoo.com email
26 addresses. Because of this, his email address and the contents of his emails to and from Yahoo users
27 have been intercepted, scanned, stored, read, and analyzed by Yahoo.

1 19. Plaintiff Baker is a resident of Brooklyn, New York. Plaintiff Baker has held a
2 gmail.com address since approximately 2004. His @gmail.com account has been his primary email
3 address for email communications in which he has a reasonable expectation of privacy.

4 20. Throughout the time period he has held his @gmail.com email address, Plaintiff Baker
5 has regularly corresponded with Yahoo! Mail users through their @yahoo.com email addresses.
6 Because of this, his email address and the contents of his emails to and from Yahoo users have been
7 intercepted, scanned, stored, read, and analyzed by Yahoo.

8 **CLASS ACTION ALLEGATIONS**

9 21. Plaintiffs Holland and Baker bring this action pursuant to Federal Rule of Civil Procedure
10 23 on behalf of themselves and a class preliminarily defined as:

11 All persons who, through non-Yahoo! Mail accounts, either received an
12 email message from a Yahoo! Mail user with an @yahoo.com email
13 address or sent an email to a Yahoo! Mail user with an @yahoo.com email
14 address within the past two years.

15 Excluded from the class are Yahoo; any agent, affiliate, parent, or subsidiary of Yahoo; any entity in
16 which Yahoo has a controlling interest; any officer or director of Yahoo; any successor or assign of
17 Yahoo; and any Judge to whom this case is assigned, as well as his or her staff and immediate family.

18 22. Plaintiffs satisfy the numerosity, commonality, typicality, and adequacy prerequisites for
19 suing as a representative party pursuant to Rule 23.

20 23. Numerosity. The proposed class consists of millions of persons—far too many to
21 practically join in a single action.

22 24. Commonality. Plaintiffs' and class members' claims raise predominantly common
23 factual and legal questions that can be answered for all class members through a single class-wide
24 proceeding. Among other questions, the following inquiries are relevant to all Plaintiffs' and class
25 members' claims, and the answers to these questions are apt to advance the litigation:

- 26 a. Is Yahoo a person, or do they act through persons for whose actions they are
27 liable? Cal. Penal Code § 7; 18 U.S.C. §2510(6).
28 b. Did Yahoo intercept or make an unauthorized connection to electronic
communications or messages in order to read them or learn the meaning of their

1 contents without consent? Cal. Penal Code § 631; 18 U.S.C. §§ 2510(4),
2 2511(1)(a), 2511(2)(d).

3 c. When Yahoo's interception or unauthorized connection was made, was it made
4 possible by use of a machine, instrument, contrivance, or electronic or mechanical
5 device? Cal. Penal Code § 631; 18 U.S.C. § 2510(4).

6 d. When Yahoo's unauthorized connection was made, were the messages in transit
7 to or from the Yahoo! Mail users, and passing over any wire, line, or cable and
8 did Yahoo use those same lines or cables to make the connection? Cal. Penal
9 Code § 631.

10 e. Do emails qualify as messages, reports, communications or electronic
11 communications? Cal. Penal Code § 631; 18 U.S.C. § 2510(12).

12 f. Do users have a reasonable expectation that their emails are confidential
13 communications? Cal. Penal Code § 632.

14 g. Was Yahoo's conduct of intercepting, wiretapping, reading, scanning, and
15 analyzing of email intentional and willful? Cal. Penal Code § 631; 18 U.S.C. §
16 2511.

17 h. Is Yahoo liable for statutory damages in the amount of \$5,000 or three times
18 actual damages for Plaintiffs' and class members' CIPA claims, and \$100 per day
19 for each violation, or \$10,000 for Plaintiffs' and class members' ECPA claims?
20 Cal. Penal Code § 637.2; 18 U.S.C. § 2520.

21 i. Should the Court issue injunctive or declaratory relief and award Plaintiffs'
22 attorneys' fees and costs against Yahoo for its violations of the ECPA and CIPA?
23 Cal. Penal Code § 637.2; 18 U.S.C. § 2520.

