

2014

Case Study in Patent Litigation Transparency, A

Bernard Chao

Derigan Silver

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Bernard Chao and Derigan Silver, *Case Study in Patent Litigation Transparency, A*, 2014 J. Disp. Resol. (2014)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2014/iss1/6>

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

A Case Study In Patent Litigation Transparency

*Bernard Chao and Derigan Silver**

“[M]any patent trials . . . often contain mountains of sealed exhibits.”¹

I. INTRODUCTION

Although the courts have long recognized both a First Amendment and common law right of access to judicial documents, this right is not absolute and parties often seek to have their filings shielded from the public eye. That individuals can hide their health records, or businesses their employee records, is neither surprising nor disturbing. But what may be shocking to some is the extent to which corporations fight their patent lawsuits in almost total secrecy. Large swaths of filings in patent litigations are totally inaccessible. Parties routinely seal court filings, sometimes with little to no judicial oversight. What’s more these filings often do not contain any trade secrets.

This practice reduces judicial accountability and is particularly harmful to our patent system. A transparent court system serves the public interest by giving the public an understanding and appreciation of how the judicial system works. Access also provides an important check on the courts, preventing both corruption and incompetence. Public outcry over unjust decisions often leads to reform. There are also patent-specific reasons why greater transparency is beneficial. Open court records make it easier to discern the boundaries of a patent’s claims and learn about any validity issues. This information improves the decision making of parties encountering patents, thereby helping the entire patent system to operate more efficiently and effectively.

By focusing on a single high profile patent case, *Monsanto v. DuPont*,² this article explores the problem of transparency in patent litigation from two perspectives. First, this article provides metrics for understanding the nature and quantity of documents that were filed under seal in the *Monsanto* case. Second, this article scrutinizes particular aspects of the case to provide a more nuanced understanding of what the public cannot see. Although primarily descriptive, this article critically analyzes the sealing of so many documents by questioning the level of judicial oversight applied in decisions to seal court filings. It then goes on to challenge the justifications for sealing many specific documents.

* Bernard Chao is an Assistant Professor, University of Denver Sturm College of Law. Derigan Silver is an Associate Professor, Department of Media, Film and Journalism Studies University of Denver. The authors would like to thank Margaret Kwoka for her thoughtful comments and Cindy Goldberg for her tireless work analyzing and coding the docket of the *Monsanto* case.

1. Order Granting-In-Part and Denying-In-Part Motions to Seal at 3, *Apple Inc. v. Samsung Electronics Co. et al.*, No. 11-CV-01846-LHK, 2012 WL 3536800 (N.D. Cal. Aug. 9, 2012) (discussing the frequency with which courts seal documents in patent cases).

2. *Monsanto Co. v. E.I. Dupont DeNemours & Co.*, No. 09-CV-00686, 2012 WL 2979080 (E.D. Mo. July 20, 2012).

This article proceeds in four parts. Part I explains why judicial transparency is important both to our democratic system, generally, and to the patent system, specifically. Part II of this article describes the confusing state of the right to access judicial documents in civil cases. Although courts agree that the public has *some* right to access *some* court records, the precise contours of these rights are not clear. Different jurisdictions apply different standards to different categories of documents. It is also disputed whether the public's right of access is rooted in the First Amendment, common law, or both. While some courts have recognized a broad right of access to judicial documents, and require a compelling reason to seal most documents, other courts determine which documents to seal based on the type of document.³

Part III introduces the *Monsanto v. DuPont* case and explains why it was chosen for this case study. The genetically modified seeds that lay at the heart of the dispute have become a vital part of U.S. agribusiness. Therefore, this litigation generated far more interest than a typical patent case. The case also raised novel damages theories. The defendant, DuPont, had not yet sold any infringing seeds, yet the jury still awarded the plaintiff, Monsanto, \$1 billion. Such a result clearly warrants further study. Finally, many of the most critical filings and decisions were sealed from public view, making *Monsanto v. DuPont* an ideal patent case to study judicial transparency.

Part IV assesses transparency in the *Monsanto* case according to several metrics. For example, 592 of the 1,697 of the filings listed in the PACER docket were filed under seal. Additional metrics count the different types of documents filed under seal, and when the judicial process was used to safeguard the public's right to access. Part IV then delves deeper with a qualitative description of some of the sealed *Monsanto* filings. Specifically, Part IV looks at selected documents filed during the pleading, summary judgment, and trial phases of the litigation.

At the beginning of the *Monsanto* case, the court used a few procedural safeguards — requiring court approval to file material under seal and the public filing of redacted versions — to ensure a minimal level of transparency. Unfortunately, the parties, and the court only paid lip service to these procedures and later abandoned them entirely. Consequently, as the case progressed through summary judgment, more and more filings were hidden from public view. The court even filed its own orders under seal. This pattern continued as the trial date approached, with motions *in limine*, jury instructions, and exhibit lists filed completely under seal. Worse yet some of these filings mysteriously disappeared from the docket. However, once the trial began, the court suddenly allowed the public to access the vast majority of the trial transcripts.

Despite this last minute change in course, the *Monsanto v. DuPont* case paints a grim picture of limited public access to court records. Much of the litigation took place entirely in secret. Many of the key filings and court decisions were filed under seal without any public redacted versions made available. The court made little or no effort to comply with the law's procedural safeguards. Unfortunately, it is unclear what caused this procedural breakdown. The court may simply not have had sufficient resources to review all the applications to seal through-

3. See *infra* Part II.

out this massive case.⁴ Whether a result of resource constraints, or another factor, one thing is clear: the *Monsanto* case highlights the recurring problem of over sealing important documents in patent cases.

