

Case Nos. 21-1568 (lead), -1569, -1570, -1571, -1573 (member cases)

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

UNILOC USA, INC., UNILOC LUXEMBOURG, S.A.,

Plaintiffs-Appellants,

UNILOC 2017 LLC,

Plaintiff,

v.

APPLE INC.,

Defendant-Appellee

ELECTRONIC FRONTIER FOUNDATION,

Intervenor-Appellee.

Appeal from the United States District Court for the Northern District of California Nos. 3:18-cv-00358-WHA, 3:18-cv-00360-WHA, 3:18-cv-00363-WHA, 3:18-cv-00365-WHA, 3:18-cv-00372-WHA, Hon. William H. Alsup

**CORRECTED COMBINED PETITION FOR PANEL REHEARING
AND REHEARING EN BANC**

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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel for Electronic Frontier Foundation certifies that:

1. The full name of the party I represent is: Electronic Frontier Foundation
2. The name of the real party in interest (if the party named in the caption is not the real party in interest) I represent is: N/A
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party I represent are: None.
4. The names of all law firms and the partners or associates that appeared for the party I represent or are expected to appear in this Court are: Alexandra H. Moss and Aaron Mackey, Electronic Frontier Foundation.
5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal: Uniloc USA, Inc. et al v. Apple Inc. No. 3:18-cv-00358-WHA (N.D. Cal.), Uniloc 2017 LLC et al. v. Apple Inc. No. 3:18-cv-00360-WHA (N.D. Cal.), Uniloc 2017 LLC et al. v. Apple Inc. No. 3:18-cv-00363-WHA (N.D. Cal.), Uniloc 2017 LLC et al. v. Apple Inc. No. 3:18-cv-00365-WHA (N.D. Cal.) and Uniloc 2017 LLC et al. v. Apple Inc. No. 3:18-cv-00572-WHA (N.D. Cal.).

6. The names of all organizational victims and bankruptcy debtors and trustees: None.

March 11, 2022

/s/ Alexandra H. Moss
Alexandra H. Moss

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STATEMENT OF COUNSEL REQUIRED BY FED. CIR. R. 35(B)

Based on my professional judgment, I believe the panel decision conflicts with the following precedents of the Supreme Court of the United States, this Court, and the Ninth Circuit: *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978); *Uniloc 2017 LLC v. Apple, Inc.*, 964 F.3d 1351 (Fed. Cir. 2020); *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172 (9th Cir. 2006); *Howmedica Osteonics Corp. v. Zimmer, Inc.*, 822 F.3d 1312, 1324–25 (Fed. Cir. 2016); and *Christian v. Mattel, Inc.*, 286 F.3d 1118 (9th Cir. 2002).

Based on my professional judgment, I believe this appeal requires an answer to two precedent-setting questions of exceptional importance:

- (1) Does the presumption of public access attach to dispositive motions and attached exhibits when they contain information about patent licenses?
- (2) May district courts deny motions to seal that fail to comply with procedural requirements of their local rules?

March 11, 2022

/s/ Alexandra H. Moss
Alexandra H. Moss

INTRODUCTION

The public’s right of access to judicial records is “sacrosanct.” Dissent at 2. The judicial records at issue here were attached to a dispositive motion, a significant step in the judicial process that the public has a right to understand. For that reason, there is a strong presumption of public access to them—a legal conclusion an earlier panel of this Court confirmed regarding some of the same records.

The district court upheld that presumption because these records go to the heart of its decision to dismiss the case and contain the only record evidence upon which that decision relies.

The panel majority turned the presumption of public access on its head: instead of treating the public’s right to access dispositive court filings as sacrosanct, it sanctified the secrecy of patent licensing information. The majority created a patent-specific exemption from the general presumption of public access—an error that conflicts with binding precedents of the Supreme Court, this Court, and the Ninth Circuit. If the panel followed those precedents, it would have recognized the public’s presumptive right of access to these records and could not have deemed the district court’s application of that presumption an abuse of discretion.

The majority was only able to conclude that the district court failed to

follow a prior panel's remand instructions because it did not apply the presumption of public access correctly. Notably, Judge Mayer, who authored the prior panel decision containing those remand instructions, reached the opposite conclusion after confirming the public's presumptive right of access applies to these records. Dissent at 1. Judge Mayer would have held the district court adhered to the remand instructions when it reviewed the material and weighed the public's right of access against the proffered interests in secrecy. *Id.*

The panel majority's errors must not be taken lightly: excessive sealing is a pervasive problem in patent cases. Because the public's right of access typically has no advocate, district court judges shoulder the burden of protecting it. Local rules on sealing make that onerous task slightly more manageable, but only if district courts have discretion to enforce them. The majority's summary conclusion that enforcing local sealing rules is an abuse of discretion compounds the consequences of its failure to apply the presumption of public access correctly.

Public access to dispositive court records is too important to the integrity of the judicial system for the errors affecting the panel decision to stand uncorrected. Panel or en banc rehearing is necessary before this decision exacerbates the problem of oversealing in patent cases and erodes the public's ability to observe, understand, and trust what happens in federal courts.