24 25. Typicality. Plaintiffs' claims are typical of class members' claims as they arise from
25 Yahoo's conduct and the same alleged privacy violations.

26 26. Adequacy. Plaintiffs will fairly and adequately protect the interests of the class. Their
27 interests do not conflict with class members' interests and they have retained counsel experienced in
28

1 complex class action litigation and data privacy lawsuits to vigorously prosecute this action on behalf of
2 the class.

3 27. In addition to satisfying the prerequisites of Rule 23(a), Plaintiffs satisfy the requirements
4 for maintaining a class action under Rule 23(b)(3). Common questions of law and fact predominate
5 over any questions affecting only individual members and a class action is superior to individual
6 litigation. The amount of damages available to individual plaintiffs may be insufficient to make
7 litigation addressing Yahoo's conduct economically feasible in the absence of the class action
8 procedure.

9 28. In the alternative, class certification is appropriate under Rule 23(b)(2) and/or (c)(4)
10 because Defendant has acted or refused to act on grounds generally applicable to the class, thereby
11 making final injunctive relief appropriate with respect to the members of the class as a whole and/or
12 there are particular issues that can be collectively resolved for all class members through the efficiencies
13 of a class action.

14 **FIRST CAUSE OF ACTION**

15 **(For violation of California's Invasion of Privacy Act, Cal. Penal Code §§ 630, *et seq.*)**

16 29. Plaintiffs incorporate the above allegations by reference.

17 30. By scanning, analyzing, indexing, reading, learning, storing or otherwise using Plaintiffs'
18 email communications intentionally and without Plaintiffs' consent, as set forth above, Yahoo has
19 violated and continues to violate California's Invasion of Privacy Act ("CIPA"), Cal. Penal Code §§ 630
20 *et seq.* Yahoo admits to using the information it unlawfully acquires for marketing purposes, including
21 but not limited to, selling targeted advertising to its subscribers.

22 31. Yahoo, as a corporation, is a person under the California Penal Code.

23 32. Under section 631(a) of the California Penal Code, it is unlawful for any person to use
24 "any machine, instrument, or contrivance" to "willfully and without the consent of all parties to the
25 communication ... read, or [attempt] to read or to learn the contents of meaning of any message, report,
26 or communication," while the message is "in transit or passing over any wire, line, or cable."

27 33. Yahoo's practices set forth above violates the privacy rights CIPA was enacted to protect.
28 Such conduct is unlawful because consumers have not given either express or implied consent to

1 Yahoo's practices, nor are they on notice that the contents of their communications are monitored and
2 used by Yahoo.

3 34. Yahoo's practices also violate section 632 of the California Penal Code, which prohibits
4 non-consensual recording of confidential communications. Communications are confidential if a party
5 to the communication has an objectively reasonable expectation that their conversation is private.
6 Plaintiffs and class members did not consent to Yahoo's practices of scanning and storing their private
7 communications, in whose confidentiality they held a reasonable belief. Plaintiffs' and class members'
8 email correspondence contained private and confidential materials including but not limited to
9 information about health and financial matters, personally sensitive information, and identification
10 information.

11 35. These communications were made directly from the non-Yahoo! Mail user's account to
12 an @yahoo.com email address. Much like sending a paper letter directly to a postal address,
13 communicating directly from one email address to another creates an objectively reasonable expectation
14 among Plaintiffs and the class that their emails were private and would not be scanned, analyzed, stored,
15 or otherwise used by Yahoo in a manner that the sender did not have notice of or consent to.

16 36. Yahoo has willfully and intentionally violated Plaintiffs' and class members' privacy by
17 scanning, analyzing, reading, attempting to read, and learning the contents of and storing email
18 communications without Plaintiffs' and class members' consent or knowledge. Yahoo's conduct
19 subjects it to statutory damages and injunctive relief pursuant to section 637.2 of the California Penal
20 Code. Plaintiffs and class members are entitled to, among other things: preliminary and permanent
21 injunctive relief to require Yahoo to cease its violations and change its practices; declaratory relief;
22 monetary relief in the amount of \$5,000 or three times actual damages for each violation, as set forth in
23 § 637.2(a)(1), as well as reasonable attorneys' fees and costs of suit.

