

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROSETTA STONE LTD.,)	
)	
Plaintiff-Appellant,)	
)	
v.)	No.10-2007
)	
GOOGLE INC.,)	
)	
Defendant-Appellee.)	

**MOTION FOR LEAVE TO INTERVENE
FOR LIMITED PURPOSE OF MOVING TO UNSEAL**

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, Public Citizen, Eric Goldman, and Martin Schwimmer move the Court to permit them to intervene in this appeal for the limited purpose of seeking to unseal the briefs and Joint Appendix in this case.

Interest of the Intervenors

Public Citizen is a consumer advocacy organization based in Washington, DC, with about 225,000 members and supporters nationwide. Public Citizen frequently litigates issues relating to consumers' rights at the intersection of Internet and intellectual property law, and publishes articles about related issues in its newspaper, *Public Citizen News*, and on its blogs, including the Consumer Law and Policy blog, pubcit.typepad.com, and the CitizenVox blog, <http://citizenvox.org/>. Those blogs have discussed this case, and Public Citizen expects to write about the significance

of this case in the future. Its staff attorney who is lead counsel in this case, Paul Alan Levy, writes about Internet and cyberlaw issues, including the issue of keyword advertising that is at the heart of this appeal, advises hosts of web sites about their legal rights and responsibilities, and has actively participated in debates within the American Bar Association's Intellectual Property Section about whether the ABA should take positions on issues related to keyword advertising. Public Citizen filed a brief in this case as *amicus curiae* (with the consent of the parties), and believes that brief could have been more helpful to this Court had Public Citizen been able to review the evidence in the appellate record. If en banc review and/or Supreme Court review is sought, and when similar cases are appealed to other circuits, Public Citizen intends to participate as *amicus curiae*, and access to the factual record on which the case was decided will enable Public Citizen to prepare better *amicus* briefs in this case and in other cases. Public Citizen also hopes to be able to better understand the outcome of this case, to educate the public about its significance, and to publish analysis of the case in its newspaper and blogs in light of the evidence disclosed pursuant to its motion to unseal.

Martin Schwimmer is a partner in Moses & Singer's Intellectual Property practice. His practice is concentrated in the area of U.S. and international trademark law. Schwimmer represents some of largest corporations regarding the special

policing issues raised by use of brand names on the Internet. *Managing Intellectual Property* magazine identified Mr. Schwimmer as one of the best trademark lawyers in the United States. He writes and speaks frequently on trademark and domain name issues and publishes The Trademark Blog (www.schwimmerlegal.com), widely recognized as a leading source of trademark news and case analysis; his blog was listed on the ABA Journal's "Blawg 100." Schwimmer has discussed on his blog the significance of facts that were newly revealed when the parties agreed to the unsealing of Rosetta Stone's opening brief, but those disclosures only whetted his appetite to see the evidence on which the brief's factual discussion was based. He expects to discuss the additional disclosures in his blog and further expects that the evidence disclosed will better enable him to advise his clients about protecting their brands online.

Eric Goldman is an Associate Professor of law at the Santa Clara University School of Law and Director of its High Tech Law Institute. He teaches and researches in the areas of internet law, advertising law, and intellectual property. He has written several recent papers on search engines, online marketing practices, and the application of trademark law in the online context. In articles such as *Brand Spillovers*, 22 Harv. J.L. Tech. 382 (2009), and *Deregulating Relevancy in Internet Trademark Law*, 54 Emory L. J. 507 (2005), he has specifically explored the legality

of keyword advertising. His blog, entitled Technology & Marketing Law Blog, blog.ericgoldman.com, analyzes cases related to keyword advertising; for important cases, he may track the case from complaint to final decision. His blog has been listed in the ABA Journal's "Blawg 100" for two years in a row.

Disclosure of the contents of the Joint Appendix would inform Goldman's academic research and policy advocacy in several respects. First, it could help him identify holes in the empirical scholarship that need to be filled. Goldman has been working with a social scientist at Penn State University to develop an empirical study of how consumers use search engines, and knowing what work has been done (or checking if he can replicate the results) is very useful to designing the study. Second, it would allow Goldman to double-check the veracity of representations the parties are making in other fora about the facts of the case; he plans to report on any discrepancies. Third, by seeing what facts the parties are relying upon, Goldman can better advise his readers about which facts are salient to litigation so they can reflect on their own behavior. Finally, as legislators consider statutory regulation of search engine advertising, a complete picture of accurate in-the-field experiences by both search engines and trademark owners can help inform those considerations and enable Goldman to propose and advocate better policy proposals.

Reasons to Allow Intervention

“Nonparties seeking access to a judicial record in a civil case may do so by seeking permissive intervention under Rule 24(b)(2).” *San Jose Mercury News v. United States District Court*, 187 F. 3d 1096, 1102 (9th Cir. 1999) (granting mandamus and reversing denial of motion for leave to intervene). *Accord Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1120-1130 (9th Cir. 2003); *In re Associated Press*, 162 F.3d 503, 506-509 (7th Cir. 1998) (“[T]he most appropriate procedural mechanism [for third parties to obtain access to court proceedings and documents] is by permitting those who oppose the suppression of the material to intervene for that limited purpose.”). Similarly, this Court has granted leave to intervene to permit the filing of a motion for access to the appellate record. *United States v. Moussaoui*, 65 F. App’x. 881, 884 (4th Cir. 2003). In this Court’s cases about the unsealing of court records, the party seeking unsealing is consistently described as having intervened for that purpose. *See In re Associated Press*, 172 F. App’x. 1, 3 (4th Cir. 2006); *Media Gen. Operations v. Buchanan*, 417 F.3d 424, 428 (4th Cir. 2005) *Virginia Dept. of State Police v. Washington Post*, 386 F.3d 567, 572 (4th Cir. 2004).

When Rosetta Stone (“Rosetta”) initially filed its opening brief on appeal, its factual discussion was largely redacted. Rosetta and Google agreed to allow Rosetta’s entire brief to be refiled without any redactions after Public Citizen asked

for their consent to a motion for leave to intervene and to unseal the brief. Similarly, after Google filed its appellate brief with some substantial redactions, both parties eventually agreed to have the brief refiled in unredacted form, although at the time this motion is filed, that revised filing has not yet occurred. However, the parties have refused to consent to this motion, or to a motion to unseal the joint appendix, even those portions of the joint appendix that provide the evidentiary basis for the factual characterizations that they have agreed to file publicly.

Accordingly, to protect their right under the First Amendment and the common law to obtain access to the judicial records on whose basis this appeal will be decided, Public Citizen, Eric Goldman and Martin Schwimmer seek the Court's leave to intervene for the limited purpose of seeking to unseal the Joint Appendix and, if any part of it is filed under seal, to unseal Rosetta's reply brief. The proposed motion to unseal is being filed simultaneously.

Respectfully submitted,

/s/ Paul Alan Levy

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December 13, 2010

CERTIFICATE OF SERVICE

I certify that on this 13th day of December, 2010, I am filing this motion through the Court's ECF system, which will serve copies of the brief on counsel for both appellant and appellee.

/s/ Paul Alan Levy
Paul Alan Levy