II. THE IMPORTANCE OF JUDICIAL TRANSPARENCY

A. Generally

The importance of allowing the public to access court records is discussed in a series of Supreme Court decisions. Beginning with *Richmond Newspapers, Inc. v. Virginia*,⁵ decided in 1980, the U.S. Supreme Court consistently held there is a First Amendment right of access to judicial proceedings.⁶ While recent scholarship⁷ and limited case law⁸ suggest that lower courts are increasingly willing to expand a First Amendment right of access to “much broader arenas of access involving other branches and agencies of government,”⁹ access to government activities and documents is typically only granted by freedom of information statutes, sunshine laws or other federal and state statutes.¹⁰ Indeed, in his concurring opinion in *Richmond Newspapers*, Justice John Paul Stevens wrote that the decision represented a landmark First Amendment decision that newsgathering was constitutionally protected.¹¹ “This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever.”¹²

Although *Richmond Newspapers* involved a closed murder trial, numerous lower courts have extended the right of access to civil trials as well. Some courts

4. For a discussion of the time and effort required to review an application to seal, see Order Denying Motion to Seal, *Apple Inc. v. Samsung Elec. Co. et al.*, No. 11-CV-01846-LHK (N.D. Cal. Jul. 24, 2012).

5. 448 U.S. 555 (1980).

6. See, e.g., *Press-Enter. Co. v. Riverside Cnty. Super. Ct.*, 478 U.S. 1 (1986) [hereinafter *Press Enterprise I*]; *Press-Enter. Co. v. Riverside Cnty. Super. Ct.*, 464 U.S. 501 (1984) [hereinafter *Press Enterprise II*]; *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596 (1982).

7. See, e.g., Matthew D. Bunker & Clay Calvert, *Could Wild Horses Drag Access Away From Courtrooms? Expanding First Amendment Rights to New Pastures*, 18 COMM. LAW & POL’Y 247 (2013) (analyzing how the “experience-and-logic test” used by the Supreme Court in judicial access cases is being applied to other areas of law); Derigan Silver, *Power, National Security and Transparency: Judicial Decision Making & Social Architecture in the Federal Courts*, 15 COMM. LAW & POL’Y 129, 156-63 (2010) (writing that some federal judges have concluded that the First Amendment right of access established in judicial transparency cases might be extendable to other types of cases).

8. See, e.g., *Leigh v. Salazar*, 677 F.3d 892 (9th Cir. 2012); *Cal-Almond, Inc. v. U.S. Dep’t of Agric.*, 960 F.2d 105 (9th Cir. 1992).

9. Bunker & Calvert, *supra* note 7, at 249.

10. The federal law governing access to government documents, the Freedom of Information Act, 5 U.S.C. § 552 (2012) is perhaps the best-known law governing access to government information in the United States, although all states have similar statutes governing access to state government documents. The term “sunshine laws” typically refer to open meeting laws at the federal and state level. For a discussion of public access laws across the United States, see Daxton R. “Chip” Stewart, *Let the Sunshine in, or Else: An Examination of the “Teeth” of State and Federal Open Meetings and Open Records Laws*, 15 COMM. LAW & POL’Y 265 (2010).

11. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 582 (1980) (Stevens, J., concurring).

12. *Id.*

have based this right of access on the First Amendment,¹³ while others have found a common law¹⁴ or state constitutional basis for public access.¹⁵ Courts have also extended both the First Amendment right of access and the common law right of access to judicial documents in criminal and civil cases.¹⁶

The Supreme Court has relied on several rationales for its creation of “an architecture of presumptive access”¹⁷ to the judiciary. Writing for a plurality in *Richmond Newspapers*, Chief Justice Warren Burger focused on the historic openness of the judicial system and discussed both the functional benefits of transparency and the First Amendment’s role in self-governance. Based on these rationales, Chief Justice Burger’s opinion held that the First Amendment required that the trial in question be open to the press and public.

Both the language of the First Amendment, and the Court’s decision in *Gannett Co. v. DePasquale*,¹⁸ one year before its *Richmond Newspapers* decision, help to explain Chief Justice Burger’s rationale. Because the Court had ruled the previous term that there was no constitutional right of access to trials under the Sixth Amendment, the justices had to distinguish *Richmond Newspapers* by finding a right of access in the First Amendment.¹⁹ However, the First Amendment is written in negative terms,²⁰ mandating what government cannot do, rather than what it must do. The Amendment seems to require the government avoid restricting speech, rather than provide access to government facilities, documents, or proceedings.²¹

Perhaps due to the textual problems with attaching a right of access to the First Amendment, Chief Justice Burger dedicated ten pages of his plurality opinion to a discussion of “the history of criminal trials being presumptively open” and the benefits government openness brings to society.²² The plurality also included a functional analysis of transparency in government, discussing the “right of access,” the “right to gather information,” and the “right to receive information and ideas,” all rights that the Chief Justice found in the First Amendment.²³ Even

13. See, e.g., *Associated Press v. New Hampshire*, 888 A.2d 1236, 1244 (N.H. 2005) (noting that lower federal courts have applied a First Amendment right of access to civil proceedings).

14. See, e.g., *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 599 (1978).

15. See, e.g., *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (recognizing both constitutional and common law rights of access to civil proceedings).

16. See, e.g., *Press-Enterprise II*, 478 U.S. 1, 13 (1986). (“Denying the transcript of a 41-day preliminary hearing would frustrate what we characterized as the ‘community therapeutic value’ of openness.”).

17. Derigan Silver, *Media Censorship and Access to Terrorism Trials: A Social Architecture Analysis*, 25 NOTRE DAME J.L. ETHICS & PUB. POL’Y 143, 152 (2011).

18. 443 U.S. 368 (1979).

19. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581-82 (1980) (White, J., concurring) (“This case would have been unnecessary had [*Gannett*] construed the Sixth Amendment to forbid excluding the public from criminal proceedings except in narrowly defined circumstances. But the Court there rejected the submission of four of us to this effect, thus requiring that the First Amendment issue involved here be addressed.” (emphasis added)).

20. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

21. For a discussion of newsgathering rights and the debate of the First Amendment’s positive requirements and negative restrictions, see generally Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL’Y 113 (2008).

22. *Richmond Newspapers*, 448 U.S. 555, 564-75 (1980) (plurality).

23. *Id.* at 576 (plurality). Ultimately, Burger concluded it was not crucial how the right was described. *Id.*

though the Constitution contains no textual guarantee to attend criminal trials, Chief Justice Burger wrote that some unenumerated fundamental rights were “indispensable to the enjoyment of rights explicitly defined.”²⁴

Two years after *Richmond Newspapers*, the Court further expanded access to the judiciary under the First Amendment. In *Globe Newspaper Co. v. Superior Court*,²⁵ Justice William Brennan, writing for the majority, employed strict scrutiny in a court-access case for the first time, and elaborated on the structural benefits outlined in *Richmond Newspapers*. Although the right of access to the judiciary is not explicitly mentioned in the First Amendment, Brennan wrote the original intent of the First Amendment supported a broad constitutional right of access.²⁶ The majority cited previous Court decisions that supported a First Amendment right of access, writing that access is necessary to protect the free flow of information about government and to ensure the proper functioning of a democratic society.²⁷ Like Chief Justice Burger, Justice Brennan noted both the long history of open judicial proceedings and contended that transparency played a “particularly significant role . . . in the functioning of the judicial process and government as a whole.”²⁸

In 1984, in *Press-Enterprise Co. v. Riverside County Superior Court (Press-Enterprise I)*,²⁹ the Court ruled that, as an integral element of criminal trials, jury selection was subject to the First Amendment presumption of openness. Writing for the majority of the Court, Chief Justice Burger once again relied upon both historical arguments,³⁰ and the structural benefits that openness brings to the judicial system.³¹

In the 1986 case, *Press-Enterprise Co. v. Riverside County Superior Court (Press-Enterprise II)*,³² the Court held that the First Amendment presumption of openness extended to criminal pretrial hearings as well. Writing for the majority, Chief Justice Burger again used both historical and structural arguments, formalizing the so-called “experience and logic” test now used to determine if a First Amendment right of access attaches to a judicial proceeding.³³ The Chief Justice wrote that if a court proceeding was traditionally open to the public, and “public access play[ed] a significant positive role in the functioning of the particular process in question,” the proceeding was presumptively open to the public.³⁴ Under this analysis, closure is only allowed when, utilizing a heightened scrutiny analy-

24. *Id.* at 580.

25. 457 U.S. 596 (1982).

26. *Id.* at 604. (“[T]he Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.”).

27. *Id.* at 604–05 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966), and citing *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940); *Richmond*, 448 U.S. at 587–88 (Brennan, J., concurring); *id.* at 575 (plurality) ([T]he “‘expressly guaranteed freedoms’ of the First Amendment ‘share a common core purpose of assuring freedom of communication on matters relating to the functioning of government’”)).

28. *Globe Newspaper Co.*, 457 U.S. at 606.

29. 464 U.S. 501 (1984).

30. *Id.* at 506–08.

31. *Id.* at 508–10.

32. 478 U.S. 1 (1986).

33. *Id.* at 6–13.

34. *Id.* at 8.

sis, the court finds that a motion to seal rebuts the presumption of access. The presumption of access “may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”³⁵

As the Court’s opinions reveal, the Supreme Court has consistently held that a transparent judicial system is part of our heritage with roots in colonial America and England, serves an important democratic function, and reinforces the public’s faith in the judicial system.³⁶ In addition, as in other areas of government, transparency can ensure the proper functioning of the judicial system and prevent corruption and abuses of power.³⁷ These benefits are advanced by access to judicial proceedings and judicial documents in both criminal and civil cases. As Judge Richard Posner wrote, “[t]he parties to a lawsuit are not the only people who have a legitimate interest in the record compiled in a legal proceeding.”³⁸

B. Patent Specific

Open access to court filings is particularly important in patent cases because such access helps give the public notice of patent boundaries. To understand just what a patent protects, it is important to be familiar with the two primary components of a patent, the “specification” and the “claims.” The “specification” is the written description of the invention. It describes one or more embodiments (*i.e.* examples) of the invention and includes explanatory drawings. The claims follow the specification and delineate the scope of the patentee’s rights. Each claim contains several limitations that define the claim’s attributes. If any claim of patent is infringed (*i.e.* when an accused product contains all the claim’s limitations), the patent is infringed.

Patent law seeks to provide the public with notice of a patentee’s property rights by requiring that claims “distinctly point out what the inventor regards as the invention.”³⁹ Patents are public documents. Ideally, competitors should be able to find relevant patents, read the claims, and determine what technology they can use.⁴⁰ In practice, however, the patent system frequently does not operate this way.

In many industries, companies turn a blind eye to patents.⁴¹ In part, this is due to the voluminous number of patents that would have to be reviewed. Technology products typically contain many features involving hundreds, if not thousands, of patents.⁴² Moreover, looking at patents often turns out to be a fruitless endeavor.

35. *Id.* at 9-10 (quoting *Press-Enterprise I*, 464 U.S. at 510).

36. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570-71 (1980) (writing that open criminal trials provide “an outlet for community concern[s], hostility and emotion”).

37. *Republic of the Phil. v. Westinghouse Elec. Corp.*, 949 F.2d 653, 660-64 (3d Cir. 1991).

