

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division

FILED

MAY 1 2012

CLERK, U.S. DISTRICT COURT  
NORFOLK, VA

I/P ENGINE, INC.,

Plaintiff,

v.

Case No.: 2:11cv512

AOL, INC., et al.,

Defendants.

ORDER TO SHOW CAUSE

Before the Court is a Motion to Seal Portions of Google's Reply in Support of Its Motion to Compel Plaintiff to Provide Conception, Reduction-to-Practice, and Priority Date Information, and Exhibits L, M, N, and P to the Declaration of Margaret Kammerud in Support Thereof (ECF No. 92) ("Motion to Seal"), filed on March 5, 2012, by defendant Google Inc. ("Google"). The Motion to Seal is unopposed. In addition to the Motion to Seal and related filings, the Court has reviewed in camera the reply brief and exhibits submitted for filing under seal. For the reasons stated below, the Court finds the basis for sealing some of the material is unclear based upon the Court's in camera review. Accordingly, the Court will GRANT the motion in part, DENY the motion in part, and ORDER the parties to SHOW CAUSE why certain of the specified materials should not be unsealed and filed in the public record.

Google has asked to file under seal the Reply Brief in Support of Google's Motion to Compel Plaintiff to Provide Conception,

Reduction-to-Practice, and Priority Date Information (ECF No. 97) and Exhibits L, M, N, and P to the Declaration of Margaret Kammerud in support thereof (ECF No. 98). The parties have agreed that certain information contained in these materials should remain confidential, but "[w]hen discovery material is classified as confidential by the parties, their classification is not binding on the court." Chemical Bank v. Affiliated FM Ins. Co., 154 F.R.D. 91, 94 (S.D.N.Y. 1994).

In Ashcraft v. Conoco, Inc., 218 F.3d 282 (4th Cir. 2000), the Fourth Circuit set out three requirements for sealing court filings:

[B]efore a district court may seal any court documents, it must (1) give public notice of the request to seal and allow interested parties a reasonable opportunity to object, (2) consider less drastic alternatives to sealing the documents, and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives.

Id. at 288 (citing Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 178, 181 (4th Cir. 1988), and In re Knight Pub. Co., 743 F.2d 231, 235-36 (4th Cir. 1984)). Local Civil Rule 5 provides further guidance to litigants with respect to motions to seal.

The Court notes that, in accordance with Local Civil Rule 5, the Clerk has provided public notice of the Motion to Seal by docketing the motion with a clear description of it as a motion to seal, and by docketing a separate Notice of Google's Motion to Seal

(ECF No. 94). No objection has been filed by any interested party.

"Even when no third party challenges a motion to seal, however, the Court must still ensure that the motion is supported by good cause." See Auburn Univ. v. IBM Corp., No. 3:09-cv-694-MEF, 2010 WL 3927737, at \*2 (M.D. Ala. Oct. 4, 2010). The Court's review, in this instance, finds insufficient support to establish good cause to seal certain of the submitted materials.

Based on the Court's in camera review of the materials submitted for filing under seal, the Court FINDS that certain of the materials submitted by Google for filing under seal do not appear, upon close review, to contain any confidential information. Namely, Exhibit P to the Kammerud Declaration is a copy of a "Disclosure of Invention" form, by which inventor Ken Lang disclosed certain information regarding an invention styled "Information Filtering [U]sing Machine Learning" to officials at Carnegie Mellon University, where he appears to have been enrolled as a graduate student at the time. Having reviewed the document in detail, the Court is unable to identify any information that appears to be confidential or otherwise worthy of protection. The content of the disclosure form indicates that Lang's research was sponsored by a corporation with no readily apparent relationship to the parties or to this litigation, that the a research paper on this invention was scheduled to be presented and published at a

July 1995 conference,<sup>1</sup> that the research paper was previously made available on the world-wide web in March 1995 and “[m]any people have downloaded copies,” and that “[t]here have been no confidentiality agreements made regarding the information concerning this work.” The document itself lacks any indicia of confidentiality,<sup>2</sup> and no extrinsic evidence of confidentiality (e.g., a confidentiality agreement between Lang and the University) has been submitted for the Court’s consideration. The Court further notes that the sealed copy of Google’s Reply Brief (ECF No. 97) describes and quotes portions of Exhibit P, which are redacted from page 7 of the public version (ECF No. 95).

Based on the Court’s in camera review, the Court FINDS that Exhibits L, M, and N (ECF No. 98), and portions of the sealed copy of Google’s Reply Brief describing these three Exhibits (ECF No. 97), contain confidential commercial information that is normally unavailable to the public. Moreover, the Court FINDS that the parties’ non-confidential, public filings adequately apprise the public of the nature of the sealed materials. See Google’s Reply Br. (public version) at 6, ECF No. 95. The Court further FINDS

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<sup>1</sup> The paper still appears to be available on the internet. See Ken Lang, NewsWeeder: Learning to Filter Netnews, Proceedings of the Twelfth International Conference on Machine Learning (1995), available at <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.85.7365> (last accessed Apr. 30, 2012).

<sup>2</sup> The Court acknowledges that the document appears to have been stamped “Confidential Outside Counsel Only” in connection with its production in discovery in this matter, but it bears no indicia of confidentiality predating its disclosure in this litigation.

that the public's interest in access is outweighed here by the parties' interest in preserving confidentiality, and there are no alternatives that appropriately serve these interests.

Accordingly, the Motion to Seal is GRANTED in part, DENIED in part, and the Court ORDERS the following:

1. The Clerk is DIRECTED to file Exhibits L, M, and N (ECF No. 98) under seal.

2. The parties are ORDERED to SHOW CAUSE why Exhibit P (ECF No. 98) and related portions of Google's Reply Brief (ECF No. 97) should not be unsealed and filed in the public record. Any party may respond to this Order to Show Cause by filing a written response within seven days of the date of this Order, setting forth any and all reasons why these exhibits should be filed under seal rather than in the public record of this case. If no response is filed within seven days of the date of this Order, the Court will issue a further order unsealing Exhibit P and related portions of the Reply Brief. In the interim, the Clerk shall continue to maintain the unredacted version of Google's Reply Brief (ECF No. 97) and Exhibit P (ECF No. 98) under seal.

IT IS SO ORDERED.



Frank M. Sankma  
UNITED STATES MAGISTRATE JUDGE

Norfolk, Virginia

May 1, 2012