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KEY IDEAS:

TOP SECRET OR TIPPED SECRETS? "SEALING DOCUMENTS" NOT SO SIMPLE

Is your client's data proprietary or public merely by filing suit? Patent infringement litigants often find themselves forced to produce highly confidential technical and financial data relating to alleged infringement and damages. When such materials become attached to court filings, an agreed motion to seal had been standard practice, and the prompt entry of an order granting the motion was taken for granted.

In *Apple Inc. v. Samsung Elec. Co., Ltd,*[1] however, a California district court refused to grant the parties' motion to seal. This unusual opinion upset the norm, at least until the Federal Circuit reversed the decision.[2] The case provides valuable insights into the growing tension between the public's right to know and the litigant's right to protect confidential information. It also suggests "best practices" for firmly sealing court records.

Common Law Right of Access

The U.S. Supreme Court recognizes a "general right to inspect and copy public records and documents, including judicial records and documents."[3] That right, characterized as the "common law right of access to judicial records," extends to "pretrial documents filed in civil cases."[4]

In *Apple Inc. v. Samsung,* the appeal did not involve substantive patent law issues. Thus, the Federal Circuit applied Ninth Circuit law, the district court's regional circuit.[5]

Ninth Circuit Rules on Access

The Ninth Circuit has a "strong presumption in favor of [public] access to court records."[6] The presumption is based on "promoting the public's understanding of the judicial process and of significant public events."[7]

Any litigant seeking to seal judicial records must supply "sufficiently compelling reasons" to override the public policy favoring access.[8] The Ninth Circuit explained: "[T]he party must articulate compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure, such as the public interest in understanding the judicial process."[9] Thus, when evaluating a motion to seal records, the court must *balance* the competing interests of the public's presumptive right to access and the party filing the motion.[10]

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1 No. 11-CV-01846-LHK, 2013 WL 3283478 (N.D. Cal. Aug. 9, 2012).
2 *Apple Inc. v. Samsung Elec. Co., Ltd.,* Nos. 2012-1600, 2012-1606, 2013-1146, 2013 WL 4487610 (Fed. Cir. Aug. 23, 2013).
3 *Nixon v. Warner Commc'ns, Inc.,* 435 U.S. 589, 597 (1978) (citations omitted).
4 *Kamakana v. City & Cnty. of Honolulu,* 447 F.3d 1172, 1178 (9th Cir. 2006).
5 *Apple Inc. v. Samsung Elec. Co., Ltd.,* Nos. 2012-1600, 2012-1606, 2103-1146, 2013 WL 4487610 at *4 (Fed. Cir. Aug. 23, 2013) (citing *In re TS Tech USA Corp.,* 551 F.3d 1315, 1319 (Fed. Cir. 2008)).
6 *Foltz v. State Farm Mut. Auto. Ins. Co.,* 331 F.3d 1122, 1135 (9th Cir. 2003).
7 *Valley Broad. Co. v. U.S. Dist. Ct. for Dist. of Nev.,* 798 F.2d 1289, 1294 (9th Cir. 1986).
8 *In re Midland Nat'l Life Ins. Co. Annuity Sales Practices Litig.,* 686 F.3d 1115, 1119 (9th Cir. 2012) (citing *Foltz,* 331 F.3d at 1135).
9 *Kamakana,* 447 F.3d at 1178-79 (internal citations and quotation marks omitted).
10 *Id.* at 1179.

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One compelling reason to seal judicial records occurs when the records contain bona fide trade secrets … Trade secrets recognized by the Ninth Circuit include pricing terms, royalty rates and guaranteed minimum payment terms found in a license agreement.

The Ninth Circuit recognizes an exception to the general presumption of access, applying a less rigorous "good cause" standard for judicial records attached to a non-dispositive motion. The public has less of a need for access to materials attached to non-dispositive motions …

One compelling reason to seal judicial records occurs when the records contain bona fide trade secrets.[11] The Ninth Circuit defines a "trade secret" as information that gives the owner an "opportunity to obtain an advantage over competitors who do not know or use it."[12] Trade secrets recognized by the Ninth Circuit include pricing terms, royalty rates and guaranteed minimum payment terms found in a license agreement.[13]

The Ninth Circuit recognizes an exception to the general presumption of access, applying a less rigorous "good cause" standard for judicial records attached to a non-dispositive motion.[14] The public has less of a need for access to materials attached to non-dispositive motions because those documents are often unrelated or only tangentially related to the underlying cause of action.[15]