38. *Citizens First Nat’l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999).

39. 35 U.S.C. § 112(b) (2012).

40. *See Permutit Co. v. Graver Corp.*, 284 U.S. 52, 60 (1931) (explaining that a patent must contain claims that “inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not.”).

41. Mark A. Lemley, *Ignoring Patents*, 2008 MICH. ST. L. REV. 19, 21 (2008) (“both researchers and companies in component industries simply ignore patents.”).

42. For example, Goodman and Myers estimated that there were 6,872 patents and patent applications essential to the Wideband Code Division Multiple Access (WCDMA) and 924 to the CDMA

Most patent claims are unclear and consequently do not provide effective notice of their boundaries.⁴³ These issues are partially due to the difficulty of using words to precisely describe technical inventions.⁴⁴ This problem is exacerbated when patent attorneys deliberately use ambiguous language.⁴⁵ Various studies show that even judges have difficulty agreeing on the meaning of different claims.⁴⁶

This uncertainty burdens innovation in several ways. When a competitor encounters a patent with unclear claims, the competitor may be forced to be unduly cautious.⁴⁷ For example, a company might forego using a particular technology that is not actually covered by a patent, in their product, due to their fear of infringement. More importantly, society loses too. A company's decision to forego using a chosen technology may cause its product to become less desirable or more expensive. Uncertainty may also cause companies to take licenses for patents they do not need. The cost of acquiring such licenses is passed on to consumers, unnecessarily increasing the price they pay for a product.⁴⁸

High transaction costs are also associated with unclear claims. It is expensive to have attorneys conduct patent clearances.⁴⁹ It is even more costly to learn the extent of a patent's reach through litigation.⁵⁰ Additionally, by the time a company learns about a patent, they may have already incurred significant sunk costs. Re-tooling a product to avoid future infringement often costs far more than designing a non-infringing product in the first instance.⁵¹

Allowing the public to access judicial records clarifies these boundaries and sheds light on validity issues. When patent holders sue in court, they must explain which aspects of the infringing product their patent claim covers. This involves disclosing infringement contentions and how they interpret the claims. Similarly, defendants try to identify weaknesses in the patent in suit. This includes identifying prior art that might affect the validity of a patent, disclosing invalidity conten-

2000 3G cellular phone standards. David J. Goodman & Robert A. Myers, *3G Cellular Standards and Patents*, 2 (2005), <http://eeweb.poly.edu/dgoodman/wirelesscom2005.pdf>.

43. See Bernard Chao, *The Infringement Continuum*, 35 CARDOZO L. REV. 1359, 1372-75 (2014) (discussing the issue of unclear claims).

44. JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRAT, AND LAWYERS PUT INNOVATORS AT RISK 55 (2008).

45. Dan L. Burk & Mark A. Lemley, *Fence Posts or Sign Posts? Rethinking Patent Claim Construction*, 157 U. PA. L. REV. 1743, 1753 (2009) (“[M]any applicants don’t specify what they mean by ambiguous technical language, either because they don’t think about the issue or because they intend to exploit the ambiguity in obtaining or enforcing the patent.”).

46. See David L. Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 MICH. L. REV. 223, 248 (2008) (finding that in disputes about claim construction, 38.2% of Federal Circuit decisions disagreed with the district court’s claim interpretation of at least one claim term); J. Jonas Anderson & Peter S. Menell, *Informal Deference: An Historical, Empirical, and Normative Analysis of Patent Claim Construction*, 108 NW. U. L. REV. 1, 61 (2013) (reporting that reversal rates have subsequently decreased to less than 20% rate by 2009).

47. Federal Trade Comm’n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition*, 78 (2011), available at <http://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf> [hereinafter FTC, *Evolving IP Marketplace*].

48. *Id.*

49. BESSEN & MEURER, *supra* note 44, at 55 (noting the \$20,000 to \$100,000 cost of legal opinion letters).

50. The median cost of bringing a single patent case to trial ranges from \$650,000 when the amount at risk is less than \$1,000,000 to \$5,500,000 when there is more than \$25,000,000 at risk. *AIPLA Report of the Economic Survey*, AM. INTELL. PROP. L. ASS’N 29 (July 2009).

51. FTC, *Evolving IP Marketplace*, *supra* note 47, at 225.

tions and explaining their own interpretation of the claims. Claim interpretation, also known as claim construction, is so important that courts often deal with it separately, in a so-called *Markman* hearing.⁵² Infringement and validity issues are also usually addressed when the parties file summary judgment motions.

Merely accessing judicial decisions is often insufficient to advance the public interest in judicial transparency. As an initial matter, since most patent cases settle, there are frequently no court rulings that reveal the positions the parties took.⁵³ Even if a court does issue a ruling, it will often be vacated.⁵⁴ In these cases, the parties' court filings become even more important. Access to these records can provide the public with a better understanding of both the scope of a patent's claims and the likelihood that a patent is valid. Infringement contentions and claim construction statements provide far greater detail on the purported scope of a patent than that found in a patent's claims. Further, the patentee is potentially estopped from changing its interpretation of claim terms.⁵⁵

The fact that the patent owners often seek to vacate any adverse rulings after settlement also highlights the importance of the parties' filings.⁵⁶ The purpose behind such tactics is to avoid collateral estoppel when asserting the patents in the future.⁵⁷ This suggests that knowing more about litigated patents benefits the public because they will be asserted again. Unfortunately, when courts seal patent litigation filings, the public never sees these benefits.

Because most patent infringement claims are not litigated,⁵⁸ court access does not enhance public notice for the vast majority of patents. However, there is reason to believe that patent suits involve the most important patents. Shawn Miller's study concluded that with the notable exception of software patents, patents that were litigated more than once tended to be of higher quality.⁵⁹ Presumably, these higher quality patents (*i.e.* patents that are likely to be found valid and have broad claim scope) affect the public most.

