2021-1568 (LEAD), -1569, -1570, -1571, -1573

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
Case Nos. 3:18-cv-00358-WHA, 3:18-cv-00360-WHA,
3:18-cv-363-WHA, 3:18-cv-00365-WHA, 3:18-cv-00572-WHA
before Judge William H. Alsup

RESPONSE IN OPPOSITION TO INTERVENOR-APPELLEE'S COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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April 13, 2022

CERTIFICATE OF INTEREST

FORM 9. Certificate of Interest **Form 9 (p. 1)**
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
AMENDED
CERTIFICATE OF INTEREST

Case Number	21-1568, -1569, -1570, -1571, -1573
Short Case Caption	Uniloc USA, Inc. v. Apple Inc.
Filing Party/Entity	Uniloc USA, Inc.; Uniloc Luxembourg S.A.

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: April 13, 2022 Signature: */s/ Aaron S. Jacobs*

Name: Aaron S. Jacobs

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☐ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☐ None/Not Applicable
Uniloc USA, Inc.	Uniloc 2017 LLC	Uniloc Corporation Pty. Ltd.
Uniloc Luxembourg S.A.	Uniloc 2017 LLC	None

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☑ Additional pages attached

Nelson Bumgardner Albritton, P.C.	Edward R. Nelson, III	Anthony Michael Vecchione
Prince Lobel Tye LLP	Kevin Gannon	Tyrus C. Cartwright
Daniel McGonagle	Dean G. Bostock	Matthew David Vella

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☐ None/Not Applicable ☑ Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

ADDENDUM

4. Legal Representatives (continued)

Prince Lobel Tye LLP (continued):	Michael James Ercolini	Robert R. Gilman
Paul J. Hayes	Brian A. Tollefson	Tyrus S. Cartwright

5. Related Cases

This is a collateral appeal regarding the district court's refusal to seal third-party confidential information arising out of five patent-infringement actions between (mostly) the same parties:

- *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, -00363, -00365 & -00572-WHA (N.D. Cal.)[1]

Appellants Uniloc USA, Inc. ("Uniloc USA") and Uniloc Luxembourg S.A. ("Uniloc LUX") are the plaintiffs in the -358 case. Uniloc 2017 LLC ("Uniloc 2017"), Uniloc USA and Uniloc LUX (collectively "Uniloc") are the plaintiffs in

[1] Cases will be referred to by their non-zero digits, *e.g.*, "the -360 case." All relevant pleadings in the -360, -363, -365 and -572 cases were filed in parallel. To avoid quadruplicate entries in the Joint Appendix, all items from the record below for these cases are from the docket of the -360 case, unless otherwise noted. The -358 case is an exception, as it took a different path.

the -360, -363, -365 and -572 cases ("-360 *et seq.* cases").[2] Appellee Apple Inc. ("Apple") is the defendant in all cases. Third-party Electronic Frontier Foundation ("EFF") is an intervenor in all cases.

The -358 case was dismissed on December 4, 2020. The substance of that dismissal was on appeal to this Court in Appeal No. 2021-1572. The -1572 appeal was briefly related to the instant appeals, *see* -1568 Appeal, Order (Feb. 1, 2021), but the Court deconsolidated the -1572 appeal pursuant to Uniloc's unopposed motion, *see id.*, Dkt. No. 15 (Feb. 25, 2021).

Uniloc and Apple dismissed the cases and appeals between them in June 2021. However, the question of whether the documents in question may be sealed is still a live issue.

Some of the same to-be-sealed information at-issue here was also submitted in eleven cases between Uniloc 2017 and Google LLC ("Google"): *Uniloc 2017 LLC v. Google LLC*, Nos. 4:20-cv-4355, -5330, -5333, -5334, -5339, -5341, -5342, -5343, -5344, -5345 & -5346-YGR (N.D. Cal.) (collectively "the *Google* cases"). The information was ordered sealed in the *Google* cases. Those cases were dismissed on December 22, 2020. The substance of those dismissals is on appeal

[2] The district court allowed Uniloc 2017 to joint as plaintiff in the -360 *et seq.* cases. Appx674. Uniloc 2017 subsequently moved to join the -358 case, but the motion was denied. Appx903.

to this Court in Appeal Nos. 2021-1498, -1500, 1501, -1502, -1503, -1504, -1505, 1506, -1507, -1508 & -1509.

