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Not So Confidential: A Call for Restraint in Sealing Court Records[1]

By Bernard Chao[2]

In view of the sanctions the Federal Circuit Court of Appeals recently issued in *In re Violation of Rule 28(d)*[3], both attorneys and judges should reconsider how confidential information is currently handled by the federal court system. All too often courts permit parties to file entire briefs under seal when there is only a kernel of confidential information. This essay reviews the practice of several district courts around the country and concludes that far too much information is shielded from public view. Courts need to setup safeguards that prevent parties from over designating their information as secret. They can do so by adopting the Federal Circuit rule of requiring public versions of confidential fillings. If the district courts adopt this practice, non-confidential information that may be of public interest will no longer be systematically lumped with confidential information. Although this essay focuses on patent cases, the recommendation applies with equal force to other types of cases.

The courts of this country have long recognized a general right to inspect and copy judicial documents.[4] A transparent court system serves the public interest by giving the public an understanding of the how the judicial system works.[5] This access also provides an important check on the courts akin to the other checks and balances found in our system of government.[6] Public outcry over unjust decisions can often

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[3] *In re Violation of Rule 28(d)*, 635 F.3d 1352 (Fed. Cir. 2011).

[4] *Nixon v. Warner Communications, Inc*., 435 U.S. 589, 597 (1978).

[5] See Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1169-70 (2002)(for a general discussion of the benefits of transparent public records).

[6] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595 (1980)(Justice Brennan's concurrence).

lead to legislative reform. Of course the right to access judicial documents is not absolute.[7] The law balances a party's interest in privacy against the public interest in disclosure.[8]

Although we generally think of privacy concerns as belonging to individuals, corporations are increasingly asking the courts to protect their secrets too.[9] Since parties generally have access to confidential filings through a protective order[10], the parties have little interest in protecting the public's right to access judicial documents. That leaves the courts as the sole guardian of the public's right to know.[11] Unfortunately, federal district courts have not been vigilant in protecting this right. Perhaps, because of apathy or lack or resources, district courts have consistently allowed parties in patent cases to file entire briefs and their accompanying exhibits under seal when only some of the information was confidential. This practice has caused huge portions of these cases to be hidden from the public. Since many of these disputes never result in a trial or published decision, there is no way for members of the public to view, understand or critique what has happened in these cases.

District courts need to implement rules that uphold the public's right to access judicial files. Fortunately, they do not have to start from scratch. The district courts can look to an existing Federal Circuit rule as a model for handling confidential filings. The recent *In re Violation of Rule 28(d)* decision shows how Federal Circuit Rule 28 guards against parties that would attempt to shield entire filings from the public. In *In re Violation of Rule 28(d)*, the Federal Circuit sanctioned Sun Pharmaceutical Industries, Ltd. and Caraco Pharmaceutical Laboratories, Ltd. (collectively "Sun") and its attorneys for violating rule 28(d) by improperly designating confidential information in their appellate brief.[12] Federal Circuit Rule 28(d) prescribes how parties file confidential material with the Federal Circuit. The rule requires that parties file two sets of briefs, a "Confidential set" and a "Nonconfidential Set". The "Confidential set" is only made available to authorized

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[7] *Nixon*, 435 U.S. at 598.

[8] *Id*. at 602-03.

[9] *Jepson, Inc. v. Makita Electric Works, Ltd*., 30 F.3d 854, 858 (7th Cir. 1994) quoting *Nault's Auto Sales, Inc. v. American Honda Motor Co*., 148 F.R.D. 25, 43 (D.N.H.1993) ("there appears to be a growing tendency throughout both federal and state courts, especially in commercial cases, for litigants to agree to seal documents produced during the discovery process as well as pleadings and exhibits filed with the court.")

[10] Protective Orders are routinely issued under Fed. R. of Civ. Proc. 26(c).

[11] In especially important cases, journalists or other third parties might intervene to gain access to judicial records. *See e.g. Nixon,* 435 U.S. at 591-92(where the press sought to obtain copies of tapes admitted as evidence from the trial of presidential advisors involved in the Watergate scandal). However, the press does not have the resources to intervene in the vast majority of cases.