52. In *Markman v. Westview Instruments*, 517 U.S. 370 (1996), the Supreme Court held that claim construction is a matter of law for courts to decide. A majority of courts now hold a hearing to construe the meaning of disputed claims terms "midway through, or before the close of, fact discovery, and prior to expert discovery." PETER S. MENELL ET AL., *PATENT CASE MANAGEMENT JUDICIAL GUIDE* 5-5 (2nd ed. 2012).

53. See, e.g., Jay Kesan & Gwendolyn Ball, *How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 WASH. U. L. REV. 237, 273 tbl. 4 (2006) (finding that over 80% of patent cases are resolved before summary judgment).

54. Jeremy W. Bock, *An Empirical Study of Certain Settlement-Related Motions for Vacatur in Patent Cases*, 88 IND. L. J. 919 (2013) (discussing how courts routinely grant vacatur of rulings affecting the scope, validity, or enforceability of a patent and thereby strip the ruling of having any preclusive effect).

55. See generally Moore's Federal Practice § 18□134.30. "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 742-43 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)).

56. Bock, *supra* note 54, at 951-52 (reporting such a condition in 22.8% of settlements).

57. *Id.* at 922.

58. See Mark A. Lemley & Carl Shapiro, *Probabilistic Patents*, 19 J. ECON. PERSP. 75, 79-83 (2005).

59. See Shawn P. Miller, *What's the Connection Between Repeat Litigation and Patent Quality? A (Partial) Defense of the Most Litigated Patents*, 16 STAN. TECH. L. REV. 313, 341 (2013). *But see*, R. Allison, Mark A. Lemley & Joshua Walker, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677- 712 (2011).

III. THE PUBLIC'S RIGHT TO ACCESS JUDICIAL RECORDS

As noted above, numerous courts have found a constitutional or common law right of access to judicial records,⁶⁰ although courts do not always agree about when a First Amendment right applies and when a common law right applies. In addition, many states have statutes guaranteeing access.⁶¹ Courts have generally ruled that the right of access applies to a wide array of both criminal and civil court records.⁶²

As in cases dealing with access to judicial proceedings, courts have used the “experience and logic test” to determine if a First Amendment right of access attaches to judicial documents. Under this test, the court must first determine whether a proceeding or record has historically been open to the public.⁶³ Next, the court must determine if transparency plays a “positive role in the functioning of the particular process in question.”⁶⁴ Closure is only allowed under a heightened scrutiny analysis, and the presumption of access “may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”⁶⁵ Put another way, courts must find a compelling reason to seal documents, and the sealing must be confined to information that advances that reason. In contrast, courts that recognize a common law right of access apply a much less strict balancing approach. Typically this approach weighs the need for confidentiality against the public’s strong, presumptive right of access to court proceedings and records.⁶⁶

United States courts have established inconsistent parameters of the right of access to documents involving negotiated settlements, civil discovery, and documents that were never officially filed with the court. Some courts have found a First Amendment or common law right of access to discovery information,⁶⁷ while other courts have not.⁶⁸ Other courts have found the standard for issuing a protec-

60. Some courts have ruled the First Amendment right of access requires a higher standard for sealing a document than the common law right. *See, e.g.,* *Lugosch v. Pyramid Co.*, 435 F.3d 110, 124 (2d Cir. 2006); *In re Baltimore Sun Co.*, 886 F.2d 60, 64 (4th Cir. 1989).

61. *See* *Judicial Records: A Guide to Access in State & Federal Courts*, NEWS MEDIA & L., Summer 1995, at 1.

62. *See, e.g., In re Access to Juror Questionnaires*, 37 A.3d 879 (D.C. Cir. Jan. 19, 2012) (granting access to questionnaires filled out by jurors and alternates); *Associated Press v. United States Dist. Court*, 705 F.2d 1143 (9th Cir. 1983) (attaching a First Amendment right of access to pretrial motions and documents); *Leucadia, Inc. v. Applied Extrusion Techs, Inc.*, 998 F.2d 157 (3d Cir. 1993) (granting access to judicial documents in a civil case).

63. *Press-Enterprise II*, 478 U.S. 1, 8 (1986).

64. *Id.*

65. *Id.* at 9-10 (quoting *Press-Enterprise I*, 464 U.S. at 510). *See also*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 606-07 (1982); *Washington Post v. Robinson*, 935 F.2d 282, 288, 292 (D.C. Cir. 1991); *Virginia Dep’t of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004).

66. Seymour Moskowitz, *Discovering Discovery: Non-Party Access to Pretrial Information in the Federal Courts 1938-2006*, 78 COLO. L. REV. 817, 861 (2007); *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995) (describing an approach that begins with a common law presumption of access to judicial records and then weighs the “public interest in understanding the judicial process” against “whether disclosure of the material could result in improper use.”). *See also In re National Broadcasting Co.*, 653 F.2d 609, 612-13 (D.C. Cir. 1981); *Miller v. Indiana Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994).

67. *See, e.g., In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 101 F.R.D. 34 (C.D. Cal 1984).

