

Case Nos. 19-1922 (lead), -1923, -1924, -1926 (member cases)

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

**UNILOC 2017 LLC, UNILOC USA, INC., AND
UNILOC LUXEMBOURG, S.A.,**
Plaintiffs-Appellants,

v.

APPLE INC.,
Defendant-Appellee

ELECTRONIC FRONTIER FOUNDATION
Intervenor-Appellee.

Appeal from the United States District Court for the
Northern District of California
No. 3:18-cv-00360-WHA, Judge William H. Alsup

**OPPOSED MOTION OF INTERVENOR-APPELLEE ELECTRONIC
FRONTIER FOUNDATION FOR LEAVE TO VIDEO RECORD
HEARING**

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**OPPOSED MOTION OF INTERVENOR-APPELLEE ELECTRONIC
FRONTIER FOUNDATION FOR PUBLIC ACCESS TO
ORAL ARGUMENT VIDEO.**

INTRODUCTION

This case, which is about the public’s right of access, presents a unique opportunity to educate and encourage litigants to respect that right without judicial intervention. Toward that end, members of the public who are not physically present in the courtroom should be able to see, as well as hear, the oral argument.

Because patent litigants have little incentive to challenge each other’s confidentiality designations or constrain their own, they routinely ask courts to seal far more information than the Constitution or common law permit. To combat this practice, this Court has repeatedly taken steps to enhance public access and limit improper sealing practices, to little avail. Still, the problem persists: Uniloc’s requests in this case are a particularly egregious example, but hardly unique.

Granting access to video of the oral argument in this case—which is about the public’s right of access to court proceedings—will help change that dynamic. Letting the public across the country see video of an oral argument devoted to that issue would send a powerful message about this Court’s commitment to protecting the public’s right of access in patent cases.

Unusually, the oral argument before this Court will be the public’s first chance to see Uniloc present its arguments for sealing in any court. Yet, Uniloc’s

prolific patent litigation practically ensures the same issues will come up in other cases,¹ which makes the outcome of this appeal particularly critical. While the audio recordings are valuable, video conveys non-verbal information that provides crucial context. Members of the public who are not parties and cannot travel to the hearing should have access to that information too.

Intervenor-Appellee Electronic Frontier Foundation (“EFF”) thus respectfully moves for public access to recorded or livestreamed video of the oral argument in this case on the ground that the Constitution and common law, as enshrined in this Court’s case law, rules, and procedures, entitle the public to such access here.²

RELIEF SOUGHT

Public access to video of the oral argument in *Uniloc v. EFF*, No. 19-1922,

¹ For example, many documents are sealed in a pending infringement suit brought by Uniloc against Google. *See Uniloc 2017 LLC v. Google LLC*, No. 2:18-cv-00548-JRG, E.D. Tex, Dkts. 78, 84 (sealed and redacted versions of Google’s motion to dismiss for lack of standing), 93 (sealed and redacted versions of Uniloc’s response), 98, 104, 105 (sealed and redacted versions of Uniloc’s reply).

² Intervenor-Appellee EFF notified counsel for Plaintiff-Appellant and Defendant-Appellee that EFF intended to move for access to livestreamed or pre-recorded video of oral argument in this case on the ground that the constitutional and common law rights of access entitle the public to such access under these circumstances. EFF was informed that Defendant-Appellee takes no position on this motion. EFF was not informed of Plaintiff-Appellant’s position, and assumes Plaintiff-Appellant objects and will file a response in opposition.

on April 8, 2020, whether previously recorded or livestreamed.

ARGUMENT

I. The Public’s Right of Access Should Include the Right to See the Oral Argument via Pre-recorded or Livestreamed Video in this Case.

A. This Court’s Rules and Procedures Enshrine the Public’s Right of Access to Judicial Proceedings Under the Constitution and Common Law.

This Court has consistently recognized the strong constitutional and common law rights of public access to judicial proceedings. *See In re Violation of Rule 28(D)*, 635 F.3d 1352, 1356 (Fed. Cir. 2011) (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597–99 (1978) for the “strong presumption in favor of a common law right of public access to court proceedings,” and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980)) for the “First Amendment right of public access to court proceedings”). The public’s rights of access under the common law and First Amendment apply with full force to oral arguments. *See, e.g.*, Practice Note to Fed. Cir. R. 34 (“Unless held in camera, oral arguments are open to the public.”).

Accordingly, the Court has taken a number of steps to ensure public access. In addition to opening its courtrooms to public, the Court makes audio recordings of oral arguments available shortly after the hearing. *See* Practice Note to Fed. Cir. Rule 34. Its rules require a separate motion for leave to seal more than 15

consecutive words in a filing. *See* Fed. Cir. Rule 28(d)(1). When parties have submitted improper, obtrusive, or excessive confidentiality markings, this Court has required them to show cause to avoid sanctions or disclosure. *See Gilead Scis., Inc. v. Sigmapharm Labs., LLC*, 584 F. App'x 929 (Fed. Cir. 2014) (ordering parties to show cause for avoiding sanctions due to improper confidentiality markings); *In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litig.*, 497 F. App'x 66, 67 (Fed. Cir. 2013) (ordering parties to show cause for sealing of settlement agreement referenced in opinion).