[12] *In re Violation of Rule 28(d)*, supra, 635 F.3d at 1361.

court personnel while the "Nonconfidential set" is available to the public.[13]

In *In re Violation of Rule 28(d)*, the Federal Circuit did not question whether a license agreement and proposed consent judgment were properly designated as confidential.[14] Rather, the Federal Circuit sanctioned Sun for also designating "case citations, direct quotations from the published opinions of the cases cited, and legal argument" as confidential.[15] Sun attempted to hide so much of their brief that the Federal Circuit called the public version of the brief "virtually incomprehensible."[16] The public could not determine what Sun was arguing. The Federal Circuit quite reasonably found this practice improper. Yet, this is precisely what many patent litigants do in many district courts around the country.

In my research as a law professor, I often look to court filings to determine what new theories parties are raising. Often these theories do not emerge in published patent decisions for many years because of the high settlement rate that these cases have.[17] I also ask my students to study court filings to assess how persuasive certain types of arguments are and to become familiar with the rhetorical techniques attorneys actually use. I have been frustrated in these efforts by the practice of many district courts to file entire documents under seal.

For example, the *Qualcomm v. Broadcom* litigation in the Southern District of California is a patent case worth studying for a number of different reasons.[18] The parties are important semiconductor manufacturers that have a significant impact on the U.S. economy. The case presented novel issues regarding attorney misconduct.[19] I also suspect that there might be untested infringement theories regarding the foreign reach of U.S. patent laws. Many of the accused semiconductor chips appeared to be made, used and sold abroad. Presumably, the parties' customers, and not the parties themselves, imported the chips into United States in finished products. Thus, it was unclear what theory of liability the patentee would assert.[20]

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[13] Federal Circuit Rule 28(d)(3).

[14] *In re Violation of Rule 28(d)*, supra, 635 F.3d 1359.

[15] *Id*.

[16] *Id*. at 1360.

[17] *See, e.g*., Jay P. Kesan & Gwendolyn G. Ball, *How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 WASH. U. L. REV. 237, 259 (2006) (finding that 80% of patent disputes settle).

[18] *Qualcomm Inc v. Broadcom Corporation*, No. 05 CV 1958-RMB (BLM) (S. D. of CA).

[19] Thomas Allman, *Deterring E-Discovery Misconduct By Counsel Sanctions: The Unintended Consequences of Qualcomm v. Broadcom*, 118 Yale L.J. Pocket Part 161 (2009).

[20] Bernard Chao, *The Case for Contribution in Patent Law*, 80 U. Cinn. L. Rev. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753910

Yet, when I tried to access the actual court filings, many of the most important documents have been filed under seal. These included motions for summary judgment regarding equitable estoppel, non-infringement and invalidity.[21] I could not determine what theory of liability was being used. Moreover, other members of the public could have an interest in assessing a patent's validity or learning the scope of the asserted patents.[22] Such information allows competitors to avoid infringement or determine whether they need to take a license. But that kind of analysis cannot be performed when entire motions relating to validity and infringement cannot be viewed. Sealing the motion on invalidity is particularly disturbing because such motions only require the analysis of publicly available material, the asserted patent and the prior art.[23]

Not only are these motions unavailable, the entries accompanying these motions are not even listed in the docket on PACER.[24] The only evidence of their existence is found in later orders that refer to the documents. Moreover, when a document is filed under seal, the public cannot access any part of the document. In other words, basic legal positions and even cases cites are now unavailable. This is essentially the practice that resulted in sanctions in *In re Violation of Rule 28(d)*.

Because of the problems I encountered in researching the *Qualcomm v. Broadcomm* case and others like it, I decided to conduct a small unscientific survey to determine if there was a systemic problem of filing too much material under seal. With the help of a research assistant, I identified cases where a party sought to file sensitive material under seal. I only searched for cases in districts with heavy patent loads. [25] The districts were the Central District of California, the Northern District of California, the Eastern District of Texas, the District of Delaware, the District of New Jersey, the Southern District of New York and the Northern District of Illinois. I

(discussing the difficulty of asserting a patent infringement claims against U.S. based component suppliers that manufacture and sell their products abroad).

