

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION

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I/P ENGINE, INC.,		)	
		)	
	Plaintiff,	)	
	v.	)	Civ. Action No. 2:11-cv-512
		)	
AOL, INC. et al.,		)	
		)	
	Defendants.	)	
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**RESPONSE TO DEFENDANTS’ MOTION TO SEAL DOCUMENTS  
AND CLOSE THE COURTROOM DURING PRESENTATION OF CONFIDENTIAL  
MATERIAL AT TRIAL**

Plaintiff’s corporate representatives, and other officers, want to attend this trial. And, there is strong public interest in this trial, as the Court observed during the September 18 hearing. In addition, as reflected in this Court’s two different Orders to Show Cause of September 13, 2012, Defendants have vastly over-designated as confidential documents, depositions, and court filings. See D.I. 244 & 245. While I/P Engine likely will not oppose a brief closure of the courtroom upon a showing that it is the only way of preserving legitimate, highly confidential information that previously has not been publicly disclosed, Defendants have failed to meet that standard in their motion. Instead, they list only broad categories of information that they seek to seal. These categories encompass information that is already public. This motion, at least as it has been presented to the Court, should be denied.

Contrary to Defendants’ statement (at 2), the public’s right to access judicial proceedings is guaranteed not only by common law, but also by the First Amendment. *Rushford v. New*

*Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (“We believe the more rigorous First Amendment standard should also apply to... civil case[s]”). Denying access to the public (including I/P Engine’s officers) can only occur when it advances a compelling government interest and is narrowly tailored to serve that interest. *Id.* Any decision to close the courtroom must be supported by reasons stated explicitly on the record and supported by specific findings. *Id.* 253-254. Any decision to close the courtroom must also be supported by a statement of reasons for rejecting alternatives to closure. *Id.* at 253-254.

Many of Defendants’ rationales for closing the courtroom must be rejected because they would apply to every patent case. For example, Defendants’ motion argues (at 8) that all of Google’s intellectual property agreements must be sealed because “Google would... suffer competitive harm in having other parties know its licensing rates for intellectual property.” Defendants’ motion merely raises broad concerns that some information, if publicly disclosed, might adversely affect one or more of the Defendants. The Supreme Court, however, has rejected this type of rationale, stating that “[i]f broad concerns of this sort were sufficient... a court could exclude the public... almost as a matter of course.” *Presley v. Georgia*, 130 S. Ct. 721, 725 (2010).

### **I. Defendants’ Motion Must Be Denied Because It Lacks Specificity**

I/P Engine cannot reply with specificity to Defendants’ motion, because Defendants have failed to specifically identify those documents that they consider to be so sensitive that they cannot be discussed in open court. Defendants have not identified which documents on Defendants’ own exhibit list should allegedly be shielded from the public eye. Instead, Defendants promised to supplement their motion in the future. D.I. 347 at 2. This fails to satisfy Defendants’ burden of overcoming the presumption that trials will be open to the public. *See*

*Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 510 (1984) (“The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”).

As this Court already has observed, during the discovery phase of this case, and in their summary judgment briefing, Defendants designated far more documents as confidential than they should have. I/P Engine has no confidence that Defendants will stop over-designating topics as confidential at trial. This is especially true in light of the extremely aggressive positions that Defendants have taken on other issues, such as seeking to exclude their own highly relevant, but damaging, documents (D.I. 303-304) and claiming, contrary to well-established law, that the Court lacks standing because co-infringers are not jointly and severally liable (D.I. 293-294).

Defendants should be required to justify, with specificity and exactness, every single item of evidence that they want to conceal from I/P Engine’s principals and the public. For each item, Defendants should be required to explain what the government interest in sealing that item of evidence is and why this Court should not apply less severe measures, such as not publishing documents to public view, or partial redaction of documents. Then this Court must weigh the public interest against the alleged harm to the Defendant seeking the sealing.

Without knowing what specific evidence Defendants seek to exclude, I/P Engine responds below to the three broad categories of information identified by Defendants and proposes procedures to ensure that no more information is kept from the public’s eye than the Constitution allows.

## **II. Redactions Should Be Preferred Over Sealing Entire Documents**

Defendants should not be allowed to seal an entire document where only a portion of the document contains highly confidential information. To allow the non-confidential portions of documents or testimony to be sealed would not be narrowly tailored, as required by the Constitution. Instead, Defendants should be required to identify with precision the evidence (testimony or documents) they seek to seal and provide redacted copies of those documents to I/P Engine well in advance of the start of trial (at least one week), so I/P Engine can determine whether it has any objections. Assuming Defendants' request is precise and narrowly tailored, then I/P Engine believes that the need for closing the courtroom can be either minimized or entirely avoided. For example, I/P Engine may be able to avoid unnecessarily excluding the public by using documents in redacted form.

## **III. Defendants' First Category Is Overbroad And Suggests An Improper Purpose For Sealing The Documents**

Defendants' trial strategy is to disavow their own public documents. Defendants moved to exclude these documents, claiming that they are inaccurate and that permitting the jury to see the documents would be unduly prejudicial. D.I. 303-304 (Defendants' Motion *in Limine* #3). I/P Engine has vigorously disputed both the assertion that Defendants' documents are inaccurate and the assertion that they should be excluded from evidence. D.I. 447.<sup>1</sup> Defendants now seek to keep these documents, and discussion of their contents, from the public.

