



ELECTRONIC FRONTIER FOUNDATION

Protecting Rights and Promoting Freedom on the Electronic Frontier

Via First Class Mail
and by email to: advisory.council@cafc.uscourts.gov

April 7, 2015

Chief Circuit Judge Sharon Prost
Advisory Council for the United States Court of Appeals for the Federal Circuit
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Re: Publication of Federal Circuit Disposition Orders

Dear Chief Judge Prost and the Federal Circuit Advisory Council:

At the end of 2014, the Federal Circuit announced that it would no longer issue daily disposition sheets, instead only offering opinions and “selected” orders for free on the court’s website. The signatories to this letter ask the Court to reconsider whether this policy, as currently practiced, meets the interests of judicial transparency and public access to justice. Signatory EFF is a nonprofit civil liberties organization that has worked for more than 20 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its approximately 25,000 dues-paying members have a strong interest in helping the courts and policy-makers in striking the appropriate balance between intellectual property and the public interest. Signatory Dennis D. Crouch is Associate Professor of Law at the University of Missouri School of Law. He is the editor of the popular patent law weblog, Patently-O.

Since the announcement on December 29, 2014, the Court’s commitment to posting “selected” orders has led to the posting of only six orders on the publicly accessible Federal Circuit website.¹ Of those six orders, two were posted between January 9-12,² the third on February 27,³ and the final three on March 23.⁴ However, other orders of high public interest were not made available. For example, an order

¹ A seventh document, listed as an order, appears to have been mislabeled and is actually a Rule 36 judgment. *Nyko Technologies, Inc. v. Energizer Holdings*, No. 2014-1085 (Jan. 12, 2015), available at http://www.cafc.uscourts.gov/images/stories/opinions-orders/14-1085.Rule_36_Judgment.1-8-2015.1.PDF.

² *Fullmer v. McDonald*, No. 2014-7046 (Jan. 9, 2015); *Unitrac v. U.S.*, No. 2014-5034 (Jan. 12, 2015).

³ *Versata Software v. Callidus Software*, No. 2014-1468 (Feb. 27, 2015).

⁴ *Stryker v. Zimmer*, No. 2013-1668 (March 23, 2015) (order on petition for rehearing en banc); *Stryker v. Zimmer*, No. 2013-1668 (March 23, 2015) (order on petition for panel rehearing); *Halo Electronics v. Pulse Electronics*, No. 2013-1472 (March 23, 2015).

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involving ongoing royalties in cases involving Apple and VirnetX⁵ was not chosen for publication on the site, despite the high interest in the proceedings the case has generated, and the impact the order could have on the publicly traded companies. Another order barred Facebook from asserting invalidity defenses on appeal for procedural reasons – a matter of public interest because it could educate litigants about how to preserve issues on appeal, and because Facebook is a public company.⁶

Even in cases where the Court seeks public participation, it has not chosen to put relevant orders up on its website for public access. On December 30, the Court granted a petition for en banc rehearing of *SCA Hygiene Products v. First Quality Baby Products*, No. 2013-1564, announcing on its website that it invited amicus curiae briefs in the case.⁷ Rather than posting the order on its website, the Court instead directed interested parties to view the order on PACER. Because the case is sufficiently important to merit an announcement on the Court’s website, it was dismaying that the order was not selected for public access on the website.

By comparison, the Court posted a wide variety of orders under its previous practice. The last full calendar quarter before the implementation of the current rule was the three month period from July 1, 2014 to September 30, 2014. During that quarter, the Court posted over 180 orders. Those included many orders of public interest, including the U.S. Supreme Court remands in *Akamai Technologies v. Limelight Networks*, No. 2009-1372 (July 24, 2014) and in *Icon Health & Fitness v. Octane Fitness*, No. 2011-1521 (August 26, 2014); an order dismissing the appeal in the well-publicized case of *State of Vermont v. MPHJ Technology Investments*, No. 2014-1481 (August 11, 2014); and several orders involving venue transfers and interlocutory appeals. It appears doubtful that these and other important orders would meet the current criteria for being a “selected” order worthy of posting.

Given these concerns, we ask that the Court review its current policy and how it has been implemented in practice. We further ask the Court to consider whether it is better in the interest of justice and openness to post all substantive orders on its website, or at a minimum post orders that discuss court practices, procedures, or substantive law. The Court’s prior practice enabled the public to easily follow the proceedings of the Court, whereas members of the public wishing to explore the docket must now navigate PACER, and pay associated charges. And even that assumes that the public knows where to look on PACER – such as figuring out which cases are worth investigating.

⁵ *Virnetx, Inc. v. Apple, Inc.*, No. 2014-1395 (Feb. 24, 2015) (order granting Apple’s motion to vacate ongoing royalty).

⁶ *Indacon v. Facebook*, Nos. 2015-1129, 2015-1130 (Feb. 24, 2015).

⁷ *Announcements*, United States Court of Appeals for the Federal Circuit, <http://www.cafc.uscourts.gov/announcements> (last visited April 6, 2015).

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Congress is currently discussing reform of the Patent Act. Free access to Federal Circuit proceedings will better enable policymakers and members of the public to debate the merits of legislative proposals.

There is a very strong public interest in open access to judicial proceedings. As Chief Justice Roberts said in his 2014 Year-End Report on the Federal Judiciary, “[t]he judiciary has a special duty to ensure, as a fundamental matter of equal access to justice, that its case filing process is readily accessible to the entire population, from the most tech-savvy to the most tech-intimidated.”⁸ Posting orders for public consumption furthers that fundamental duty to the public.

Respectfully,

Electronic Frontier Foundation

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⁸ Chief Justice John Roberts, *2014 Year-End Report on the Federal Judiciary* (Dec. 31, 2014), available at <http://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf>.