[21] The December 5, 2006 Minute Entry refers to Sealed Motion 165, Motion for Summary Adjudication as to Broadcom Corp's Defenses of Equitable Estoppel, Sealed Motion 109, Summary Judgment of Noninfringement of US Patent No 5,452,104, and Sealed Motion 113, Summary Judgment of Noninfringement and Invalidity of US Patent No. 5,576,767.

[22] See Federal Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* at 75 (2011)(discussing the public notice function of patents).

[23] *Lear, Inc. v. Adkins*, 395 U.S. 653, 674 (1969)(holding that a licensee could challenge a patent's validity due, in part, to the "strong federal policy favoring the full and free use of ideas in the public domain.")

[24] Docket entries 109, 113 and 165 described above are missing from the Pacer Docket report.

[25] We examined district courts that had over a thousand patent case filings between 2000 and 2010. The data was obtained from the Intellectual Property Litigation Clearinghouse ("IPLC") Website, http://lexmachina.stanford.edu.

identified three cases in each district where parties sought to file material under seal. I then simply looked at what material was filed under seal and searched for a public version of the same document.

The results were not good for those who care about open access to court records. When there was confidential material to be filed under seal in the Central District of California[26], the Northern District of California, the Eastern District of Texas, the District of Delaware and the District of New Jersey, the entire brief was filed under seal and there was no public version.[27] In other words, in five of the busiest patent courts in the country, when confidential material was filed under seal, other material that had no claim of confidentiality was also made unavailable. There were more heartening results from the Southern District of New York and the Northern District of Illinois. In these two courts, parties that sought to file confidential material under seal also filed a public version of the same material. Thus, the public had access to the basic legal arguments being advanced.

As these examples illustrate, the federal rules allow each court to determine how confidential information should be treated. Although Federal Rule of Civil Procedure 26(c), permits district courts to issue protective orders to prevent the discovery or disclosure of certain information, there is no specific provision describing how to file material under seal. In some cases, district courts have issued local rules. But those rules are inadequate. For example, in the Eastern District of Texas, the local rule merely says that a document can only be filed under seal pursuant to a motion.[28] The local rules in the Central District of California also require approval of the court before filing any document under seal.[29] But neither set of rules provide any mechanism for assuring that non-confidential material is not also filed under seal.

This problem can easily be cured. Whether by amendment to the Rules of Civil Procedure or local rules, district courts need to implement a mechanism to prevent non-confidential information from being hidden. The obvious mechanism is to adopt a version of Federal Circuit Rule 28(d). The beauty of this solution is that it places most of the burden on the parties and not the courts. It forces the parties to file both confidential and public versions of the same document. This will prevent parties from carelessly lumping non-confidential material together with their real secrets.

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[26] Courts may not be consistent in how they handle confidential filings. For example, the author is a special master in a multidistrict patent litigation assigned to Judge Klausner of the Central District of California. In these cases, the court has required that parties file public versions of confidential filings. *See In re Katz Interactive Call Processing Litigation,* No. 07-ML-1816 RGK (FFMx)(C. D. of CA).

[27] Oddly, in one case in the Northern District of California, the docket indicates that there is redacted version of a filing, but when the link is followed, the system indicates the document has been filed under seal.

[28] Eastern District of Texas Local Rule CV-5.

[29] Central District of California Local Rule 79-5.1.

Hopefully, this will solve the balance of the problem. There will always be some situation where a party abuses the process and hides too much from the public version. In those cases, the public will continue to rely on the courts to protect their rights.

Open access to public court records "allows the citizenry to monitor the functioning of our courts, thereby insuring quality, honesty, and respect for our legal system."[30] By taking just a small step, federal district courts can significantly improve the access the public has to court records.

[30] *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984).