No. 10-2007

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROSETTA STONE LTD.,

Appellant,

v.

GOOGLE INC.,

Appellee.

On Appeal from a Judgment of the
United States District Court
for the Eastern District of Virginia

PETITION OF PUBLIC CITIZEN, ERIC GOLDMAN AND MARTY SCHWIMMER FOR REHEARING EN BANC ON UNSEALING OF JOINT APPENDIX

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March 29, 2011

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COUNSEL'S STATEMENT OF REASONS FOR REHEARING EN BANC

The Court should grant rehearing en banc of the summary disposition of the motion for unsealing of the Joint Appendix because it conflicts with previous decisions and presents questions of exceptional importance about how records that were sealed by consent in the district court should be handled after they are transferred to this Court during an ensuing appeal:

1. The summary disposition conflicts with several decisions of this Court, of the Supreme Court, and of other circuits, holding that when courts decide to allow closure of a courtroom or sealing of judicial records, they must articulate the reasons for the decision supported by specific findings, and explain the reasons why they rejected alternatives to sealing. *Press-Enterprise Co. v. Superior Court of California, Riverside County,* 464 U.S. 501, 510 (1984); *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006); *U.S. v. Ochoa-Vasquez*, 428 F.3d 1015, 1030 & n.16 (11th Cir. 2005); *U.S. v. Doe,* 63 F.3d 121, 128 (2d Cir. 1995); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 .2d 569, 574 (8th Cir. 1988); *In re Knight Publishing Co.*, 743 F.2d 231, 235 (4th Cir. 1984); *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984).

2. The decision conflicts with decisions of this Court and of the Seventh Circuit holding that, when a court of appeals is asked to maintain under seal documents that were sealed below, the court of appeals must make its own

independent judgment about whether the reasons for confidentiality are sufficiently compelling to overcome the public's right of access to judicial records. *United States v. Moussaoui*, 65 F. App'x 881 (4th Cir. 2003); *Baxter Int'l v. Abbott Labs.*, 297 F.3d 544, 545 (7th Cir. 2002).

En banc rehearing is needed to keep uniformity of decision on both points.

STATEMENT OF THE CASE

On July 17, 2010, Rosetta Stone sued Google for trademark infringement and dilution, raising one of the hottest current issues in trademark law — the propriety of Google's practice of allowing advertisers to bid for the right to display advertising when someone's trademarks are used among the terms in a search engine search. The parties entered an intense period of discovery, and, as frequently occurs in commercial litigation, they stipulated with the district court's approval that either party could unilaterally designate any information produced in discovery as "confidential information," "confidential attorneys eyes only," or "restricted confidential — source code." No proof was required to make such designations, and there was no provision for adversarial testing of the validity of claims of confidentiality unless and until one party challenged the other party's designations. Moreover, the stipulation provided that any discovery materials that had been stamped "confidential" would be filed under seal.

Neither party challenged any of the "confidential" stamps. When the parties

filed cross-motions for summary judgment, motions for leave to file affidavits and exhibits under seal were filed either jointly or, at least, without opposition. DN 100, 132, 170, 185. This, too, is often the case in modern litigation. Not only does each party have no incentive to challenge the other's confidentiality claims, each has considerable incentives **not** to challenge the other. Each side gets to seal whatever it likes and avoid significant extra work by not challenging the other.

Here, each motion duly recited in the most conclusory fashion, without any supporting affidavits or any detail concerning the contents of the documents, that the documents to be sealed contained confidential business information and that disclosure would be harmful. The trial judge approved each of the sealing motions and signed the proposed orders that the parties had presented, which, in turn, recited that the information was confidential and that disclosure would be harmful. There was no indication that the trial judge viewed the documents in question, no explanation of the contents of the documents, and no attempt to weigh the need for confidentiality against the public interest in disclosure.

The trial court granted summary judgment for Google, and this appeal followed. This is one of the first appellate cases in which likelihood of confusion caused by keyword advertising will be reviewed. There has been extensive coverage of the case both in trade publications and in the mainstream media. The case has also attracted the participation of forty amici curiae (including Public

Citizen), who joined in nine separate amicus briefs. Yet when the parties agreed to file a fifteen-volume joint appendix, thirteen volumes were filed under seal. The first two volumes of the Joint Appendix, which consist primarily of the complaint, court documents, transcripts of hearings, an affidavit attaching relevant authority, and a handful of other affidavits, were filed openly. The remaining thirteen sealed volumes of the Joint Appendix contain the bulk of the evidence relevant to this appeal. Even those parts of the Joint Appendix that are cited as the evidentiary basis for the factual assertions in the parties' briefs remain under seal. The parties provided no explanation of the need to keep the thirteen volumes of Joint Appendix under seal.[1]

