

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION**

I/P ENGINE, INC.

Plaintiff,

v.

AOL INC., *et al.*,

Defendants.

Civil Action No. 2:11-cv-512

**MEMORANDUM IN SUPPORT OF DEFENDANT GOOGLE INC.'S
MOTION TO SEAL AND REDACT PORTIONS OF TRIAL RECORD**

Defendant Google, Inc. hereby moves for an order redacting limited, confidential portions from the publicly-available transcripts of the jury trial in the above-captioned matter held between October 16 and November 6, 2012. Google timely filed notice of its intent to request redaction on November 21, 2010. Google hereby submits the following Memorandum in Support of its Motion to Redact Portions of Trial Record, identifying unsealed portions of the transcript that contain highly confidential information concerning (1) trade secrets about the accused systems, (2) the amounts paid for intellectual property under confidential licensing agreements Google entered into with third parties, and (3) Google's revenue from the accused systems. Google has consistently sought to protect this highly confidential information during the course of this litigation by sealing various pleadings and by moving to seal the courtroom for the limited purpose of protecting the very information that is the subject of this motion. (*See, e.g.,* Dkt. 347.) In addition, during conferences with the Court prior to and during the course of the trial, Google's counsel again requested that the Court take all steps necessary to protect this very information and objected to its introduction during trial. Because of the highly confidential and sensitive nature of this information, there are no alternatives other than redacting the following information from the public record to prevent its dissemination:

I. Trade Secrets About the Accused Systems

Dkt. Number	Date	Session	Start	End
744	10/24/2012	PM	1118:24	1121:10
744	10/24/2012	PM	1122:9	1122:19
744	10/24/2012	PM	1123:14	1125:2

II. Amounts Paid for Intellectual Property Under Confidential Licensing Agreements

Dkt. Number	Date	Session	Start	End
730	10/16/2012	PM	166:20	
730	10/16/2012	PM	166:25	167:1
742	10/23/2012	PM	836:13	
742	10/23/2012	PM	836:17	

742	10/23/2012	PM	836:19	
742	10/23/2012	PM	878:21	
742	10/23/2012	PM	882:3	
742	10/23/2012	PM	884:9	
742	10/23/2012	PM	884:23	
742	10/23/2012	PM	885:3	885:4
756	10/26/2012	PM	1567:15	
756	10/26/2012	PM	1567:17	
756	10/26/2012	PM	1598:15	
756	10/26/2012	PM	1598:19	
756	10/26/2012	PM	1598:21	
765	10/30/2012	AM	1620:3	
765	10/30/2012	AM	1620:20	
764	10/30/2012	PM	1765:6	

III. Revenue for Accused Systems

Dkt. Number	Date	Session	Start	End
759	10/23/2012	AM	746:10	746:10
759	10/23/2012	AM	746:12	746:12
742	10/23/2012	PM	832:24	832:25
742	10/23/2012	PM	833:6	833:13
742	10/23/2012	PM	833:23	
760	10/24/2012	AM	952:17	
774	10/31/2012	Full day	1967:1	1967:3
774	10/31/2012	Full day	1967:19	

ARGUMENT

Google seeks to redact small portions of the trial transcript concerning specific, highly confidential details about the accused systems, the amounts paid for intellectual property under confidential licensing agreements Google entered into with third parties Disney and Carl Meyer, and the revenues from the accused systems. All of this information is entitled to protection because further public dissemination of this information would harm Google's competitive standing. The Court can prevent this additional harm to Google by redacting portions of the trial transcript including this information.

The Fourth Circuit expressly acknowledged the legitimacy of limiting public access to court records in order to protect proprietary information in an unpublished per curiam decision. *Woven Elecs. Corp. v. Advance Group, Inc.*, Nos. 89-1580, 89-1588, 1991 U.S. App. LEXIS 6004, at *17, *19 (4th Cir. Apr. 15, 1991) (acknowledging exception to public access to judicial records where it "might harm a litigant's competitive standing" and allowing for the sealing of "those portions necessary to prevent the disclosure of trade secrets").¹ Even though confidential information had been revealed during open trial in that case, the Fourth Circuit acknowledged the importance of later sealing records containing such information: "Given the present posture of this case nothing can be done to remedy the situation at trial. However, an obvious corollary to our conclusion is a requirement that the district court record be sealed to the extent necessary to prevent the release of trade secrets." *Id.* at *18-19.