24 **SECOND CAUSE OF ACTION**

25 **(For violation of the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510, *et seq.*)**

26 37. Plaintiffs incorporate the above allegations by reference.

27 38. Yahoo's unlawful interception and use of Plaintiffs' and class members' email
28 communication violates the ECPA, 18 U.S.C. §§ 2510, *et seq.* Plaintiffs have standing to assert their

1 claims under ECPA on behalf of themselves and similarly situated individuals pursuant to 18 U.S.C. §
2 2520(a), which grants standing to “persons[s] whose... electronic communication[s] [were]
3 intercepted... in violation of this chapter.”

4 39. Yahoo, as a corporation, is a “person” under 18 U.S.C. § 2510(6).

5 40. Yahoo! Mail is offered as a service throughout the United States, and its conduct affects
6 interstate commerce. Additionally, Plaintiffs and class members reside in various states, and frequently
7 send email to states outside their own, the contents of which may be routed to or through California in
8 the course of Yahoo’s unlawful practices.

9 41. The ECPA protects those, like Plaintiffs, whose privacy has been violated by any person
10 or corporation who “intentionally intercepts, endeavors to intercept... any wire, oral, or electronic
11 communication,” and who then “intentionally uses or endeavors to use, the contents of any wire, oral, or
12 electronic communication, knowing or having reason to know that the information was obtained through
13 the interception of a wire, oral, or electronic communication in violation of this subsection.” 18 U.S.C. §
14 2511.

15 42. Yahoo intercepted and used the contents of Plaintiffs’ and class members’ email for the
16 purpose of driving profits from, among other things, the marketing of their personal data and the sales of
17 targeted advertising and content. The scanning, analyzing, and storing of email that Yahoo undertakes is
18 beyond what is necessary to operate an electronic communication platform. Yahoo is incentivized to
19 scan emails in order to sell targeted advertising at a premium, but the scanning is not essential to the
20 email service itself.

21 43. As a result of Yahoo’s violations of the ECPA, pursuant to 18 U.S.C. § 2520, Plaintiffs
22 and class members are entitled to appropriate relief including, but not limited to: preliminary and
23 permanent injunctive relief to require Yahoo to stop the unlawful conduct alleged herein; statutory
24 damages for Plaintiffs and class members in the amount of \$100 per day of violation, or \$10,000; plus
25 reasonable attorneys’ fees and costs of suit.

26 **PRAYER FOR RELIEF**

27 WHEREFORE, Plaintiffs, individually and on behalf of the Class, request that the Court:
28


- 1 a. Certify this case as a class action on behalf of the class defined above, appoint Plaintiffs
- 2 Holland and Baker as class representatives, and appoint Girard Gibbs LLP as class
- 3 counsel;
- 4 b. Award injunctive and other equitable relief as is necessary to protect the interests of
- 5 Plaintiffs and other class members;
- 6 c. Award statutory damages to Plaintiffs and class members in an amount to be determined
- 7 at trial;
- 8 d. Award Plaintiffs and class members their reasonable litigation expenses and attorneys'
- 9 fees under CIPA, the ECPA, Federal Rule of Civil Procedure 23, California Code of Civil
- 10 Procedure 1021.5, or other applicable law;
- 11 e. Award Plaintiffs and class members pre- and post-judgment interest, to the extent
- 12 allowable; and
- 13 f. Award such other and further relief as equity and justice may require.

JURY TRIAL

14 Plaintiffs demand a trial by jury for all issues so triable.

15
16
17 Dated: October 25, 2013

GIRARD GIBBS LLP

18
19 By: 
Matthew B. George

20
21 Daniel C. Girard
22 Matthew B. George
23 Heidi H. Kalscheur
24 601 California Street, 14th Floor
25 San Francisco, California 94108
26 Telephone: (415) 981-4800
27 Facsimile: (415) 981-4846

28 *Attorneys for Plaintiffs*