ARGUMENT

I. This Case Presents Issues of Exceptional Importance Warranting *En Banc* Review.

The panel majority drastically cabined the presumption of public access to judicial records by creating a categorical exemption for records containing information about patent licenses. This is a legal error of exceptional importance.

The judicial records at issue here are dispositive motion papers and attached exhibits. “The public’s right of access to documents filed in connection with a dispositive pleading is sacrosanct,” Dissent at 2 (citations omitted), because it “helps secure the integrity and transparency of the judicial process.” *DePuy Synthes Prod., Inc. v. Veterinary Orthopedic Implants, Inc.*, 990 F.3d 1364, 1369 (Fed. Cir. 2021) (citations omitted).

The majority’s failure to recognize the public’s presumptive right of access to dispositive pleadings and their attachments, regardless of patent-specific information they contain, will resonate in countless future patent cases. Licensing information is often relevant in patent cases—for example, to issues of implied license, damages, and, as in this case, standing. Given the frequent pertinence of patent licensing information, the errors affecting the majority’s decision will impair the transparency and integrity of judicial proceedings in patent cases across the country.

II. The Panel Majority’s Decision Conflicts with Controlling Precedents of This Court, The Ninth Circuit, and The Supreme Court.

A. The Panel Majority Overlooked the Strong Presumption of Public Access to Dispositive Court Filings Such as These.

The panel majority concluded that the district court “made an error of law in making a blanket ruling that the public has a broad right to licensing information relating to patents.” Majority Opinion (“Maj.”) at 6. That conclusion relies on the majority’s unduly narrow and legally incorrect interpretation of the public’s presumptive right of access. As the dissent emphasizes, “[t]he public presumptively has a broad right of access to *all* information filed with a court in connection with a dispositive motion, and this includes patent licensing information.” Dissent at 5 (emphasis in original) (citation omitted). The majority ignored this controlling rule of law and focused on an irrelevant question—whether the public has a general right to patent licensing information.

The majority’s approach conflicts with this Court’s earlier decision in *Uniloc 2017 LLC v. Apple, Inc.*, 964 F.3d 1351, 1358 (Fed. Cir. 2020) (“*Uniloc I*”), even though that decision is binding precedent this panel was required to follow. See *Newell Cos., Inc. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988). (“This court has adopted the rule that prior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned *in*

banc.”) (citations omitted).

Uniloc I held that “all filings were presumptively accessible” in this case because they were “attached to a motion”—Apple’s motion to dismiss for lack of standing—“that is more than tangentially related to the underlying cause of action.” *Uniloc I*, 964 F.3d at 1358, 1362 (internal quotation marks and citations omitted). The same is true here: Apple attached all the filings at issue to its motion to dismiss.¹

Uniloc I correctly applied Ninth Circuit law, which governs the sealing issues in this case. *Id.* at 1357. That law is crystal clear: “the strong presumption of access to judicial records applies fully to dispositive pleadings.” *Kamakana*, 447 F.3d at 1179 (internal quotations omitted).

Until now, this Court has consistently followed precedents of the Supreme Court and circuit courts establishing the public’s general right of access to judicial records. *See Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978) (“It is clear that the courts of this country recognize a general right to inspect

¹ The prior appeal involved a different motion to dismiss for lack of standing with some, but not all, of the same attachments. A table containing information about Uniloc’s licenses was at issue in the prior appeal, but an internal memorandum of its financier, Fortress, was not. *Compare* Appx32 (“We turn first to the Federal Circuit’s task on remand, to reconsider the sealing or redaction of the purportedly confidential information of third parties”) *with* Appx35 (“Turning to Apple’s most recent motion to dismiss, *Uniloc* . . . seeks to seal a three-page extract of an internal Fortress memorandum and brief references to it in Apple’s motion.”)

and copy public records and documents, including judicial records and documents.”); *Uniloc I*, 964 F.3d at 1358 (quoting *id.*); *DePuy Synthes Prod., Inc. v. Veterinary Orthopedic Implants, Inc.*, 990 F.3d 1364, 1369 (Fed. Cir. 2021) (applying presumption of access to complaint); *Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1221 (Fed. Cir. 2013) (applying presumption of access to documents filed with court); *In re Violation of Rule 28(d)*, 635 F.3d 1352, 1356 (Fed. Cir. 2011) (applying presumption of access to appellate briefs).

The majority opinion improperly abrogates *Uniloc I* and contravenes controlling authorities. Absent Supreme Court intervention, en banc or panel review is necessary to resolve these conflicts.

B. The Panel Majority Erred in Failing to Apply the Presumption of Public Access Based on the Information in these Judicial Records Rather than their Role in the Judicial Process.

These conflicts result from the panel’s flawed approach to the presumption of public access. Instead of deciding whether the public’s right of access applied based on the role of the sealed filings in the judicial process, the majority decided whether the public’s right of access applied based on the particular information these filings contain. *See* Maj. at 7 (“[N]o rule of law or binding precedent says that the public is generally entitled to know what consideration a patentee receives for licensing its patent.”); *see also id.* at 8.