Some of the same to-be-sealed information at-issue here was also submitted in a case brought by Uniloc USA and Uniloc LUX against Motorola Mobility, LLC ("Motorola"): *Uniloc USA, Inc. v. Motorola Mobility, LLC*, C.A. No. 17-1658 (CFC) (D. Del.). The relevant information remains under seal in the *Motorola* case. The *Motorola* case was dismissed on December 30, 2020. The substance of that dismissal is on appeal to this Court in Appeal No. 2021-1555.

The following table lays out the cases and appeals, and how they are related:

Case	Uniloc(s)	Defendant	Appeal	Subject Matter
-358 (N.D. Cal.)	USA, LUX	Apple	-1572	Standing (dismissed)
			-1573	Sealing (present appeal)
-360 (N.D. Cal.)	2017, USA, LUX	Apple	-1568	Sealing (present appeal)
-363 (N.D. Cal.)	2017, USA, LUX	Apple	-1569	
-365 (N.D. Cal.)	2017, USA, LUX	Apple	-1570	
-572 (N.D. Cal.)	2017, USA, LUX	Apple	-1571	

-4355 (N.D. Cal.)	2017	Google	-1498	Standing
-5330 (N.D. Cal.)	2017	Google	-1500	
-5333 (N.D. Cal.)	2017	Google	-1501	
-5334 (N.D. Cal.)	2017	Google	-1502	
-5339 (N.D. Cal.)	2017	Google	-1503	
-5341 (N.D. Cal.)	2017	Google	-1504	
-5342 (N.D. Cal.)	2017	Google	-1505	
-5343 (N.D. Cal.)	2017	Google	-1506	
-5344 (N.D. Cal.)	2017	Google	-1507	
-5345 (N.D. Cal.)	2017	Google	-1508	
-5346 (N.D. Cal.)	2017	Google	-1509	
-1658 (D. Del.)	USA, LUX	Motorola	-1555	Standing

This Court's determination of the present appeals should not impact the outcome of the -1498 *et al.* appeals or the -1555 appeal, and vice versa. The Court's determination will, however, influence whether the materials filed in the underlying cases remain under seal.

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ARGUMENT

The panel came to the correct conclusion in these appeals; there is no cause to revisit its decision.

These appeals relate to the district court's denial of motions to seal confidential information pertaining to patent licenses and other trade-secrets held by more than 100 third-parties. *Uniloc USA, Inc. v. Apple Inc.*, 25 F.4th 1018, 1021-22 (Fed. Cir. 2022) ("*Uniloc II*"). Sealing documents of any kind is an issue governed by regional circuit law. *E.g.*, *Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1220 (Fed. Cir. 2013) ("*Samsung*"). So, EFF petitions this Court for *en banc* consideration of a sister circuit's law. This bears repeating: EFF asks the Federal Circuit for an *en banc* determination of Ninth Circuit law.

Notably, EFF never mentions the outcome of this appeal. Given the melodrama about supposedly turning "sacrosanct" "law on its head" and the alleged creation of "a patent-specific exemption from the general presumption of public access," Dkt. No. 76 ("Pet.") at 2, one might assume the panel affirmatively ordered the district court to seal the information-at-issue. It did not. Instead, the panel followed Ninth Circuit law; reproached the district court for failing to abide by that law and this Court's prior remand instructions; and so remanded the cases for further consideration. This too bears repeating: The matter was simply remanded for application of existing Ninth Circuit law.

I. Background

Uniloc USA and Uniloc LUX sued Apple for patent infringement in five cases. For present purposes, the cases are in two groups: The -360 *et seq.* cases (3:18-cv-360, -363, -365 and -572) and the -358 case (3:18-cv-358).