Consequently, Public Citizen, joined by two prominent trademark law bloggers, Eric Goldman and Martin Schwimmer, sought to intervene to move to unseal the Joint Appendix. Both sides consented to intervention, which was granted. Rosetta Stone promptly agreed to unseal all materials that it had stamped confidential during the discovery process, but Google objected to the disclosure of roughly 800 pages of Joint Appendix that it had stamped. However, rather than show the need for confidentiality through an affidavit based on personal

[1]Significant portions of the factual discussions in the parties' briefs were originally filed under seal. In response to Public Citizen's requests for consent to a motion to unseal, both sides agreed to file their entire briefs without redaction.

knowledge, Google presented an affidavit of its outside lead appellate counsel who averred that she and Google's other lawyers had "carefully reconsidered . . . what documents could be unsealed without compromising . . . confidential information," along with a chart that summarized, in very conclusory terms and without any reference to a detailed supporting affidavit, types of reasons why each document should be kept under seal.

In an opinion signed by the Clerk on March 15, 2011, the Court granted the motion to unseal only in part:

> [T]he court grants the motion to unseal only with respect to those documents that appellee has agreed in its response to unseal, and denies the motion to unseal as to those documents that appellee seeks to have remain under seal.

No reasons were given for this ruling.

REASONS FOR EN BANC RECONSIDERATION

This Court has repeatedly held that the public has a right of access to judicial proceedings in civil cases, under the common law as enunciated in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978), and under the First Amendment as enunciated in *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 (1980), and *Press-Enterprise Co. v. Superior Court,* 478 U.S. 1, 15 (1986). The Court has extended the First Amendment right of access to documents filed in connection with a summary judgment motion. *Rushford v. New Yorker*, 846 F.2d

249, 253 (4th Cir. 1988). It follows that the First Amendment protects access to documents filed in connection with this appeal from a summary judgment ruling.

The public's right of access to judicial records is a vital protection that supports the accountability of judges, our government's only unelected branch, and enables the public to understand fully the basis for judicial decisions and hence predict how future cases may be decided. "An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny." *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982). Without access to records that influenced a judge's decision, "[h]ow else are observers to know what the suit is about or assess the judges' disposition of it?" *Baxter Int'l v. Abbott Labs.,* 297 F.3d 544, 547 (7th Cir. 2002). The enforcement of that right is particularly important in a case like this one, which has aroused substantial public interest because it is one of the first cases to reach the appellate level relating to a significant trademark claim that is being advanced in many different courts across the country and that involves one of the nation's most important corporations.

This Court has insisted that when lower courts are asked to keep documents under seal, they cannot just rely on the parties' own assessments of their need for confidentiality, but must instead conduct a document-by-document examination and balance the strong public interest in disclosure against the parties' claimed

need for confidentiality. Parties inevitably weigh their own concerns about confidentiality more heavily than the public's right of access. And under the time and financial pressures of high-stakes litigation, especially in jurisdictions like the Eastern District of Virginia that place a high priority on the prompt resolution of litigation, it is too tempting for lawyers to make and accede to excessive claims of confidentiality, and thus, to apply the "confidential" stamp liberally and make no objection to an adversary's claims of confidentiality. After all, the clients are paying to get their cases resolved; nobody is paying for the enforcement of the public's right to know. It is the Court that must stand up for the public's rights in these cases, and it protects those rights by scrupulously applying both the standards and the procedures for balancing the public and private rights.

A. The Panel's Determination That 800 Pages of the Joint Appendix Should Remain Sealed Because the Parties Did Not Agree to Unseal Them, With No Further Explanation of the Basis for Decision, Is Contrary to Numerous Decisions of this Court, the Supreme Court, and Other Courts of Appeals.

The panel decided that only parts of the Joint Appendix that **both** parties agreed to make public should be unsealed; it provided no additional explanation for its decision. Yet this Court has held that the proponent of sealing must meet a heavy burden of showing that the sealings serve "a compelling governmental interest" and that the denial of access "is narrowly tailored to serve that interest."