68. *See, e.g., In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985); *Tavoulareas v. Washington Post*, 724 F.2d 1010 (D.C. Cir 1984).

tive order to be the “good cause” standard rather than the First Amendment.⁶⁹ The “good cause” standard, based on Rule 26(c) of the Federal Rules of Civil Procedure⁷⁰ and other similar state rules of procedure, requires a party in a civil lawsuit to show good cause as to why documents should be sealed.⁷¹ Still other courts have ruled that no right of access to discovery materials exists until the trial has begun or the documents have been introduced as evidence.⁷²

Further complicating matters is whether unfiled documents are presumptively open to the public. While many courts have refused to recognize a right of access to unfiled documents,⁷³ a few judges have declined to seal unfiled materials, except upon a showing of “good cause.” For example, in 1992, a Minnesota trial court denied a motion from a St. Paul City Council member, who was a defendant in a civil lawsuit, to seal all discovery materials on grounds that disclosure would cause her public humiliation and reputational harm.⁷⁴ The court said there was a common law and statutory presumption of openness and, therefore, rejected the closure request as overbroad.⁷⁵

A 2009 case, involving sealed documents filed in twenty-three actions alleging sexual abuse by Roman Catholic clergymen, provides an excellent discussion of the various approaches courts have taken. In *Rosado et al. v. Bridgeport Roman Catholic Diocesan Corp.*, the Connecticut Supreme Court ruled that there was a presumptive right of public access to “judicial documents,” which it defined as “any document filed that a court reasonably may rely on in support of its adjudicatory function.”⁷⁶ While the underlying sex abuse cases had been settled and withdrawn in 2001, in 2002 four newspapers filed motions seeking permission to intervene in the cases and requested an order vacating the orders to seal documents. Although the court acknowledged the split regarding the types of judicial documents considered “public,” and reviewed the different approaches taken, the court ultimately concluded that because “discovery proceedings can have a significant impact on the eventual resolution of disputes,” discovery documents should be public in order to advance the public interest in judicial monitoring.⁷⁷

69. See, e.g., *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 118-20 (3d Cir. 1986) (holding the standard for issuing a discovery protective order is good cause).

70. FED. R. CIV. P. 26. Under Rule 26(c), eight types of protective orders may be issued, but the list is nonexclusive and judges have wide discretion to order other appropriate restrictions. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) (“[T]rial courts are in the best position to weigh fairly the competing needs and interests of parties affected by discovery.”).

71. *But see also In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987) (discussing the operation of umbrella protective orders that postpones the necessary showing of “good cause”).

72. See, e.g., *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985); *Tavoulareas v. Washington Post*, 724 F.2d 1010 (D.C. Cir. 1984); *Booth Newspapers, Inc. v. Midland Circuit Judge*, 377 N.W.2d 868 (Mich. Ct. App. 1985); *appeal denied*, 425 Mich. 854 (1986).

73. See, e.g., *West Virginia v. Moore*, 902 F. Supp. 715, 717 (S.D. W. Va. 1995) (holding that depositions in a civil recovery for alleged corrupt acts that were never filed with the court were not judicial documents subject to a right of access).

74. *Baloga v. Maccabee*, No. C3-92-11589, 1992 WL 455440 (Minn. Dist. Ct. Nov. 16, 1992).

75. *Id.*

76. *Rosado et al. v. Bridgeport Roman Catholic Diocesan Corp.*, 970 A.2d 656, 682 (Conn. 2009), *cert. denied*, 130 S. Ct. 500 (2009).

77. *Id.* at 683.

Especially important to the discussion of patent cases is that some courts have denied access to judicial records in order to protect trade secrets.⁷⁸ However, even in these cases, many courts require parties show cause as to why a document should be kept from the public. For example, in 2001 four media companies sued to unseal nine discovery documents and ten pages excerpted from legal briefs from a case brought against Bridgestone/Firestone, Inc., for the death of an 18-year-old football player from West Virginia University. The United States Court of Appeals for the Eleventh Circuit used a “good cause” standard to decide whether the sealed discovery documents should be unsealed.⁷⁹ The Eleventh Circuit ruled that under the “good cause” standard, Bridgestone/Firestone’s interest in keeping trade secrets confidential had to be balanced against the media organizations’ contention that disclosure would serve the public’s interest.⁸⁰

A recent high profile patent case provides an excellent example of how judges apply different standards in deciding whether or not to grant a motion to seal court documents. In *Apple v. Samsung*,⁸¹ a case involving a \$2.5 billion patent infringement claim and dubbed “The Patent Trial of the Century,”⁸² the district court considered numerous motions to seal documents by both the litigants and a substantial number of third parties. The original motions to seal pertained to several different kinds of documents. Some of the documents were produced by the parties and would be used in the trial. Others were used exclusively for prior motions, such as motions for summary judgment. Finally, third parties created some of the documents that were to be used by either Apple or Samsung at trial.⁸³ While neither party opposed the other’s motions to seal, Reuters America LLC filed an opposition, something that is common in patent cases. Because the opposing party does not care if the records are sealed so long as they get to see the documents, motions to seal are rarely challenged unless a third party, such as a media organization, intervenes. The district ruled on this motion in August 2012.

Basing its decision on the common law right of access to judicial documents, the court wrote when considering motions to seal, a “strong presumption in favor of access [was] the starting point.”⁸⁴ The court then used the good cause standard for “non-dispositive motion[s]” and pre-trial documents and the compelling reason standard for any record “attached to a dispositive motion or presented at trial.”⁸⁵ However, the court also used the compelling reason standard for pre-trial documents related to the admissibility of evidence, because admissibility of evidence was “such a closely contested issue in [the] trial,” and had “become crucial

78. A trade secret “may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” RESTATEMENT (FIRST) OF TORTS § 757, cmt. b (1939).

79. *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1314-15 (11th Cir. 2001).

80. *Id.*

81. Order Granting-In-Part and Denying-In-Part Motions to Seal at 1, *Apple Inc. v. Samsung Electronics Co. et al.*, No. 11-CV-01846-LHK, 2012 WL 3536800 (N.D. Cal. Aug. 9, 2012).