The majority's focus on the particular information in the sealed filings as the first analytical step in determining the public's right of access is contrary to law. To determine whether the public's right of access to judicial records applies, courts look at the role the documents containing that information play in the judicial process. *See Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1101 (9th Cir. 2016); *see also Uniloc I*, 964 F.3d at 1358 (citing *id.*).

For example, the Ninth Circuit has explained that the public's presumptive right of access does not generally attach to discovery material because it "may be unrelated, or only tangentially related, to the underlying cause of action." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1134 (9th Cir. 2003) (quotation marks and citation omitted). "When discovery material is filed with the court, however, its status changes," and the presumption of access attaches. *Id.* When material is filed with a dispositive motion, the presumption is even stronger because "the resolution of a dispute on the merits . . . is at the heart of the interest in ensuring the public's understanding of the judicial process and of significant public events." *Kamakana*, 447 F.3d at 1179 (quotation marks and citations omitted).²

² Other circuits have adopted similar rules for dispositive documents. *See, e.g., Baxter Int'l, Inc. v. Abbott Lab'ys*, 297 F.3d 544, 546 (7th Cir. 2002) (recognizing circuit precedents "which hold that the *dispositive* documents in any litigation enter the public record notwithstanding any earlier [confidentiality] agreement") (emphasis in original).

The same reasoning applies here. When litigants produce discovery material containing patent licensing information, the public does not have a presumptive right of access at that time. But when the material is filed with a dispositive motion, the presumption of public access attaches. The presence of patent licensing information may be relevant to whether that presumption is overcome, but not whether it exists.

The majority’s approach confuses the first question in right of access cases—whether a presumption of public access attaches to particular materials—with the second question—whether the movant established sufficient reasons to rebut the presumption and seal some or all the materials. This error led the majority to focus on the wrong question and vitiate the public’s right to access judicial records bearing directly on the merits of a case.

C. The Majority’s Approach Conflicts with this Court’s Established Practice of Applying the Presumption of Public Access to Judicial Records Containing Patent Licensing Information.

The majority’s approach also conflicts with this Court’s established practice of applying the presumption of public access to judicial records containing patent licensing information.

For example, when facing a sealed settlement and license agreement, this Court ordered the parties to “show adequate cause why *any of the information in this opinion regarding the settlement agreement* should be kept under seal or

redacted.” *In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Pat. Litig.*, 497 F. App’x 66, 67 (Fed. Cir. 2013) (emphasis in original). The court proceeded to release the unsealed opinion in full. *See In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Pat. Litig.*, 504 F. App’x 900, 903 (Fed. Cir. 2013) (affirming interpretation of agreement providing “a non-exclusive license to the patents-in-suit”).

As one judge of this Court explained to parties that marked an entire patent settlement and license agreement confidential: “I don’t see how we can possibly have an argument or write an opinion in this case if these materials are treated as confidential. Is . . . the fact of this agreement and the language of the agreement proprietary? . . . How can we have an argument, how can we write a decision, without talking about the language of the agreements that the two of you entered into?” *Sanofi-Aventis v. Sandoz*, No. 2010-1338, Oral Argument Hr’ing Tr. at 2:57-3:16 & 4:11 (Dyk, J.);³ *see also Sanofi-Aventis v. Sandoz*, 405 Fed. App’x 493, 494–96 (Fed. Cir. 2010) (quoting and discussing license terms).

D. The Panel Majority’s Conclusion that the District Court Did Not Comply with the Remand Instructions Resulted from its Failure to Apply the Presumption of Public Access Correctly.

The majority’s failure to apply the presumption of public access correctly was fatal to its analysis of whether the district court abused its discretion in

³ Available at <http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2010-1338.mp3>.

denying Uniloc's motions to seal. *See* Maj. at 5-7.

The majority asserted that “the district court failed to follow our remand instructions to make particularized determinations as to whether the third-party licensing information sought to be sealed should be made public,” Maj. at 5, but it ignored the particularized determinations the district court made. *See* Appx32–35. Had the majority applied the law correctly, it would have considered the district court's weighing of “the *particular bases* offered” in support of sealing against the determination that was “[c]onclusive” to the sealing analysis: the role the sealed records played in its decision-making process. Appx32, Appx34.

The district court found one record, a table listing the names of Uniloc's licensees as well as the dates and amounts they paid, was central to its decision. *See* Appx34–35 (“[T]he dates and dollar amounts involved in Uniloc's patent licenses ‘go to the heart of’ the primary dispute” because they “revealed Uniloc's failure to meet its time-based monetization goals which, in turn, . . . divested Uniloc of standing to sue.”).

Because that table is the *only* evidence in the record establishing the fact that was dispositive of Uniloc's lack of standing, the district court also found access was necessary to permit review of its decision. *See* Appx35. (“Review of the parties' and the Court's calculation of Uniloc's actual monetization requires public access to the underlying amounts and dates of Uniloc's patent licenses.”).

The majority's speculation that evidence other than the license table establishes the dispositive facts of the district court's decision is erroneous. *See* Maj. at 8.⁴ Tellingly, neither the majority nor the district court cited any other evidence of these facts in the record. *Compare* Maj. at 8 *with* Appx897 (“On March 31, 2017, the Unilocs had only gathered \$14 million in revenue over the previous year.”); *see also id.* (“The Unilocs missed their monetization mark by six million dollars”). The public has a right to see the evidence underlying the district court's calculations rather than take the dispositive facts of the case on faith alone.