A. The -360 *et seq.* cases.

Apple moved to dismiss the -360 *et seq.* cases in October 2018 for lack of standing. In short, Apple argued that the Uniloc entities had granted their creditor, Fortress Credit Co. LLC ("Fortress"), a license to Uniloc's patents, with the right to sublicense in the event of a default. Apple further argued Uniloc had defaulted because the agreements required Uniloc to obtain at least $20,000,000 in licensing revenue between April 1, 2016, and March 31, 2017, during which time it obtained about $14,000,000. So, Apple concluded, Uniloc lacked the right to exclude Apple from practicing the patents. The court denied this iteration of Apple's motion. Appx666-675.

Apple's motion attached materials that disclosed, *inter alia*, licensing details of more than 100 third-parties. For example, Exhibit A included a table listing the licensee, date, payment and license type for 109 licenses, stretching back to 2010. Appx732-734:

SUMMARY OF UNILOC LICENSE AGREEMENTS
Updated May 10, 2017

Licensee	Date	Lump Sum	Document Type

The parties moved to seal this and other information submitted with the briefing. *See* Appx349-375.

EFF moved to intervene to oppose the parties' motions to seal.

In January 2019, the district court denied the parties' motions to seal and denied EFF's motion to intervene. Appx38-39. Shortly thereafter, Uniloc put about 90% of the disputed materials into the public record and filed a motion for reconsideration as to the rest. *See* Appx418-435. Uniloc's filing included a fifteen-page, 5000-plus-word declaration from counsel detailing, on an item-by-item basis, the grounds for sealing the few pages and information still at-issue. Appx761-776. The declaration included statements from twenty-three third-parties who asked Uniloc to relay their positions to the district court. Appx767-772.

Thirteen third-party licensees provided their own declarations with Uniloc's motion, including, *inter alia*, Microsoft, Allscripts Healthcare and NEC. Appx436-450, Appx805-837.[3] These third-parties implored the district court to keep their licensing details sealed. As the third-parties explained, disclosure of their licensing information would lead information asymmetry, which would significantly disadvantage them in future negotiations. *Id.*

EFF moved to intervene, again.

[3] Some licensees disclosed their identities; the rest sought to remain confidential.

In May 2019, the district court acknowledged that "Apple's motion to dismiss for lack of standing did not directly depend upon information regarding the specific dollar amounts, financial terms, and names of the licensees in the various agreements (with Fortress or third-party licensees)." Appx42. Nonetheless, it denied Uniloc's motion for reconsideration and denied EFF's second motion to intervene, other than as to an appeal. Appx43.

Uniloc filed an interlocutory appeal in which EFF intervened. In its August 2020 opinion, this Court concluded, first, that the district court did not abuse its discretion by strictly applying the local rules to deny "Uniloc's requests to seal its purportedly confidential information" due to originally overbroad requests. *Uniloc 2017 LLC v. Apple, Inc.*, 964 F.3d 1351, 1063 (Fed. Cir. 2020) ("*Uniloc I*"). Second, though, this Court found that the third-parties' requests were nonetheless entitled to consideration and so vacated that part of the order:

> Such third-parties were not responsible for Uniloc's filing of an overbroad sealing request. Their information calls for an analysis not dependent on the [local rules] overbreadth rationale just discussed.
>
> Significantly, … many of Uniloc's licensees have submitted declarations stating that they wish their licensing information to remain confidential and that the disclosure of such in-formation would cause them material competitive injury.
>
> [W]e conclude that 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.

Id. at 1363-64 (citations omitted).

Following remand, Uniloc published its own information on the record. And, rather than drag out the issue, third-party (and non-party) Fortress published its confidential information from the -360 *et seq.* cases. Uniloc then filed a motion to seal the remaining third-party information. Appx676-700.

B. The -358 case.

Apple filed a similar motion to dismiss the -358 case in October 2020. This motion included additional confidential documents including, *inter alia*, the "Fortress Memorandum." Appx614-616. This document—produced by Fortress in response to a subpoena and never seen by Uniloc personnel—disclosed Fortress's confidential business analyses and the same licensing details from Exhibit A for fifty-five of the third-party licensees. Appx619-625.