82. See Ashby Jones & Jessica E. Vascellaro, *Apple v. Samsung: The Patent Trial of the Century*, WALL ST. J., July 24, 2012.

83. *Apple Inc.*, 11-CV-01846-LHK, at 1.

84. *Id.* at 1-2. (citing *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006)).

85. *Id.* (citing *Pintos v. Pac. Creditors Ass’n*, 605 F.3d 665, 678 (9th Cir. 2010)).

to the public's understanding of the proceedings."⁸⁶ The court then weighed each litigants' and third parties' interests in sealing each document against the public's interest in accessing that document.⁸⁷ The public's interest in the document was analyzed in light of the role the document would play in "ensuring the 'public's understanding of the judicial process and of significant public events.'"⁸⁸

Based on this standard, the district court agreed to seal "only a small number of trial exhibits" and "most exhibits attached to pre-trial and post-trial motions were ordered unsealed."⁸⁹ In general, the court sealed information about the parties' production and supply capacities, confidential source code, third-party market research reports, and the pricing terms of licensing agreements. The court unsealed documents disclosing the parties' product-specific profits, profit margins, unit sales, revenues and costs, Apple's proprietary market research, and non-price terms of licensing agreements.⁹⁰ After trial, Apple moved for a permanent injunction and enhanced damages from Samsung.⁹¹ In opposing the motion, Samsung submitted exhibits containing information Apple had designated as confidential, in addition to a motion to seal the material.⁹² The district court, however, denied Samsung's motion in November 2012.⁹³

While Apple and Samsung did not challenge most of the district court's orders, both appealed the courts' orders to unseal a "small subset of exhibits attached to pre-trial and post-trial motions."⁹⁴ These exhibits had been filed by both parties and contained financial information and market reports. On appeal, the U.S. Court of Appeals for the Federal Circuit based its decision, affirming in part and reversing in part, on the common law right of access to judicial records. The court found that under Ninth Circuit precedent there was "a strong presumption in favor of access to court records."⁹⁵ However, this presumption of access could be overcome by providing "sufficiently compelling reasons" that override the public policies favoring disclosure.⁹⁶ The court wrote the party seeking to seal a judicial record "must articulate compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure, such as the public interest in understanding the judicial process."⁹⁷ The court also confirmed that under Ninth Circuit precedent, the good cause standard under Federal Rules of Civil Procedure 26(c) was sufficient to seal discovery documents

86. *Id.* at 7 ("Because admissibility of evidence is such a closely contest issue in this trail, which has become crucial to the public's understanding of the proceedings, the Court will apply the "compelling reasons" standard to documents attached to these non-dispositive motions as well.").

87. *Id.* at 7-8.

88. *Id.* at 1-2 (citing *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (quoting *Valley Broadcasting Co. v. U.S. Cist. Court for Dist. Of Nev.*, 798 F.2d 1289, 1294 (9th Cir. 1986))).

89. *Apple Inc. v. Samsung Electronics Co. et al.*, 12-CV-0630-LHK (July 24, 2013).

90. For a complete discussion of the individual documents, see Order Granting-In-Part and Denying-In-Part Motions to Seal, *Apple Inc. v. Samsung Electronics Co. et al.*, No. 11-CV-01846-LHK, 2012 WL 3536800 (N.D. Cal. Aug. 9, 2012).

91. Order Granting-In-Part and Denying-In-Part Motions to Seal, *Apple Inc. v. Samsung Electronics Co. et al.*, No. 11-CV-01846-LHK at 2 (N.D. Cal. Nov. 29, 2012).

92. *Id.* at 1.

93. *Id.*

94. *Apple Inc.*, 12-CV-0630-LHK at 1-2.

95. *Id.* at 10.

96. *Id.*

97. *Id.* (quoting citing *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006)).

attached to non-dispositive motions.⁹⁸ The Federal Circuit, however, ruled that the district court erred when it applied the compelling reasons standard to documents attached to non-dispositive motions that simply addressed the admissibility of evidence.⁹⁹

Based on these standards, the appeals court overturned the district court's August order to unseal financial documents. The court found the litigants were only seeking to seal a small subset of the documents that they had originally sought to seal, only sought to redact limited portions of that subset, and had a significant interest in preventing the release of their detailed financial information.¹⁰⁰ The court held that the public had a "minimal interest" in this information.¹⁰¹ In addition, the court overturned the district court's November order to unseal nine Apple market research reports. Balancing Apple's interest in sealing the documents with the public's interest, the court ruled that Apple could suffer competitive harm if the reports were made available to the public. In addition, the court noted that Apple agreed to make public all of the information contained in the documents that were actually cited by the parties or the district court. Based on these reasons, the Ninth Circuit held the district court had abused its discretion in ordering all nine market research reports be unsealed.¹⁰²

In *Apple v. Samsung*, both the district court and appeals court used appropriate standards, despite reaching disparate conclusions. However, it is important to note that not all courts consistently apply the experience and logic test, the presumption of access required by the common law, the "good cause" standard, or any other uniform approach to sealing judicial documents. As Professor Seymour Moskowitz notes, the problem is compounded by the fact that "protective orders are often approved pro-forma by overburdened courts anxious to avoid time consuming . . . disputes."¹⁰³ Professor Moskowitz also notes that local federal district courts have rules barring or excusing parties from filing discovery materials unless ordered to do so, and local rules often deviate from federal rules in "many particulars."¹⁰⁴ Perhaps because of these inconsistencies, patent trials "often contain mountains of sealed exhibits."¹⁰⁵

IV. STUDYING ACCESS TO PATENT LITIGATIONS

In patent cases, there are indications that it is far easier to seal court records than what the law suggests. Reporters and bloggers have written about difficulties accessing important filings in high profile patent cases.¹⁰⁶ Both courts and the

98. *Id.* at 11.