Rehearing is necessary to cure the errors affecting the majority's decision. To the extent the panel's decision turns on the narrow issue of the district court's fidelity to this Court's remand instructions, the majority opinion should be revised to eliminate portions denying the public's presumptive right of access to patent licensing information in judicial records. This Court previously held the presumption of public access applies to these records; the panel had no authority to overrule that holding.

⁴ The panel also mischaracterized the records at issue here, implying they are patent licenses. *See* Maj. at 8. That is incorrect. Licenses were not filed with Apple's motion. The license table at issue contains only the “names of Uniloc's licensees and the dates and dollar amounts of the deals.” Appx32.

E. The Errors Affecting the Panel Majority’s Cursory Analysis of the Fortress Memorandum Contravene this Court’s Precedents Respecting District Courts’ Authority to Enforce Local Rules.

The panel’s failure to apply the presumption of public access led it to undermine the district court’s authority to enforce its local rules, conflicting with numerous precedents of this Court, including *Uniloc I*.

One piece of evidence submitted with Apple’s successful motion to dismiss was a memorandum from Uniloc’s financier, Fortress, containing its “internal deliberations on whether to invest more in Uniloc’s litigation campaign.” Appx35. The majority acknowledged Uniloc’s request to seal this memorandum did not comply with the local rules: “Uniloc filed a declaration in support of sealing, instead of Fortress, as required by the rules.” Maj. at 4. The majority then summarily concluded that, “for the Fortress investment memorandum, any procedural failings of Uniloc and Fortress cannot justify unsealing the information of third parties.” Maj. at 8. But it provided no support for its conclusion that it was an abuse of discretion to deny a motion that violated the court’s local rules.

The majority’s holding—that a district court abuses its discretion by strictly enforcing its local rules—cannot be squared with *Uniloc I*. This Court confirmed that “[a] district court does not abuse its discretion simply because it elects to strictly enforce its local procedural rules.” *Uniloc I*, 964 F.3d at 1363

(citing *Grove v. Wells Fargo Fin. Ca. Inc.*, 606 F.3d 577, 582 (9th Cir. 2010) (affirming a district court’s decision to deny a request for taxable costs because the party “failed to comply with the local rules governing motions for [such] costs”) and *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1129 (9th Cir. 2002) (concluding that a district court did not abuse its discretion in refusing to consider any supplemental filings because they “failed to comply with local rules regarding page limitations and typefaces”).

The panel majority emphasized that the rule Uniloc violated was “procedural.” Maj. at 8. But so are all local rules. Moreover, this Court has repeatedly held that procedural failings justify denying a party’s motion even when the “result may seem harsh.” *Howmedica Osteonics Corp. v. Zimmer, Inc.*, 822 F.3d 1312, 1324 (Fed. Cir. 2016) (affirming decision to preclude patentee from raising infringement argument due to noncompliance with local rules); *see also SanDisk Corp. v. Memorex Prod., Inc.*, 415 F.3d 1278, 1292 (Fed. Cir. 2005) (affirming refusal to consider infringement argument made after cut-off date prescribed by local rules); *Petrolite Corp. v. Baker Hughes Inc.*, 96 F.3d 1423, 1425–26 (Fed. Cir. 1996) (affirming decision to invalidate a patent based on party’s failure to contest statement of facts within time required by local rules).

Notwithstanding the procedural nature of the local sealing rule, its

significance is substantial. When a party seeks to seal information designated confidential by another entity, Local Rule 79-5(f)(3)⁵ requires the entity that designated the information confidential to file a declaration or statement in support of sealing. That makes sense: whoever requests confidentiality should proffer facts to support the request.

Failing to comply with this kind of procedural requirement is not a “mere punctilio[], to be observed when convenient.” *Phoenix Newspapers, Inc. v. U.S. Dist. Ct. for Dist. of Ariz.*, 156 F.3d 940, 951 (9th Cir. 1998). Procedural safeguards for sealing judicial records “provide the essential, indeed only, means by which the public’s voice can be heard.” *Id.* “All too often, parties to the litigation are either indifferent or antipathetic to disclosure requests,” and requiring them to supply proper support for sealing requests is necessary to “ensure[] that the trial court will have a true opportunity to weigh the legitimate concerns of all those affected by a closure decision.” *Id.*

Permitting parties to violate local sealing rules whenever filings implicate information of non-parties is particularly inappropriate here. Although the panel’s decision alludes to the “unsealing of third party information” in connection with the Fortress memorandum, Maj. at 8, Uniloc has not alleged

⁵ The panel erroneously cited Local Rule 79-5(e)(1), which pertains to parties filing pleadings and briefs under seal. Maj. at 4. The district court enforced Local Rule 79-5(f), which concerns judicial records that contain materials designated confidential by entities other than party-litigants.

that this exhibit implicates information of third parties. *See* Appx 35 (explaining the memorandum contains “Fortress’s internal deliberations on whether to invest more in Uniloc’s litigation campaign,” such that disclosure would “broadcast Fortress’s business model and criteria for investment”). Nor does Uniloc contend that Fortress is a third party. As the panel recognized, “[o]ne threshold issue raised by this court in its remand order was whether Uniloc’s financier, Fortress . . . , should be considered a third party or a Uniloc-related entity for purposes of sealing.” Maj. at 3. The district court never resolved that issue because Uniloc never addressed it.

