

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

Amicus Curiae Brief of The Reporters Committee for Freedom of the Press in
Support of Petition for Rehearing En Banc on Unsealing of Joint Appendix by
Intervenors Public Citizen, Eric Goldman and Marty Schwimmer

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29, *amicus* The Reporters Committee for Freedom of the Press states that it is an unincorporated association that has no parent and issues no stock.

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IDENTITY OF *AMICUS*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

STATEMENT OF INTEREST

Amicus, as a defender of the rights of the journalists that it represents, has an interest in upholding the public's right to access, monitor and report on the proceedings of this nation's court system. The panel's summary order at issue here raises concern about the practical application of this well-recognized right in the appellate context. *Amicus* submits this brief in support of intervenors' en banc petition to emphasize the need for appellate courts to ensure meaningful access to court records on appeal.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a), *amicus* has filed a motion with this Court for leave to file this *amicus* brief. Counsel for Rosetta Stone and Intervenors have consented to the filing of this brief, and counsel for Google does not oppose its filing.

RULE 29(c)(5) COMPLIANCE

Pursuant to Fed. R. App. P. 29(c)(5), *amicus curiae* states: (a) no party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money intended to fund preparing or submitting this brief; and (c) no person—other than *amicus*, its members, or its counsel—contributed money intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The Reporters Committee for Freedom of the Press urges this Court to accept en banc review of the panel’s order regarding the unsealing of appellate records. Such review will allow this Court to clarify the responsibility of appellate courts to independently analyze and explain the reasons for sealing appellate court records—records that, as intervenors note, should largely consist of those that are “vital to the understanding of the basic issues on appeal.” *See* 4th Circ. L.R. 30(b).

The importance of ensuring public access to the judicial records that form the basis of court decisions is firmly entrenched in appellate law. As the U.S. Court of Appeals for the Seventh Circuit observed in *Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000), “Judges deliberate in private but issue public decisions after public arguments based on public records.” *See also United States v. Stoterau*, 524 F.3d 988, 1012 (9th Cir. 2008); *Doe v. United States*, 253 F.3d 256, 262 (6th Cir. 2001) (quoting *Union Oil* in context of public argument). Decisions by this Court strongly recognize the value of the common law and First Amendment rights of access to court records, and paint a compelling picture of the essential role played by the courts in protecting those rights. Yet the panel’s order suggests that it may not hold this Court and the parties on appeal to the same

standard as precedent requires of courts and parties at the district court level.

Amicus urges this Court to reconsider that decision.

ARGUMENT

I. Both trial and appellate courts must protect the common law and First Amendment rights of access to court records.

It is incumbent on all courts to protect the public's common law and First Amendment rights of access to judicial records. *See, e.g., Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir.1999) (“The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it).”). Although this Court's precedent suggests that U.S. district courts should generally decide whether to seal their own records, when the issue is access to appellate records, this Court should take a more active role.

This Court has repeatedly emphasized the responsibility of the courts to protect access rights through adherence to established “substantive and procedural” requirements. *See, e.g., Virginia Dept. of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004) (“When presented with a request to seal judicial records or documents, a district court must comply with certain substantive and procedural requirements.”); *Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). Namely, courts must determine first “the source of the right of access with respect to each document sealed,” and then weigh the

competing interests through the three step procedure laid out in *In re. Knight Publishing Co.*, 743 F.2d 231 (4th Cir. 1984): (1) provide adequate notice and an opportunity to challenge a sealing request, (2) consider less drastic alternatives, and (3) provide specific findings to support the sealing. *Virginia State Police*, 386 F.3d at 576. These substantive and procedural safeguards play an important role in protecting the public’s access rights by ensuring “that the decision to seal records will not be made lightly, and [by] mak[ing] possible meaningful review of a decision to seal.” *Stone v. Univ. of Maryland Med. Syst. Corp.*, 855 F.2d 178, 182 (4th Cir. 1988).

To be sure, this Court’s rules and case law contemplate that it is the district courts that typically decide a sealing issue in the first instance. *See* 4th Cir. L.R. 25(c)(1)(A) (“Record material held under seal by another court or agency remains subject to that seal on appeal *unless modified or amended* by the Court of Appeals.”) (emphasis added). Accordingly, in cases in which intervenors at the circuit court level seek to have *district court* records unsealed, this Court’s practice has been to remand the case for an initial determination by the district court.

For example, in *Stone*, the Baltimore Sun intervened in the parties’ appeal for the limited purpose of challenging the district court’s sealing order. *Stone*, 855 F.2d at 180. This Court reversed and remanded the district court’s sealing decision because the district court failed to comply with the procedural requirements of

Knight. See *Stone*, 855 F.2d. at 179-80, 182. Similarly, in *Rushford*, the Washington Post intervened at the appellate stage to challenge whether documents sealed in the district court pursuant to a discovery protective order should remain sealed after being submitted to the district court for summary judgment. 846 F.2d at 252. This Court disposed of the parties’ merits appeal and remanded the case to the district court for a reconsideration of the sealing order. *Id.* at 253-54.