Law in Other Circuits

Sister federal circuit courts of appeals apply similar rules to determine whether judicial records should be sealed. For example:

- **Second Circuit** – "The common law right of public access to judicial documents is firmly rooted in our nation's history."[16] The court must balance the presumption of access with the role of the materials at issue in the pending proceeding and the value of such materials to those monitoring the courts.[17] Documents may be sealed if closure is essential to preserve higher values and is narrowly tailored to serve that interest.[18]
- **Third Circuit** – "Although the right of access to judicial records is 'beyond dispute,' it is not absolute."[19] While there is a strong presumption in favor of public access, records may be sealed when justice requires.[20] For example, a party's reliance on the district court's assurance of confidentiality in entering into a settlement agreement can outweigh the public's right of access.[21] Documents that have not been filed with, interpreted or enforced by the district court are excluded from the general rule of access.[22]
- **Seventh Circuit** – "Secrecy is fine at the discovery stage, before the material enters the judicial record."[23] But documents "that influence or underpin the judicial decision are open to public inspection unless they meet the definition of trade secrets or other categories of bona fide long-term confidentiality."[24] A mere agreement between the parties that a document is confidential without a showing that the document contains a trade secret or something comparable will not meet the legal standard.[25]

Apple v. Samsung – District Court Rulings

Pre-Trial Ruling ("August Order")[26] – In *Apple v. Samsung,* the district court considered multiple administrative motions to seal documents filed by both parties. While granting many of the motions, the court refused to seal confidential financial data pertaining to product-specific profits and profit margins, product-specific unit sales and revenue, and costs.[27] The court said that Apple's

11 *Id.* at 1179; *see also Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1162 (9th Cir. 2011).
12 *Restatement (First) of Torts,* § 757, cmt. 6.
13 *See In re Elec. Arts,* 298 F. App'x 568, 569 (9th Cir. 2008); *Apple Inc. v. Samsung Elec. Co., Ltd.,* Nos. 2012-1600, 2012-1606, 2103-1146, 2013 WL 4487610 at *5 (Fed. Cir. Aug. 23, 2013).
14 *In re Midland Nat'l Life Ins. Co. Annuity Sales Practices Litig.,* 686 F.3d at 1119.
15 *Kamakana,* 447 F.3d at 1179 (internal citations and quotation marks omitted).
16 *Lugosch v. Pyramid Co. of Onondaga,* 435 F.3d 110, 119 (2d Cir. 2006) (citation omitted).
17 *Id.*
18 *Id.* at 120.
19 *LEAP Sys., Inc. v. Moneytrax, Inc.,* 638 F.3d 216, 221 (3d Cir. 2011) (citing *Nixon v. Warner Commc'ns, Inc.,* 435 U.S. 589, 598 (1978)).
20 *Id.*
21 *Id.* at 222.
22 *Id.* at 220.
23 *Baxter Int'l, Inc. v. Abbott Labs.,* 297 F.3d 544, 545 (7th Cir. 2002).
24 *Id.*
25 *Id.* at 546-47, 548.
26 *Apple Inc. v. Samsung Elec. Co., Ltd.,* No. 11-CV-01846-LHK, 2013 WL 3283478 (N.D. Cal. Aug. 9, 2012).
27 *Id.* at *3.

… the Federal Circuit first decided that the district court committed legal error by applying the "compelling reasons" standard to documents attached to non-dispositive motions regarding the admissibility of evidence at trial …

The parties did not seek to seal the documents in their entirety, but only to redact limited portions containing detailed product-specific financial information, including costs, sales, profits, and profit margins.

The parties had agreed pre-trial not to present the detailed financial information at trial and instead to rely on less-detailed materials to prove damages. Thus, the financial information at issue was not considered by the jury.

rationale for sealing the documents was secondary to the public's interest in having the information.[28] The court applied the same analysis when denying Samsung's motions.[29]

Post-Trial Ruling ("November Order")[30] – After trial, the district court considered motions to seal portions of briefs and exhibits filed by Samsung in opposition to Apple's motion for a permanent injunction.[31] The district court denied the motion insofar as it related to Apple's marketing reports–applying much the same analysis it had used in the earlier order.[32]

Apple v. Samsung – Federal Circuit Opinion[33]

Implementation of the orders was stayed while both Apple and Samsung appealed the August Order and Apple appealed the November Order.[34] Neither party opposed the other party's requested relief in the Federal Circuit.[35]