B. Video Coverage Provides Valuable Non-Verbal Information that Audio Recordings Cannot Convey.

Audio recordings of oral arguments cannot convey the valuable information that comes from non-verbal communications between the judges and parties. For example, “[e]xchanged glances, raised eyebrows, smiles, nods, shaking heads, and disapproving frowns (and not to mention, vacant stares when an attorney has altogether lost a judge’s attention) are all left out of the public record, and all of these gestures can shift the meaning of the words judges and attorneys say during oral argument.” Richard A. Posner, Reforming the Federal Judiciary 216 (2017).

This information is no secret. Everyone in the courtroom gets to see the demeanor of party counsel is and whether the judges are paying attention. The entire public, including those who cannot afford to travel to join the proceedings,

should as well.

C. Providing Video Coverage Would Bring This Court in Line with a Growing Trend in the Geographic Circuits.

Recognizing that the public’s right of access extends to oral argument video will also help ensure that this Court’s exclusive jurisdiction enhances, rather than diminishes, public access by reconciling this Court’s practice with a growing trend across the regional circuit courts. These courts—including the Ninth Circuit—provide online access to videos of appellate arguments.³ This is an appeal from the District Court for the Northern District of California. If this case were being appealed to the Ninth Circuit, as it would be if the subject matter did not pertain to patents, the public would have access to online video of the oral argument by default. This disparity should not stand.

II. The Public Has a Strong Interest in Accessing the Full Audiovisual Record of Uniloc’s Oral Argument.

A. Numerous Members of the Public Have an Interest in this Case Because of Uniloc’s Extensive Patent Litigation.

Uniloc is one of the most active patent litigants in the world. Uniloc entities

³ Since 2010, the Ninth Circuit has been posting video recordings of its oral arguments online within 24 hours. Since January 2017, the Third Circuit has permitted panels to decide whether to post videos of oral arguments online. Since of May 1, 2018, the Seventh Circuit has allowed the public to request such access.

have filed hundreds of patent suits in U.S. district courts.⁴ Many members of the public, including litigants and judges, have an interest in learning about Uniloc’s right to sue for patent infringement and seal court documents relevant to that subject. Uniloc’s standing is at issue in the underlying infringement dispute, and, because Uniloc’s standing is a jurisdictional requirement in every patent case, documents like those at issue here could be relevant in any patent case Uniloc brings.

B. This Is the Public’s First—and Likely Last—Chance to See Uniloc Argue for these Sealing Requests in Court.

Despite the legal significance of Uniloc’s standing, oral argument in this Court will be the first time Uniloc has to argue for its sealing requests in court. The District Court never held a public hearing on Uniloc’s initial sealing requests or the revised requests at issue on appeal. Once this Court rules on Uniloc’s sealing requests, district courts will be even less likely to permit parties to re-argue these issues in the future. The fact that this may be the public’s only chance to see Uniloc defend its position in open court makes the need for video access acute.

⁴ See Malathi Nayak, *Google, Amazon, Apple Are Targets of Uniloc Lawsuit Blitz*, Bloomberg Law, (Nov. 23, 2018), <https://news.bloomberglaw.com/ip-law/google-amazon-apple-are-targets-of-uniloc-lawsuit-blitz>.

C. Providing Video Will Encourage Litigants in Patent Cases to Make Proper Sealing Requests that Respect the Public’s Right of Access.

Patent litigants have long obstructed public access and burdened dockets with improper sealing requests.⁵ In many cases, private attorneys have little incentive to challenge an adversary’s redactions—especially where, as is often the case, those attorneys’ clients want to keep their own information secret. Representatives of the press and public can move for leave to intervene, but doing so requires substantial time and resources. The same is true when district court judges have to consider (and re-consider) heavy redactions on multiple docket entries.

Letting the public review the video record of oral argument in this case will send a powerful message with consequences for future patent litigants. However the Court rules on the merits, it is hard to imagine a better way to show this Court’s commitment to the public’s right of access than by ensuring the oral argument devoted to that very issue is available to the public.

⁵ See Bernard Chao and Derigan Silver, *A Case Study in Patent Litigation Transparency*, 2014 J. Disp. Resol. (2014), <https://scholarship.law.missouri.edu/jdr/vol2014/iss1/6> (last visited Feb. 26, 2020).

CONCLUSION

EFF respectfully requests the Court make pre-recorded or livestreamed videos of the oral argument scheduled for argument on April 8, 2020, available to the public.

March 9, 2020

Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION

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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, Electronic Frontier Foundation, San Francisco, California.

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 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.).

March 9, 2020

/s/ Alexandra H. Moss
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*Attorneys for Electronic Frontier
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CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. The foregoing Motion of Intervenor-Appellee Electronic Frontier Foundation For Leave to Video Record Hearing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A). The motion is printed in proportionally spaced 14-point type, and there are 1,611 words in the motion according to the word count of the word-processing system used to prepare the motion (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 motion 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 motion has been prepared in a proportionally spaced typeface using Microsoft® Word for Mac 2016 in 14-point Times New Roman font.

March 9, 2020

/s/ Alexandra H. Moss
Alexandra H. Moss
*Attorneys for Electronic Frontier
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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2020 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.

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