C. The order on appeal.

The parties' motion to seal in the -358 case lined up in time and basic underlying substance with the motion in the -360 *et seq.* cases following remand.

EFF moved to intervene, again.

On December 17, 2020, the district court heard the pending motions. Appx924-940. Shortly thereafter, the district court denied the parties' motions to seal and allowed EFF to permanently intervene. Appx30-36.

II. Law: The Ninth Circuit applies a uniform balancing test to determine whether information may be sealed.

As the panel observed, the question of whether materials—including patent licenses—may be sealed is left to local circuit law. *Uniloc II*, 25 F.4th at 1022; *see also Uniloc I*, 964 F.3d at 1357; *Samsung*, 727 F.3d at 1220.[4]

The Ninth Circuit "start[s] with a strong presumption in favor of access to court records." *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016) (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003)). The touchstone of this "presumption of access is 'based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice.'" *Id.* (quoting *U.S. v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995)); *Samsung*, 727 F.3d at 1226 ("The presumption in favor of public access to court documents is based on 'promoting the public's understanding of the judicial process and of significant public

[4] EFF incorrectly states that this Court has its own "established practice of applying the presumption of public access to judicial records containing patent licensing information." Pet. at 9. This Court has no such separate practice, as the cases cited by EFF make clear. For example, in *In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Pat. Litig.*, this Court expressly applied *regional* circuit law. 497 F. App'x 66, 67 (Fed. Cir. 2013).

events.'") (quoting *Valley Broad. Co. v. U.S. Dist. Court for Dist. of Nev.*, 798 F.2d 1289, 1294 (9th Cir. 1986)).

This said, "the right to inspect and copy judicial records is not absolute." *Nixon v. Warner Commnc'ns, Inc.*, 435 U.S. 589, 598 (1978). Rather, "'the common-law right of inspection has bowed before the power of a court to insure that its records' are not … sources of business information that might harm a litigant's competitive standing." *Id.* (quoting *In re Casewell*, 18 R.I. 835, 836, 29 A. 259 (1893)). The Ninth Circuit asks whether there are "compelling reasons" to seal information filed with a motion that is "more than tangentially related to the merits of the case," *e.g.*, a dispositive motion. *Center for Auto Safety*, 809 F.3d at 1096. If so, the presumption of public access may be overcome.

As the panel acknowledged, *Uniloc II*, 25 F.4th at 1022, the Ninth Circuit recognizes "compelling reasons" to seal documents where their release "'*might have become* a vehicle for improper purposes,' such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or *release trade secrets*." *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (quoting *Nixon*, 435 U.S. at 598) (emphasis added).

There is, then, a uniformly applied Ninth Circuit balancing test to seal documents accompanying dispositive motions. On one side is the public's general-interest in understanding the bases for the outcome in the given case. On the other

side is the private party's interest in protecting its confidential information, such as trade secrets. If there are compelling reasons to protect that information, it may be sealed. *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995) ("The factors relevant to a determination of whether the strong presumption of access is overcome include the public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets.") (cleaned up); *e.g.*, *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1212-13 (9th Cir. 2002).

More than a decade ago, the Ninth Cirucit explained that the private-interest in "pricing terms, royalty rates, and guaranteed minimum payment terms found in [a license agreement] … plainly falls within the definition of 'trade secrets,'" and so meets the "'compelling reasons' standard" to seal. *In re Elec. Arts, Inc.*, 298 F. App'x 568, 569 (9th Cir. 2009) (reversing district court's refusal to seal licensing terms). The other courts of the District unanimously follow the Ninth Cirucit in application of *In re Electronic Arts*—they recognize that patent-license information is a trade secret and so constitutes a compelling reason to seal. In just the briefing in this appeal, Uniloc cited some forty orders from the District sealing patent-license information. *See* Dkt. No. 23 ("Principal Br.") at 30-37, & nn.5-19; Dkt.