Although the Fortress memorandum does not implicate third party information, the majority apparently assumed otherwise, and deemed the district court’s refusal to seal it an abuse of discretion solely on that basis. At the least, the panel opinion should be revised to provide an accurate and coherent explanation of its decision regarding the Fortress memorandum, which was not at issue in *Uniloc I* and was not subject to its remand instructions. Because that memorandum was attached to a dispositive motion, the public has a presumptive right to see it. If this right is to be denied, the public has a right to know why.

CONCLUSION

The panel decision conflicts with binding precedents and threatens to erode the public’s right of access in patent cases. Panel or en banc rehearing is

necessary to ensure the consistency, transparency, and integrity of judicial processes.

March 11, 2022

Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION

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CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. The foregoing petition for panel rehearing and rehearing en banc complies with the type-volume limitation of Fed. R. App. P. 35(b)(2); 40(b). The brief is printed in proportionally spaced 14-point type, and there are 3,649 words in the brief according to the word count of the word-processing system used to prepare the brief (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), that is, the tables of contents and citations, and certificates of counsel, and by Fed. Cir. R. 32(b), that is, the certificate of interest, the statement of related cases, and the addendum in an initial brief of an appellant.

2. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and with the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft® Word for Mac in 14-point Times New Roman font.

March 11, 2022

/s/ Alexandra H. Moss
Alexandra H. Moss

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2022, I caused the foregoing to be served by electronic means via the Court's CM/ECF system on all counsel registered to receive electronic notices.

March 11, 2022

/s/ Alexandra H. Moss
Alexandra H. Moss

ADDENDUM

**United States Court of Appeals
for the Federal Circuit**

UNILOC USA, INC., UNILOC LUXEMBOURG S.A.,
Plaintiffs-Appellants

UNILOC 2017 LLC,
Plaintiff

v.

APPLE INC.,
Defendant-Appellee

ELECTRONIC FRONTIER FOUNDATION,
Intervenor-Appellee

2021-1568, 2021-1569, 2021-1570, 2021-1571, 2021-1573

Appeals from the United States District Court for the Northern District of California in Nos. 3:18-cv-00358-WHA, 3:18-cv-00360-WHA, 3:18-cv-00363-WHA, 3:18-cv-00365-WHA, 3:18-cv-00572-WHA, Judge William H. Alsup.

Decided: February 9, 2022

AARON JACOBS, Prince Lobel Tye LLP, Boston, MA, argued for plaintiffs-appellants. Also represented by JAMES J. FOSTER.

DOUG J. WINNARD, Goldman Ismail Tomaselli Brennan & Baum LLP, Chicago, IL, argued for defendant-appellee. Also represented by ALAN ERNST LITTMANN, MICHAEL T. PIEJA; CATHERINE CARROLL, DAVID P YIN, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; MARK D. SELWYN, THOMAS GREGORY SPRANKLING, Palo Alto, CA.

ALEXANDRA HELEN MOSS, Electronic Frontier Foundation, San Francisco, CA, argued for intervenor-appellee. Also represented by AARON DAVID MACKEY.

Before LOURIE, MAYER, and CUNNINGHAM, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* LOURIE.

Dissenting opinion filed by *Circuit Judge* MAYER.

LOURIE, *Circuit Judge*.

Uniloc USA, Inc., and Uniloc Luxembourg, S.A. (collectively, “Uniloc”) appeal from a decision of the United States District Court for the Northern District of California refusing to seal certain documents in several related cases between Uniloc and Apple Inc. (“Apple”). *See Uniloc USA, Inc. v. Apple, Inc.*, 508 F. Supp. 3d 550 (N.D. Cal. 2020) (“*Decision*”). For the reasons provided below, we vacate and remand.

BACKGROUND

This is Uniloc’s second appeal regarding the sealing of documents. In its first appeal, Uniloc attempted to defend requests to seal matters of public record, such as quotations of this court’s opinions and a list of patent cases Uniloc had filed. *See Uniloc 2017 LLC v. Apple, Inc.*, 964 F.3d 1351 (Fed. Cir. 2020). The district court correctly applied its local rules to reject these requests in their entirety and to reject Uniloc’s request for reconsideration. This

court affirmed the district court's rulings in nearly all respects.

We also held, however, that the district court must conduct a more detailed analysis on whether confidential licensing information of certain third-party licensees of Uniloc's patents should be sealed. *Id.* at 1363–64. As for this subset of information, we remanded for the district court to “make particularized determinations as to whether and, if so, to what extent, the materials of each of these parties should be made public.” *Id.* at 1364. The present appeal is narrowly directed to this third-party licensing information.