Google has consistently and repeatedly sought to prevent the introduction into the public record of the evidence at issue in this motion. Accordingly, Google has not waived its right to seal portions of the record containing this information. *Compare Level 3 Commc'ns, LLC v. Limelight Networks, Inc.*, 611 F. Supp. 2d 572, 583 (E.D. Va. 2009) (refusing to seal court records where third party failed to raise with the court objections to their admission prior to or during trial because an effort must be "made to seal a document *in advance of or contemporaneously with* its use or filing with a court) (emphasis in original). Google has been careful to narrowly limit these redactions to only those portions absolutely necessary to protect Google's confidential information just as it sought to close the courtroom only during the most sensitive trial testimony. (See Dkt. 347; Dkt. 349; Dkt. 350; Dkt. 351.) Because Google has

¹ See also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 901 (E.D. Pa. 1981) ("Judicial proceedings and records may be closed in part or in full to the public in order to protect private interests, including proprietary interests in trade secrets and other commercial information.").

sought to redact only such limited information as will harm its competitive standing as detailed below, Google requests the Court grant this motion in its entirety.

A. Google's Technology and Product Design and Operations Are Highly Confidential.

There can be no dispute that evidence related to the design and technology underlying Google's advertising products is confidential, proprietary information that must be protected. In fact, the Court explicitly recognized this fact and, as a result, closed the courtroom for portions of the trial. Again today, Google seeks to protect technical details about precisely how its accused products function. Google has invested significant resources in building, maintaining, and improving the technology at issue here, and its public disclosure would allow competitors to adopt Google's valuable proprietary information without making the same investment Google did. (Dkt. 349, ¶ 17.) Google asks that the Court grant its request to protect this highly confidential information and allow for redaction from the public transcripts confidential technical information that was supposed to be elicited only during the closed portions of the trial.

During trial, Plaintiff cross-examined Bartholomew Furrow regarding highly confidential details about the specific way in which Google's accused systems function. This occurred despite the fact that the Court closed the courtroom during portions of Mr. Furrow's testimony to protect precisely this type of information and over the objection of Google's counsel. (*Id.*, 1122:20-1123:10.) Allowing this information into public court records will further harm Google. Accordingly, the Court should redact the portions of the transcripts identified above that relate to this testimony.

B. The Disclosure of Google's Confidential Intellectual Property Agreements Could Harm Google's Competitive Standing.

Google also asks the Court to redact the portions of transcripts specifying the amounts paid for intellectual property rights under licensing agreements with third parties. In this action,

the Court allowed testimony about the Disney and Carl Meyer patent license agreements to occur in open court over Google's requests for protection of this very information. Further public dissemination of this sensitive financial data would harm both Google and the third parties to the licensing agreements. (*See generally* Dkt. 351.)

A lack of Court protection of the information included in the intellectual property agreements in this action would cause Google to suffer competitive harm in having other parties know its licensing rates for intellectual property. This could give competitors or potential licensors insight into Google's and its licensing partners' confidential licensing strategies and thus an unfair competitive advantage. (Dkt. 351, ¶ 5.) Further, Google and its partners in those agreements consider this information to be highly confidential and sensitive, and treat it as such under the confidentiality provisions negotiated and entered into by those parties. Google asks the Court to do the same by redacting portions of transcripts concerning the amounts paid for the underlying intellectual property rights under each agreement.

C. The Disclosure of Google's Nonpublic Financial Data Could Harm Google's Competitive Standing.

Google also asks the Court to redact the portions of transcripts specifying revenue from the accused systems. In this action, the Court allowed testimony about this revenue to occur in open court despite Google's requests for protection of this very information. These revenue figures are not public information and were not willingly released by Google. Further public dissemination of this sensitive financial data would harm Google. (*See generally* Dkt. 350.) Courts typically find that a party's interest in maintaining the confidentiality of nonpublic financial information outweighs the common law right to public access. *See, e.g., Flexible Benefits Council v. Feltman*, No. 1:08cv371 (JCC), 2008 WL 4924711 (E.D. Va. Nov. 13, 2008).

For these reasons, Google asks the Court to redact limited portions of the transcript revealing the revenue from the accused systems.

CONCLUSION

For the foregoing reasons, the Court should seal and/or redact Google's confidential information that was disclosed at trial.

DATED: November 21, 2012

/s/ Stephen E. Noona

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2012, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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