The procedural posture here is different, however. While the intervenors in *Stone* and *Rushford* sought access to trial court records, the intervenors here seek access to this Court’s own records. It is in this respect that the unpublished order¹ in *United States v. Moussaoui* is most on point. Like the present intervenors, the intervenors in *Moussaoui* sought to unseal, *inter alia*, portions of a Joint Appendix on appeal. 65 Fed. Appx. 881, 888 (4th Cir. 2003) (unpublished). This Court’s order recognized its obligation to independently review the appellate record “document by document” in order to ensure meaningful protection of the public’s right of access. See *id.* at 889. As this Court observed, that analysis included determining both the “source of the right of access (if any such rights exists),” and conducting “the appropriate balancing to determine whether the remainder of the document should remain sealed, in whole or in part.” *Id.*

¹ Although unpublished, *Moussaoui* is cited as an example of the type of analysis *amicus* urges this Court to undertake here. See 4th Circuit L.R. 32.1

The panel's approach in *Moussaoui* enabled this Court to give practical effect to the public's right of access to appellate records. If the documents submitted on appeal consist largely of those that the parties believe to be "vital to the understanding of the basic issues on appeal," 4th Cir. L.R. 30(b), it should be the appellate court that weighs the interests in keeping those documents under seal. The Seventh Circuit, in particular, has recognized and reiterated this fact in a series of decisions that emphasize the need for appellate courts to independently assess the sealing of its own appellate records. As Chief Judge Easterbrook has repeatedly stated, "[i]nformation transmitted to the court of appeals is presumptively public because the appellate record normally is vital to the case's outcome." *United States v. Foster*, 564 F.3d 852, 853 (7th Cir. 2009) (Easterbrook, C.J., in chambers); accord *Baxter Int'l, Inc. v. Abbott Labs*, 297 F.3d 544, 545 (7th Cir. 2002) (same); see also *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 460-61 (10th Cir. 1980) (regardless of district court's sealing order, circuit court retains authority to decide whether to seal its own records on appeal).

Accordingly, the Seventh Circuit requires parties to file a motion to seal documents in the appellate record, regardless of its sealed status at the district court. See 7th Cir. Op. P. 10. That court has made clear that such motions are anything but a formality, warning that it will "deny outright any motion [to seal]

that does not analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations.” *Baxter*, 287 F.3d at 548.

This Court need not go so far as to adopt the Seventh Circuit’s procedure in order to protect access rights; Fourth Circuit Local Rule 25(c) also contemplates independent review of this Court’s own records. But when presented with a meritorious challenge to the sealing of this Court’s *own records* (such as the sealing of 13 volumes of a Joint Appendix), upholding the right of access necessitates that this Court undertake the same sealing examination that it mandates to district courts.

II. Relying on the district court’s sealing orders means that no court is likely to have undertaken the required analysis.

The panel’s unexplained order is all the more concerning here because the record suggests that no court has undertaken the proper review of the sealed records in this case. This Court has repeatedly stated that district courts, before sealing a record, “first must determine the source of the right of access with respect to each document.” *Virginia State Police*, 386 F.3d at 576 (citation and quotation marks omitted). Such a determination is necessary because “[o]nly then can [the court] accurately weigh the competing interests at stake.” *Id.* (citation omitted); *see also Rushford*, 846 F.2d at 253 (explaining that sealing of documents subject to the common law requires “showing some significant interest that outweighs the presumption” of access, while the “more rigorous First Amendment standard”

requires a denial of access to be “necessitated by a compelling government interest and narrowly tailored to serve that interest.”).

Here, however, the district court’s pertinent sealing orders do not identify whether it afforded a common law or First Amendment right of access to the documents at issue. *See* Dist. Ct. Dkt 177, 202. Assessing a sealing request under the wrong standard prevents the court from “accurately weigh[ing] the competing interests at stake,” *Virginia State Police*, 386 F.3d at 576, and carries serious consequences:

The distinction between the rights of access afforded by the common law and the First Amendment is “significant,” because the common law “does not afford as much substantive protection to the interests of the press and the public as does the First Amendment.”

Id. at 575(citations omitted). For this reason, this Court has repeatedly stated that sealing records without properly identifying the “source of the right of access” violates the sealing process it has mandated. *Id.* at 576; *Stone*, 855 F.2d at 181.

Where, as here, the record suggests that the district court did not complete this analysis, the need for this Court to examine the sealing of the appellate records is all the more critical. Alternatively, to the extent this Court relies on the district court’s sealing, it suggests the matter should be remanded for specific findings.

CONCLUSION

Amicus does not dispute the legitimate need to protect some commercially sensitive information. But as this Court’s prior cases reflect, that determination is

not one that can be solely delegated to the parties. The procedural safeguards traditionally followed by this and other courts are intended to ensure that the public's constitutional and common law access rights are given adequate consideration. *Amicus* urges this Court to grant the petition for en banc review in order to ensure that those rights are as vigorously enforced in the appellate courts as in the trial courts.

Respectfully submitted,

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Dated: April 5, 2011
Arlington, VA

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 2,076 words, excluding those portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that, on April 5, 2011, I am filing this *amicus curiae* brief in support of intervenors' petition for rehearing en banc through the Court's ECF system, which will effect service on all parties.

I further certify that on April 5, 2010, I caused to be served for filing with the Court, 1 original and 20 true and correct copies of the foregoing brief *amicus curiae* by first-class mail, postage prepaid at the following address:

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