One threshold issue raised by this court in its remand order was whether Uniloc's financier, Fortress Credit Co. LLC (“Fortress”), should be considered a third party or a Uniloc-related entity for purposes of sealing. Uniloc moved to seal or redact third-party documents that revealed licensing terms, licensees' names, amounts paid, and dates. One document at issue was a Fortress investment memorandum that contained Fortress's investment criteria and other third-party licensing information. Apple did not oppose Uniloc's motion. The Electronic Frontier Foundation (“EFF”) moved to intervene to argue in favor of unsealing, and the district court granted its motion.

The district court denied Uniloc's motion. The court explained that “[t]he public has every right to account for . . . anyone holding even a slice of the public grant.” *Decision* at 554. It added that “patent licenses carry unique considerations” that bolster the public's right of access, including the valuation of patent rights. *Id.* at 555. The court further stated that “[t]he public has an interest in inspecting the valuation of the patent rights” reflected in Uniloc's licenses. *Id.* It then suggested that disclosure of patent licensing terms would facilitate “up-front cost evaluations of potentially infringing conduct,” “driv[e] license values to a more accurate representation of the

technological value of the patent,” and help “inform reasonable royalties in other courts.” *Id.*

The district court also determined that “the dates and dollar amounts involved in Uniloc’s patent licenses go to the heart of the primary dispute, that of Uniloc’s standing (or lack of) to sue.” *Id.* (internal quotation marks omitted). The court then ordered that the licensing information, including the identity of the licensees, be unsealed in full.

With respect to the Fortress investment memorandum, the district court found that Fortress did not comply with Local Rule 79-5(e)(1) of the Northern District of California because Uniloc filed a declaration in support of sealing, instead of Fortress, as required by the rules. *Id.* On this basis alone, the court denied Uniloc’s request to seal this document.

Uniloc filed the present notice of appeal to this court. We have jurisdiction pursuant to the collateral order doctrine. *See Uniloc 2017*, 964 F.3d at 1357–58.

DISCUSSION

This appeal involves the standard for sealing court records, not substantive issues of patent law. Thus, Ninth Circuit law applies. *Uniloc 2017*, 964 F.3d at 1357. “In the Ninth Circuit, a district court’s decision to seal or unseal court records is reviewed for abuse of discretion.” *Id.* “A district court abuses its discretion if it bases its decision on an erroneous legal standard or clearly erroneous findings of fact.” *Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1221 (Fed. Cir. 2013) (internal quotation marks omitted). A district court also abuses its discretion if the reviewing court “has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.” *Id.*

Sealing may be appropriate to keep records from being used “as sources of business information that might harm a litigant’s competitive standing.” *Nixon v. Warner*

Commc'ns, Inc., 435 U.S. 589, 598 (1978). In the Ninth Circuit, “compelling reasons” are needed to seal judicial records related to a dispositive motion. *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). Such compelling reasons include preventing the release of trade secrets. *Id.*

Uniloc and Apple both argue that the district court erred in failing to follow this court’s remand instructions to make particularized determinations as to whether third-party licensing information should be sealed. The parties contend that the court erroneously applied heightened scrutiny to requests to seal licensing information. Apple adds that such information can rise to the level of a trade secret, which is the type of information that the Ninth Circuit has deemed sealable. Uniloc cites various cases from the district court and the Ninth Circuit sealing similar types of information. *See, e.g., Uniloc 2017 LLC v. Google LLC*, 508 F. Supp. 3d 556, 575 n.23 (N.D. Cal. 2020); *In re Elec. Arts, Inc.*, 298 F. App’x 568, 569 (9th Cir. 2009).

Intervenor EFF counters that denying Uniloc’s motion was a sound use of the district court’s discretion. EFF adds that the court conscientiously weighed Uniloc’s submissions in support of sealing and concluded that they were insufficient to overcome the public’s strong interest in access.

We conclude that the district court failed to follow our remand instructions to make particularized determinations as to whether the third-party licensing information sought to be sealed should be made public. That failure was an abuse of discretion. The first time this case appeared before us, “the district court failed to make findings sufficient to allow us to adequately assess whether it properly balanced the public’s right of access against the interests of the third parties in shielding their financial and licensing information from public view.” *Uniloc 2017*, 964 F.3d at 1364. We explained that “there is no indication

in the record that the court assessed whether any of the third-party information was protectable as a trade secret or otherwise entitled to protection under the law.” *Id.* (internal quotation marks omitted). We thus remanded and instructed that the district court “make particularized determinations as to whether and, if so, to what extent, the materials of each of these parties should be made public.” *Id.* Yet, on remand, the district court again neglected to make sufficient findings. Nowhere in the record does the district court discuss whether any of the third-party materials constitute protectable trade secrets. *See Decision*. For that reason, and because it is relevant to the protectability of the license information, we remand for the district court to carry out the examination this court instructed it to do.

We also disagree with the district court’s statements purportedly supporting its decision concerning the public’s right of access to information relating to patent licenses. The court stated that “[t]he public has an interest in inspecting the valuation of patent rights . . . particularly given secrecy so often plays into the patentee’s advantage in forcing bloated royalties.” *Decision* at 555. The court thus made an error of law in making a blanket ruling that the public has a broad right to licensing information relating to patents.