No. 36 ("Reply Br.") at 7-10; Dkt. No. 70-1 ("Supp. Auth."). Uniloc has time,[5] and again,[6] and again,[7] challenged EFF to identify a single contrary example from the Ninth Circuit. Despite eight briefs and four oral arguments, EFF failed to do so.[8]

III. Order on Appeal: The district court abrogated the Ninth Circuit's uniform test for sealing documents and refused to consider the third-parties' requests despite the remand instruction from this Court.

The order on appeal did two things of note.

First, it discarded the Ninth Circuit's uniform test for sealing documents. Although the order alluded to the general public-interest, it held all information related to patents constitutes a second, heavier interest, which is entitled to a different, overwhelming presumption:

> In our present case, a *second* public interest also favors access…. A patent is not a private agreement between parties ….

Appx31 (emphasis in original). Further:

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[5] Appx887.

[6] *Uniloc I*, oral arg. at 0:00:42, *available at* http://oralarguments.cafc.uscourts.gov/default.aspx?fl=19-1922.mp3.

[7] Appx931.

[8] EFF's final brief did cite *a* case where licensing information was unsealed: *Cinpres Gas Injection Ltd. v. Volkswagen Grp. of Am. Inc.*, No. 12-cv-13000, 2013 WL 11319319 (E.D. Mich. Feb. 14, 2013). Dkt. No. 31 ("Resp. Br.") at 17. Of couse, an unpublished opinion from a district court in the Sixth Circuit has no bearing here. That EFF had to leave the Ninth Circuit, to find even one, proves Uniloc's point.

> [T]he public … has a strong interest in knowing the full extent of the terms and conditions involved in [the patentee's] exercise of its patent rights and in seeing the extent to which [the patentee's] exercise of the government grant affects commerce.
>
> The impact of a patent on commerce is an important consideration of public interest.

Appx31-32. And further still:

> [A] patent is a *public* grant of rights. A patent owner is a tenant on a plot within the realm of public knowledge, and a licensee is her sub-tenant. The public has every right to account for all its tenants, all its sub-tenants, and (more broadly) anyone holding even a slice of the public grant.

Appx35 (emphasis in original); *see also, e.g.*, *id.* ("[P]atent licenses carry unique considerations."); Appx925-926 ("[W]e are dealing with the public right here …. [¶] And ownership of that public right ought to be known."). The order cited no precedents in support of its theory that this makes any difference to the question of sealing information. *Cf. Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021) ("The dissent's contrary assertion is unaccompanied by any citation.").

In short, the order abrogated the Ninth Circuit's uniform balancing test in favor of a patent-specific conclusion. Despite repeated prompting, *even EFF* declined to defend these grounds during oral arguments, Oral Arg. at 23:45-24:40, 26:50-27:35, 32:30-33:30, *available at* https://oralarguments.cafc.uscourts.gov/default.aspx?fl=21-1568_12062021.mp3, and EFF does not do so in its Petition.

Second, the order discounted—refuse to even consider—the wealth of information in the record from the third-parties. For example, the order acknowledged that twenty-three third-parties relayed requests in Uniloc's counsel's declaration. *See* Appx767-772, ¶¶ 9-9.w.i. But, it rejected their evidence on a new, novel ground: Hearsay. Appx33. This disregarded the District's uniform acceptance of outside-counsel's sworn declarations in support of motions to seal. *See* Reply Br. at 10-12 & nn.5-6 (citing orders from fifteen judges).

The order also discounted the thirteen clearly-not-hearsay third-party declarations, *see* Appx436-450, Appx805-837, also on a new, novel ground: They were submitted before the *Uniloc I* appeal. Appx34. This disregarded this Court's remand instruction to specifically consider the evidence already in the record, including Uniloc's declaration and the third-party declarations. *Uniloc I*, 964 F.3d at 1364.

Continuing, the order held that it was "[c]onclusive" 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 thereof) to sue." Appx34. Yet this is facially untrue. There is no relevance to any individual licensee's payment between April 2016 and March 2017. Appx42 ("Apple's motion to dismiss for lack of standing did not directly depend upon information regarding the specific

dollar amounts, financial terms, and names of the licensees ….”). And, even if individual payments did matter, only one-third of the licenses on Exhibit A fall within the date range. Appx732-734.