After concluding it had jurisdiction over the consolidated appeals under the collateral order doctrine,[36] the Federal Circuit first decided that the district court committed legal error by applying the "compelling reasons" standard to documents attached to non-dispositive motions regarding the admissibility of evidence at trial.[37] The Federal Circuit found no case law supporting the district court's conclusion that the admissibility of evidence was closely contested, was crucial to the public's understanding, and thus required the more stringent "compelling reasons" test.[38]

Turning to the specific documents at issue, the Federal Circuit said that its decision would not change even if the "compelling reasons" standard were applied.[39] In evaluating the August Order and concluding that the district court abused its discretion in unsealing the documents, the Federal Circuit noted:

- On appeal, the parties challenged the district court's order unsealing 26 documents. The parties did not seek to seal the documents in their entirety, but only to redact limited portions containing detailed product-specific financial information, including costs, sales, profits, and profit margins.[40]
- The documents were filed in conjunction with *Daubert* motions to exclude certain expert opinions.[41]
- The parties filed declarations from employees explaining measures taken to protect the confidentiality of the information and describing anticipated harm resulting from disclosure of that information.[42]
- The parties had agreed pre-trial not to present the detailed financial information at trial and instead to rely on less-detailed materials to prove damages.[43] Thus, the financial information at issue was not considered by the jury.[44]

28 *Id.* at *4.
29 *Id.* at *8.
30 *Apple Inc. v. Samsung Elec. Co., Ltd.,* No. 11-CV-01846-LHK, 2013 WL 5988570 (N.D. Cal. Nov. 29, 2012).
31 *Id.* at *1.
32 *Id.* at *5.
33 *Apple Inc. v. Samsung Elec. Co., Ltd.,* Nos. 2012-1600, 2012-1606, 2103-1146, 2013 WL 4487610 (Fed. Cir. Aug. 23, 2013).
34 *Id.*
35 *Id.*
36 *Id.* at *3-*4.
37 *Id.* at *6.
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.* at *7.
42 *Id.*
43 *Id.* at *8.
44 *Id.* at *9.

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- The parties said that they would be put at a competitive disadvantage by release of the sealed information.[45] Thus, they had a strong interest in keeping the information sealed.[46]
- The extraordinary amount of public interest in the case did not automatically create a legally cognizable interest in every document filed by the parties.[47]

The Federal Circuit reached a similar conclusion for similar reasons in reviewing the district court's November Order unsealing nine Apple market research reports:

- In opposing Apple's post-trial motion for a permanent injunction, Samsung cited 12 pages out of 500 pages of internal Apple market research reports. Apple did not seek to seal any of the 12 pages actually cited by Samsung. It agreed to make seven pages public and then sought to redact customer information for other countries from the remaining five. Apple sought to seal the remainder of the market reports which were not relied on by the court.[48]
- Apple filed a declaration in support of the motion explaining the market research, how it was used and the extraordinary steps Apple took to keep it confidential, as well as how disclosure would be considered harmful.[49]
- Competitors could not obtain the same information anywhere else. Giving competitors access to the reports would provide them with a head start–to Apple's detriment.[50]
- Information relating to customers outside the United States would not assist the public's understanding of damages limited to the domestic market.[51]

The Federal Circuit concluded with an overview of the competing interests:

> We recognize the importance of protecting the public's interest in judicial proceedings and of facilitating its understanding of those proceedings. That interest, however, does not extend to mere curiosity about the parties' confidential information where that information is not central to a decision on the merits.[52]

Conclusions

The Federal Circuit's opinion suggests these "best practices":

- Research the jurisdiction's rules regarding the sealing of judicial documents.
- Understand the difference between sealing discovery and sealing judicial records.
- Don't overreach with requests to seal judicial documents. Tailor the request to seal.
- Limit what you file in support of motions, especially dispositive motions.
- Don't assume the court will seal the documents. Take the time to make your case for sealing.
- Know the standard for trade secrets in your jurisdiction. Supply the court with a factual record supporting trade secret status and protection for any material you want sealed.

45 *Id.*
46 *Id.* at *10.
47 *Id.* at *9.
48 *Id.* at *10.
49 *Id.* at *10-*11.
50 *Id.* at *11.
51 *Id.* at *12.
52 *Id.* at *12.

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Shook, Hardy & Bacon offers expert, efficient and innovative representation to our clients. We know that the successful resolution of intellectual property issues requires a comprehensive strategy developed in partnership with our clients.

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