The public indeed does have an interest in patents, but it is an interest in ensuring that patents are not procured by fraud, or other improper means. *See U.S. v. Glaxo Grp. Ltd.*, 410 U.S. 52, 57–58 (1973) (discussing the public interest in free competition and ensuring that patents are not obtained by fraudulent means). This is because patents are to be granted only if they are valid, *i.e.*, they describe and claim inventions meeting the requirements of the law, inventions that are novel, not obvious, and described in an enabling manner.

The enforcement of patents is also imbued with the public interest. Litigants and their counsel are subject to Rule 11 of the Federal Rules of Civil Procedure, requiring that parties presenting a case perform an “inquiry reasonable under the circumstances” as to the legal and factual merits of the claim, and they are subject to sanctions for an exceptional case and for a frivolous appeal. Fed. R. Civ. P. 11. Moreover, a patent can be held to be unenforceable for inequitable conduct in its procurement. But no rule of law or binding precedent says that the public is generally entitled to know what consideration a patentee receives for licensing its patent.

The district court stated that patents are granted in derogation of the usual free flow of goods and ideas. It stated colorfully that “a patent owner is a tenant on a plot within the public realm of public knowledge, and a licensee a subtenant.” *Decision* at 554. Those statements are incorrect, as patents are granted for inventions that, until their disclosure, did not constitute any flow of goods. Goods claimed in a patent, if the patent is valid, did not previously flow. Patents are granted for *new* inventions, those which did not flow in commerce before the invention. A properly-issued patent creates new land, keeping within the court’s metaphor. It expands public knowledge.

The district court stated that the public has a strong interest in knowing the full extent of the terms and conditions involved in the exercise of its patent rights and in seeing the extent to which the patentee’s exercise of the government grant affects commerce. But this is not an antitrust case or an FTC investigation involving unlawful restraint of trade or monopolization. It is a suit for patent infringement. Absent an issue raised by the parties concerning license rights and provisions, there is no public interest or entitlement to information concerning consideration for the grant of licenses. The parties are in agreement that license information here should be sealed and protected. The only differing voice has come from an

independent nonparty, appointed by the district court to advocate unsealing the information that neither party wished to unseal. But we have seen no citation of a rule of law providing a presumption of access in a patent infringement suit to information concerning consideration for the licensing of a patent.

An earlier issue in this case was a question of alleged indiscriminate oversealing in patent and commercial cases nationwide. For that reason, in the earlier appearance of this case in our court, we affirmed-in-part the district court's refusal to seal all the requested information and remanded for the limited purpose of assessing whether third-party licensing information should be sealed. But oversealing was no longer the issue on remand.

The district court did note that a key issue in this case was whether Uniloc had received at least \$20 million in royalties needed under licensing agreements to provide it with standing to sue. But that fact can be proved without opening up all the licenses that the court granted access to.

Lastly, for the Fortress investment memorandum, any procedural failings of Uniloc and Fortress cannot justify unsealing the information of third parties. The district court should have considered whether the interests of the implicated third parties outweigh the public's interest in seeing individual licensing details that are not necessary for resolving this case.

We therefore vacate and remand for the district court to comply with this court's previous remand instructions.

CONCLUSION

We have considered EFF's remaining arguments, but we find them unpersuasive. Because the district court failed to follow our previous remand instructions to make particularized determinations as to whether third-party licensing information should be sealed, we vacate the court's denial and remand for the court to perform that analysis.

UNILOC USA, INC. v. APPLE INC.

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VACATED AND REMANDED

COSTS

No costs.

**United States Court of Appeals
for the Federal Circuit**

UNILOC USA, INC., UNILOC LUXEMBOURG S.A.,
Plaintiffs-Appellants

UNILOC 2017 LLC,
Plaintiff

v.

APPLE INC.,
Defendant-Appellee

ELECTRONIC FRONTIER FOUNDATION,
Intervenor-Appellee

2021-1568, 2021-1569, 2021-1570, 2021-1571, 2021-1573

Appeals from the United States District Court for the Northern District of California in Nos. 3:18-cv-00358-WHA, 3:18-cv-00360-WHA, 3:18-cv-00363-WHA, 3:18-cv-00365-WHA, 3:18-cv-00572-WHA, Judge William H. Alsup.

MAYER, *Circuit Judge*, dissenting.

The district court adhered to our remand instructions when it carefully weighed the public's right of access to court records against the interests of third-party patent licensees in shielding their licensing information from public view. The court's decision to deny the motion by Uniloc

USA, Inc., and Uniloc Luxembourg, S.A. (collectively, “Uniloc”) to seal information related to its licenses with third parties was a sound exercise of discretion given that the dates and dollar amounts of those licenses went “to the heart of the primary dispute” between Uniloc and Apple Inc., which was whether Uniloc had generated sufficient licensing revenue to provide it with standing to sue. *Uniloc USA, Inc. v. Apple, Inc.*, 508 F. Supp. 3d 550, 555 (N.D. Cal. 2020) (“*District Court Decision*”) (internal quotation marks omitted). Uniloc’s third-party licensees, moreover, failed to demonstrate a compelling interest in keeping their licensing information confidential. *See id.* at 554. I therefore respectfully dissent.