Moreover, there was no dispute of fact. The district court’s order dismissing the -358 case stated: “Our facts are uncontested.” Appx897. Everyone agrees that Uniloc collected about $14,000,000 during the relevant period, and everyone agrees that $14,000,000 is less than $20,000,000. Appx892, Appx897.

Lastly, the order held the Fortress Memorandum should be unsealed because “Fortress has not submitted a declaration in support of its sealing request. Instead, Uniloc filed the hearsay declaration here, merely reporting what Fortress’s counsel apparently said.” Appx35. Among other things, this was a mistake of fact—the declaration was submitted by counsel representing Uniloc *and* Fortress. *See* Appx619-625 ¶¶ 3, 19-23; Appx888-89.

IV. *En Banc* Rehearing: The full Federal Circuit should not sit *en banc* to issue an advisory opinion regarding Ninth Circuit law.

This Court “applies its own law with respect to issues of substantive patent law and certain procedural issues pertaining to patent law, but applies the law of our sister circuits to non-patent issues.” *Rsch. Corp. Techs. v. Microsoft Corp.*, 536 F.3d 1247, 1255 (Fed. Cir. 2008). As the current issue of sealing is left to Ninth Circuit law, it would be an inapt use of this Court’s time to issue an

effectively advisory *en banc* opinion regarding a sister circuit's law. And, in all events, the panel correctly applied Ninth Circuit law.

V. Panel Rehearing: The panel correctly recognized that the district court failed to abide by this Court's prior remand order and that the district court misapplied Ninth Circuit law, so no rehearing is necessary.

A. Third-party licensing information.

As the panel recognized, the district court made two reversible errors with respect to the third-party information. *Uniloc II*, 25 F.4th at 1023-24.

First, this Court in *Uniloc I* reversed and remanded-in-part because "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 I*, 964 F.3d at 1364. The *Uniloc II* panel recognized that the district court failed to follow this instruction: "Nowhere in the record does the district court discuss whether any of the third-party materials constitute protectable trade secrets." *Uniloc II*, 25 F.4th at 1023. Rather, as discussed above, the district court found new ways to avoid doing so. Even EFF does not argue that the order balanced the third-parties' interests. So, the district court abused its discretion. *Id.*

Second, the panel recognized 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." *Id.* The panel did not—as EFF alleges—create a "patent-

specific exemption from the general presumption of public access," Pet. at 2, but rather did just the opposite: The panel understood that the Ninth Circuit does not permit a proverbial thumb on the scale when the information relates to patents. *Uniloc II*, 25 F.4th at 1022, 1023-24. The Ninth Circuit does not recognize any category of information that must be disclosed, irrespective of the private-interests involved.

Everyone agrees that if individual patent-license details are relevant to the outcome in the given case, then they may qualify under the general-interest half of the balancing test. But here, the district court abrogated the other half of the test: It did not balance the private-interests. This was a mistake of law. Even where the licensing details are part of the general-interest—even if they are *only evidence* of the issue—compelling private-interests may still outweigh their disclosure. *E.g.*, *In re Elec. Arts*, 298 F. App'x at 569 (granting petition for writ of mandamus to reverse district court; ordering license agreement sealed).

Indeed, it is not the panel that seeks to turn established law "on its head," Pet. at 2, but EFF. For, EFF does not acknowledge the private-interest aspect of the balancing test. In fact, EFF does not even mention the concept of "compelling

reasons." A balancing test is meaningless if one does not accept that there are two sides to the scale.[9]

As discussed above, the other judges of the District uniformly follow *In re Electronic Arts* to find the private-interests involved in patent licenses constitute compelling reasons to seal. *See supra* at 8-9. For example, the *same day* that the order on appeal issued, Judge Gonzales-Rogers—also of the District—sealed *some of the exact same documents* in Google's parallel motion to dismiss Uniloc's cases against it, including the list of 109 licenses:

> Uniloc 2017 seeks to seal portions of two exhibits that identify third-party licensees and the amounts they paid for each license, as well as their confidential payment information. Pricing terms and confidential financial information are routinely sealed as materials that may be used to harass or harm a party's competitive standing. *See In re Elec. Arts, Inc.*, 298 F. App'x 568, 569 (9th Cir. 2009)[.] The requests are narrowly tailored and do not prevent the public from understanding the issues in this motion. Accordingly, Uniloc 2017's motion seal is GRANTED.