Virginia Dept. of State Police v. Washington Post, 386 F.3d 567, 575 (4th Cir. 2004). A court may not agree to allow the sealing of documents without any explanation beyond the fact that one party or the other desires confidentiality; the court "must state its reasons on the record, supported by specific findings," and in particular "must state its reasons for rejecting alternatives to closure." *Rushford v. New Yorker Magazine*, 846 F.2d 249, 254 (4th Cir. 1988). If a court order "leaves us guessing as to how it resolved" the "serious questions regarding the extent of the competing interests at stake, . . . or whether it even considered them," that alone is reason to reverse and remand for an explanation of the decision. *Stone v. University of Md. Med. Sys. Corp.*, 855 F.2d 178, 181 (4th Cir. 1988). This determination must be made "with respect to each document sealed . . .." *Id.* at 182; *Virginia Dept. of State Police*, 386 F.3d at 577-580. Decisions from the many other circuits that impose equally exacting requirements when a court decides whether to allow judicial records to be kept under seal are cited on page 1. The Supreme Court has similarly demanded findings when a lower court rules that the public right of access is outweighed by other concerns. *Press-Enterprise Co. v. Superior Court of California, Riverside County,* 464 U.S. 501, 510 (1984); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 581 (1980).

These decisions recognize the need for a detailed explanation when a trial court is deciding whether to allow the sealing of its judicial records, but the rule is

equally applicable when it is an appellate court that is deciding whether to allow sealing of its own judicial records. After all, without any explanation of the reasons for unsealing, a reviewing court cannot be certain whether the court below applied the proper considerations according to the proper standards. Moreover, the discipline of providing a written explanation for decisions is the most important way that judges can be held accountable to the public for their decisions. The discipline of accountability is if anything more important at the appellate level because unlike district court sealing decisions, which can be appealed as of right, a much smaller fraction of all cases are subject to appellate review by certiorari. Explanations at the appellate level also provide guidance to lower courts and thus play a key role in defining the scope of the right of access.

A detailed explanation of the reasons for unsealing was especially necessary in this case because it is highly unlikely that each of the 800 pages that Google would not agree to unseal is so sensitive as to outweigh the public interest in seeing the record on which this Court will decide a very significant trademark case. The affidavit supplied by Google's appellate counsel does not state on personal knowledge the need for sealing, but relies on the unspecified opinions of others; and the document-by-document explanations use such conclusory terms as that the documents are "competitively sensitive" or "consumer sensitive" (whatever that means) instead of providing a particularized showing "how

disclosure would work a clearly defined and serious injury to [Google's] interests." *Littlejohn v. Bic Corp.*, 851 F.2d 673, 685 (3d Cir. 1988). The affidavit never addresses the public interest in unsealing or explains why the need for confidentiality of specific documents clearly outweighs that interest. At best, the evidence before the panel establishes only that Google's counsel believed that they had made reasonable sealing decisions.

Furthermore, some of the explanations given by Google for unsealing are particularly farfetched. For example, Google argues that roughly seventy sealed pages of the Joint Appendix are "irrelevant" to the issues on appeal. However, in both the Federal Rules of Appellate Procedure and this Court's Rules, Rule 30 cautions parties to include in the Joint Appendix only those parts of the record below that are truly "necessary" to decide the issues on appeal. Although Google may not consider the pages relevant, Rosetta Stone must have felt otherwise.

Well over one hundred pages of exhibits are being withheld that describe a series of internal studies conducted by Google between 2000 and 2009 concerning the impact of its keyword advertising policies on consumer confusion. The age of the documents, and the argument in Google's appellate brief that the confusion revealed by its early studies should be given little weight on this appeal because it has developed better technology to avert confusion, Br. at 6-8, 28, casts doubt on Google's claim of a current need for confidentiality. "Continued sealing must be

based on 'current evidence to show how public dissemination of the pertinent materials now would cause the competitive harm [the parties] claim.'" *In re Cendant Corp.*, 260 F.3d 183, 196 (3d Cir. 2001).[2]

Indeed, the explanation on Google's chart of sealed and unsealed documents is **not** that the studies would reveal anything about Google's current keyword advertising but that disclosure would reveal "Google's policies and procedures with respect to internal experimentation and competitive analysis." Google never showed that preventing public disclosure of such policies and procedures serves a "compelling government interest" sufficient to overcome the public's right of access, and that the sealing was narrowly tailored to serve that interest. *Virginia Dept. of State Police*, 386 F.3d 567, 575 (4th Cir. 2004).

It is our impression as appellate litigators involved in issues of public access that there is increasing tendency on the part of commercial litigators to put large blocks of documents into joint appendices under seal; we hear the same from other lawyers who litigate public access issues. This is the natural result of the facts that lawyers are too busy to distinguish carefully between those documents that truly

[2]Parts of Rosetta Stone's brief characterizing the findings of these studies were originally redacted at Google's insistence. When the brief was unsealed, several commentators wrote that the studies contradicted Google's public representations about its policies. It is possible that Google wants to keep these studies confidential not because disclosure would cause serious competitive harm but because it is embarrassed about the details.

merit sealing and those that are only a bit embarrassing, and that they are confident that their appellate adversaries will not challenge their sealing decisions. But this trend exists in part because the lawyers expect that judges, as well, are too busy for document-by-document evaluations of the need for sealing.