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<sup>1</sup> I/P Engine's expert analyzed the documents, compared them with Google's source code, and concluded that the documents are accurate. See, e.g., Ex. 1 (Frieder Report) at Exhibit 5, p. 9-10. At most, Google's claims of inaccuracy are hyper-technical and misleading. See D.I. 447 at 6-8.

Defendants apparently want to shield their attack on their own documents from the public eye.<sup>2</sup> But the documents they attack are public. Some of the documents were even cited in I/P Engine’s Complaint. The public’s right of access to judicial proceedings would be a farce if Google were allowed to have different public and private positions on the issues. Yet Defendants’ motion would allow exactly this result. The Government has no interest in shielding the public from Defendants’ embarrassing, self-contradictory arguments. Although encompassed by Defendants’ motion, Defendants’ public documents, and discussions thereof, should not be sealed.

#### **IV. Defendants’ Second And Third Categories Cover Routine Information That Is Rarely Excluded**

Defendants’ second category to exclude is “Google’s confidential patent license agreements and other intellectual property agreements.” Such documents are a part of nearly every patent trial. Indeed, such licenses are routinely considered when evaluating the amount of a reasonable royalty. *See, e.g.*, Exhibit 2 at p. 36-53 (Google expert report discussing multiple Google intellectual property licenses). Google’s third category (“Defendants’ confidential, non-public financial information”) also encompasses information that is routinely considered in order to establish a royalty base. *See, e.g., Id.* at 73-92.

Defendants have identified nothing that distinguishes Google’s agreements from those that are routinely considered in other patent trials. Similarly, Defendants have failed to identify

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<sup>2</sup> Defendants’ first category of topics to seal reads “how AdWords and AdSense for Search determine which advertisements to display to users.” D.I. 347 at 1. This broad category encompasses the documents Defendants seek to exclude in their third motion *in limine* (D.I. 303-304).

anything that distinguishes their financial information from the financial information that is ordinarily considered in other patent trials.<sup>3</sup>

Defendants' second and third categories encompass nearly all of the evidence that relates to damages in this case. If other Courts sealed these categories of information, the damages phase of patent trials would virtually always occur in secret, turning the presumption of openness on its head. Sealing damages evidence wholesale cannot be the correct result. *See Presley v. Georgia*, 130 S. Ct. 721, 725 (2010) (non-specific concerns are not sufficient to exclude the public as a matter of course); *cf. Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 610-11 (1982) (overturning law requiring mandatory closing of criminal trials during testimony of minors who were victims of sexual abuse).

Defendants have cited no case law that supports sealing even one of Google's intellectual property agreements, let alone all of them. The case cited by Defendants does not address an agreement of any sort. Rather it addresses whether a movant can redact an affidavit containing "15 years of revenue data." *Flexible Benefits Council v. Feldman*, 2008 WL 4924711 at \*1 (2008). Notably, the movant did not seek to seal a whole category of documents or even the affidavit as a whole. Rather, the movant sought "to file a version of the [affidavit] with the financial information redacted." *Id.* Defendants should similarly focus their requests.

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<sup>3</sup> Even if some specific aspects of an agreement or a specific bit of financial information deserve the Court's protection, Defendants have failed to explain what that bit of information is and why it should be specially protected. I/P Engine acknowledges that special cases may exist, and it may be willing to limit its objections if Defendants make a specific case for why any specific bit of information, as opposed to a broad category of information, should be sealed.

**V. Defendants Should Certify That The Documents They Seek To Seal Are Not Already Public**

I/P Engine believes that at least some of the technical documents, intellectual property agreements, and financial information that Defendants seek to conceal have been publicly disclosed. There is no legitimate governmental interest in shielding the public from information that it can already access. Making already-public information harder to access would hinder the public's right to access judicial proceedings by making the information needed to understand the proceedings needlessly difficult to obtain.

If and when Defendants identify the specific information they seek to redact they should be required to certify that the information has not been made public, in another lawsuit or otherwise. Defendants should also provide a specific statement of why each piece of evidence meets the standard for closing the courtroom, instead of making the overly-broad statements in its present motion.

**VI. Presentation of Evidence Necessitating Closure of The Courtroom Should Be Grouped**

If the Court finds the Defendants have properly supported any request to seal the Courtroom, those events should be rare and aggregated. Rather than making a spectacle of repeatedly closing the courtroom, Defendants should be allowed to close the courtroom only a limited number of times, and they should present all evidence they seek to shield from the public during those times. For example, Defendants could close the courtroom once during their non-infringement case in order to present any source-code related documents. If this Court agrees that the damages portions of this trial should proceed in secret, then Defendants could immediately follow the confidential portion of their non-infringement case with their damages case.

## VII. Conclusion

I/P Engine opposes sealing the broad categories of information that the Defendants identified. The courtroom should not be closed unless and until Defendants identify the specific portions of documents and testimony that they seek to seal, and support all requests with evidence and reasoning sufficient to satisfy the First Amendment.

Dated: October 1, 2012

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 1st day of October, 2012, the foregoing **RESPONSE TO DEFENDANTS' MOTION TO SEAL DOCUMENTS AND CLOSE THE COURTROOM DURING PRESENTATION OF CONFIDENTIAL MATERIAL AT TRIAL**, was served via the Court's CM/ECF system, on the following:

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