Uniloc 2017 LLC v. Google LLC, 508 F. Supp. 3d 556, 575 n.23 (N.D. Cal. 2020) (citations omitted).[10] Even though Judge Gonzales-Rogers dismissed the *Google*

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[9] For example, even if Exhibit A is "the *only* evidence in the record establishing the fact that was dipositive of Uniloc's lack of standing," Pet. at 11, a court must still balance that against the third-parties' private-interests in its confidentiality, irrespective of EFF's policy arguments. *Id.* at 11-12.

[10] Google's motion paralleled Apple's motions and is the subject of the *Google* -1498 *et seq.* appeals. Many of the same documents currently at-issue were subject to a motion to seal and declaration in the *Google* cases, which filings explained the procedural history of *Uniloc I*. *See* Appx1056-1062.

cases on the basis of the exhibits in question, *id.*, she still sealed those documents. This was the proper outcome.

In sum, the panel correctly recognized that the district court failed to abide by this Court's prior remand; that the individual licensing information was not relevant to the general public-interest in these cases; and that there is no exception to the Ninth Circuit's balancing test for patent licenses. Thus, the panel correctly reversed and remanded as to the third-party information.

B. The Fortress Memorandum.

Lastly, the district court refused to seal the Fortress Memorandum because the district court mistakenly asserted that the declaration in support of sealing it came from Uniloc's counsel.

First, this was a mistake of fact, as the declaration was filed by counsel representing Uniloc *and* Fortress. Appx619-625, ¶¶ 3, 19-23; *see* Dkt. No. 30 at 17-18, 46, 59-61; Reply Br. at 18-20; Appx888-89.

Second, even if it was hearsay as to Fortress, the District uniformly accepts such declarations. *See* Reply Br. 36 at 10-12 & nn.5-6.

Third, as the panel noted, "any procedural failings of Uniloc and Fortress cannot justify unsealing the information of third parties." *Uniloc II*, 25 F.4th at 1024. EFF retorts that "[t]he majority's holding—that a district court abuses its discretion by strictly enforcing its local rules—cannot be squared with *Uniloc I*."

Pet. at 13. But, that is *literally* what *Uniloc I* found: Third-parties cannot be held liable for a party's supposed failure to follow the local rules when it comes to their confidential information. *Uniloc I*, 964 F.3d at 1363-64.

Finally, EFF asserts that "Uniloc has not alleged that [the Fortress Memorandum] implicates information of third parties." Pet. at 15-16. This is untrue. For example, in its Principal Brief, Uniloc explained that the first two pages of the "Fortress Memorandum is a detailed analysis of Uniloc created by non-party Fortress," "based upon Fortress's internal, proprietary analyses." Principal Br. at 59. And, "[t]he third page of the Fortress Memorandum includes a list of fifty-five third-party licenses taken from the larger list of 109 licenses" of Exhibit A. *Id.* at 61; *see also, e.g.*, Dkt. No 36 at 18-20 (discussing Fortress's separate status). These clearly "implicate[] information of third parties," including of Fortress (which is not a party) and the third-party licensees.

CONCLUSION

There is no basis for rehearing. The panel correctly interpreted and applied Ninth Circuit law. And, in the final analysis, the Petition seeks not to apply Ninth Circuit law, but to *change* Ninth Circuit policy, a singularly inappropriate request to make of this Court.

For the foregoing reasons, EFF's Combined Petition for Panel Rehearing and Rehearing *En Banc* should be denied.

April 13, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 13th day of April, 2022, a copy of the foregoing document was filed electronically.

This filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/ Aaron S. Jacobs
Aaron S. Jacobs

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Circuit Rule 40(c). This brief contains 3882 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman type style.

April 13, 2022 *<u>/s/ Aaron S. Jacobs</u>*
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