As this Court said in *University of Md. Med. Sys. Corp.*, 855 F.2d at 182, "[w]e do not minimize the difficulty of the . . . court's task" in adhering to the Supreme Court's and this Court's procedural and substantive standards for deciding whether each particular court record merits sealing. The task is made more onerous because the parties filed a large Joint Appendix, and because Google insists on keeping 800 pages of it under seal. But only by adhering to those standards can this Court protect the public's right of access to court records. The case should be reheard en banc to reaffirm the necessity of explanations, and to demonstrate that Fourth Circuit judges must meet the same standards with respect to the sealing of their Court's records as the standards to which district court judges in this Circuit are held.

B. The Panel's Decision Is Inconsistent with Previous Decisions in this Circuit and in the Seventh Circuit That an Appellate Court Is Responsible for Making its Own Decisions About the Sealing of Appellate Records, Rather than Deferring to Decisions of the Parties or of Lower Court Judges About the Same Records as They Appear in District Court Files.

In arguing to the panel against unsealing, Google contended that because

the trial court had allowed the records to be kept under seal on its docket, this Court should defer to that ruling and consider the motion for unsealing under an abuse of discretion standard. Because the panel did not explain its decision, it is possible that it decided that little explanation was needed because sealing had already been approved below. A second and related reason for granting en banc review is to maintain consistency of decision about the independent responsibility of a Court of Appeals to enforce the public's right of access to appellate records regardless of how those records were treated while before the district court.

Appellate courts possess inherent supervisory authority to unseal files once they are transferred from the district court, because "'[e]very court has supervisory power over **its own** records and files . . ..'" *See SEC v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993) (quoting *Nixon*, 435 U.S. at 597) (emphasis added). The Seventh Circuit has held that its records may only be sealed by its own order, even when the district judge has previously placed records under seal. *Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000). And the presumption of access applies as forcefully to appellate proceedings as it does to district court proceedings. In *Baxter Int'l v. Abbott Labs.*, the Seventh Circuit explained:

> Information transmitted to the court of appeals is presumptively public because the appellate record normally is vital to the case's outcome. Agreements that were appropriate at the discovery stage are no longer appropriate for the few documents that determine the resolution of an appeal, so any claim of secrecy must be reviewed

independently in this court.

297 F.3d 544, 545 (7th Cir. 2002).

This Court adopted the same approach in *United States v. Moussaoui*, 65 F. App'x 881 (4th Cir. 2003), where it responded to a motion to unseal a joint appendix of documents transferred from the district court by stressing the Court's independent duty to conduct its own examination of the documents to determine whether they should be maintained under seal:

> As noted above, while the classified appendix contains a number of classified documents, not all of the documents therein are classified, and it appears that at least some of the documents that contain classified information could be made public (assuming a common law or First Amendment right of access attaches) after classified material is redacted. The unclassified appendix contains a wide variety of materials, such as pleadings, hearing and deposition transcripts, and some discovery materials. Some of these documents fall within the common law presumption of access, while others are subject to the greater right of access provided by the First Amendment. Still others may not qualify as "judicial records" at all. *See Amodeo,* 44 F.3d at 145-46 (discussing when a document filed with the court is a "judicial record"). We therefore must examine the unclassified appendix document by document to determine, for each document, the source of the right of access (if any such right exists). *See Stone,* 855 F.2d at 181. As to those documents subject to a right of access, we must then conduct the appropriate balancing to determine whether the remainder of the document should remain sealed, in whole or in part.

Id. at 888-89.

The public interest in disclosure is stronger at the appellate level because this Court's decisions have broader effect and the public's need to understand the

bases for judicial rulings is concomitantly greater. In arguments before the panel, Rosetta Stone implicitly agreed with this greater need for disclosure on appeal. It stated that, although it had designated certain documents as confidential and demanded that they be kept under seal in the district court's records, the public interest in the documents relevant to the appeal was greater, and consequently it was ready to agree that the entire Joint Appendix should be unsealed. Moreover, records that may not be presumptively subject to public access at the trial court level, such as because they relate to discovery disputes, become presumptively subject to disclosure when they are included in the joint appendix because one party or the other contend that they bear on the propriety of affirmance or reversal.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

/s/ Paul Alan Levy

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March 29, 2011

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CERTIFICATE OF SERVICE

I hereby certify that, on 29th day of March, 2011, I am filing this petition for rehearing en banc through the Court's ECF system, which will effect service on all parties.

/s/ Paul Alan Levy
Paul Alan Levy