The public’s right of access to documents filed in connection with a dispositive pleading is sacrosanct. *See Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (explaining that “the strong presumption of access to judicial records applies fully to dispositive pleadings, including motions for summary judgment and related attachments,” given that “the resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in ensuring the public’s understanding of the judicial process and of significant public events” (citations and internal quotation marks omitted)); *see also DePuy Synthes Prods., Inc. v. Veterinary Orthopedic Implants, Inc.*, 990 F.3d 1364, 1369 (Fed. Cir. 2021) (stating that the “longstanding right” of access to judicial records and documents “helps secure the integrity and transparency of the judicial process”); *In re Chiquita Brands Int’l, Inc.*, 965 F.3d 1238, 1242 (11th Cir. 2020) (“A lawsuit is a public event. Parties who ask a court to resolve a dispute must typically walk in the public eye.”); *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001) (explaining that “[t]he public’s right of access extends beyond simply the ability to attend open court proceedings” and includes “a pervasive common law right to inspect and copy public records and documents, including judicial records and

documents” (citations and internal quotation marks omitted)). The right can be abridged only in certain narrow circumstances, and the party seeking to seal information bears the burden of providing “sufficiently compelling reasons for doing so.” *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). While “[m]any a litigant would prefer that the subject of [its] case . . . be kept from the curious (including its business rivals and customers),” those who “call on the courts . . . must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials.” *Union Oil Co. v. Leavell*, 220 F.3d 562, 567–68 (7th Cir. 2000).

What constitutes a compelling reason to seal documents is a determination “best left to the sound discretion of the trial court.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 599 (1978). Here, the district court did not abuse its discretion in concluding that Uniloc’s third-party licensees failed to make out a compelling case for shielding their licensing information from public view. Notably, not a single licensee directly filed a request with the district court seeking to seal its licensing information. *See District Court Decision*, 508 F. Supp. 3d at 554. Instead, when this case was initially pending before the district court, “Uniloc solicited the views of all one hundred nine licensees regarding the sealing of their patent license details.” *Id.* While thirty-one licensees requested that all or part of their licensing information be kept confidential, only thirteen licensees submitted declarations in support of their requests. *See id.*; J.A. 436–50, 805–37 (sealed third-party declarations).

These declarations, by and large, are vague and conclusory and fail to provide concrete evidence that the dissemination of licensing information would cause the licensees significant competitive injury in future licensing negotiations or that the licensing information in question otherwise qualifies as a trade secret. *See* J.A. 436–50, 805–37; *see also Total Recall Techs. v. Luckey*, No. 21-15590, 2021

WL 5401664, at *1 (9th Cir. Nov. 18, 2021) (affirming a district court’s order denying seven motions to seal where the party seeking sealing failed to provide “specific” or “compelling” evidence for doing so); *DePuy*, 990 F.3d at 1373 (affirming a district court order unsealing purportedly confidential business information where the declarations filed by the party seeking to prevent disclosure failed to address how making the information public “would harm its proprietary and competitive business interests” (citations and internal quotation marks omitted)); *Kamakana*, 447 F.3d at 1182 (explaining that a party’s “conclusory” declarations about the confidential nature of certain documents did “not rise to the level of ‘compelling reasons’ sufficiently specific to bar the public access to the documents”). Indeed, only one of the publicly available declarations even uses the term “trade secret” and that declaration broadly, and without meaningful support, states that all the company’s “financial records” qualify as trade secrets. J.A. 438. Importantly, moreover, none of the declarations adequately explain why redacting the names of the third-party licensees—but fully disclosing the dates and dollar amounts of their licenses with Uniloc—would not serve to eradicate any even arguable concern regarding the disclosure of trade secret information. *See* N.D. Cal. Civ. Local R. 79-5(b) (2018) (emphasizing that any motion to seal “must be *narrowly tailored* to seek sealing only of sealable material” (emphasis added)).

The fact that other courts, under other circumstances, have granted motions to seal patent licensing information does not mean that the district court abused its discretion in declining to do so here. This case involves the unusual situation in which Uniloc, the party seeking the sealing order, forfeited its right to keep its licensing information confidential because its “original sealing request was grossly excessive and its flouting of Local Rule 79-5 particularly flagrant.” *Uniloc 2017 LLC v. Apple, Inc.*, 964 F.3d 1351, 1361 (Fed. Cir. 2020).

I disagree with this court's conclusion that the district court "made an error of law in making a blanket ruling that the public has a broad right to licensing information relating to patents." *Ante* at 6. The public presumptively has a broad right of access to *all* information filed with a court in connection with a dispositive motion, and this includes patent licensing information. *See, e.g., Kamakana*, 447 F.3d at 1180 (explaining that "judicial records are public documents almost by definition, and the public is entitled to access by default").

"The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification." *Union Oil*, 220 F.3d at 568. Because the third-party licensees failed to supply compelling reasons for overriding the strong presumption in favor of public access, I would affirm.