99. *Id.* at 12 ("[W]e are not aware of any Ninth Circuit precedent applying the 'compelling reasons' standard to non-dispositive motions regarding the admissibility of evidence at trial. The district court's reasoning—that admissibility of evidence was a closely contested issue—does not justify departure from the Ninth Circuit's general rule").

100. *Id.* at 17.

101. *Id.* at 19. The court reasoned that disclosure of information in the documents did not promote the public's understanding of the judicial process or significant public events.

102. *Id.* at 23-24.

103. Moskowitz, *supra* note 66, at 826.

104. *Id.* at 828.

105. *Apple Inc. v. Samsung Electronics Co. et al.*, 12-CV-0630-LHK, 3 (July 24, 2013).

106. Evan Hansen, *Why Secrecy in Patent Cases Is Out of Control — and What to Do About It* (April 30, 2013), <https://medium.com/your-digital-rights/112b7784d0a>; Dan Levine, *Microsoft vs. Google Trial Raises Concerns over Secrecy*, REUTERS (Nov. 2, 2012, 2:18 PM),

press have also complained that parties in patent cases designate almost everything as confidential.¹⁰⁷ In at least two instances, the courts have chastised parties for attempting to hide basic information like case citations.¹⁰⁸ One author recounted his frustrations in trying to learn about emerging theories in patent law by looking at district court filings.¹⁰⁹ Entire briefs in many of the busiest patent courts were frequently sealed.¹¹⁰ Unfortunately, it is not clear how pervasive the problem is.

Consequently, the authors are studying the accessibility of patent court records in two contexts. Analyzing transparency from a macro prospective, we are currently conducting the first comprehensive study of judicial transparency in district court patent litigation. More immediately, this Article considers transparency in patent cases by focusing on a single high profile patent case, *Monsanto v. DuPont*.¹¹¹ Together these approaches provide both a quantitative assessment of transparency and a dynamic understanding of what kind of subject matter is hidden from the public when filings are routinely placed under seal.

A. The Transparency Landscape

Although the subject of this Article is the *Monsanto v. DuPont* docket, it adopts many of the same metrics the authors are using in their larger, comprehensive study. Consequently, this section provides a brief description of the methodology of the larger study here. All patent cases filed in United States district courts in 2009 are being studied using the Lex Machina database.¹¹²

In addition to determining the number of filings placed under seal in each case,¹¹³ the study also counts motions to file under seal and their success rates.¹¹⁴ Because some courts require parties to file public versions of any sealed filing,¹¹⁵ such redacted versions, and any files that are ultimately unsealed, are also counted. The documents contained in each sealed filing are categorized by subject mat-

<http://www.reuters.com/article/2012/11/02/net-us-microsoft-google-secrecy-idUSBRE8A106Y20121102>.

107. Raymond Baldino, *Federal Judge Orders Unsealing of Documents in Ongoing Apple-Samsung Patent Litigation*, Reporters Committee for Freedom of the Press (July 20, 2012), available at <https://www.rcfp.org/browse-media-law-resources/news/federal-judge-orders-unsealing-documents-ongoing-apple-samsung-paten>.

108. *Apple Inc. v. Samsung Electronics Co. et al.*, 12-CV-0630-LHK (July 24, 2013) (discussing Google's attempt to seal published case citations filed in support of a motion to quash); *In re Violation of Rule 28(d)*, 635 F.3d 1352 (Fed. Cir. 2011) (issuing sanctions for over designating confidential material).

109. Bernard Chao, *Not So Confidential: A Call for Restraint in Sealing Court Records*, 2011 PATENTLY-O PAT. L. J. 6 (2011), available at <http://patentlyo.com/media/docs/2011/07/chao.sealed.records.pdf>.

110. *Id.* at 7.

111. No. 09-CV-00686, 2012 WL 2979080 (E.D. Mo. July 20, 2012).

112. The Lex Machina is a database populated by crawling the entire federal court PACER docketing system daily looking for patent documents. See LEX MACHINA, www.lexmachina.com (last visited Apr. 21, 2014).

113. By "filing", we mean a single docket entry in PACER (Public Access to Court Electronic Records). The PACER system allows the public on-line access to federal district court filings.

114. In some districts, most notably the Eastern District of Texas, a party does not have to ask the court to file a document under seal. See LR CV-5(a)(7)(A), E.D. TEX. LOCAL CIV. R., available at <http://www.txed.uscourts.gov/page1.shtml?location=rules:local>.

115. See Civil Standing Order Regarding Motions To File Under Seal U.S. District Judge Lucy H. Koh (December 1, 2011), available at <http://www.cand.uscourts.gov/lhkorders>.

ter. The three subject matter categories are: summary judgment, discovery, and other. In some cases, courts even seal their own rulings. Consequently, the study also counts these occurrences.

B. *Monsanto v. DuPont*

The *Monsanto v. DuPont* case was chosen for this case study for a number of reasons. First, it was a high profile patent case of significant public importance. Monsanto developed and patented a strain of genetically modified soybean plant that is resistant to Monsanto's Roundup herbicide. The resulting seeds were so successful that by 2011 Monsanto controlled approximately 90% of the soybean seed market.¹¹⁶ DuPont sought to develop its own Roundup resistant seed and obtained a license from Monsanto to do so. However, the scope of that license was disputed, and Monsanto sued DuPont for patent infringement. Monsanto eventually prevailed at trial, receiving a jury verdict of one billion dollars, one of the largest awards in a patent infringement case in U.S. history.¹¹⁷

Second, *Monsanto v. DuPont* involved a new, untested patent damages theory. Traditionally, damages in patent cases are awarded based on sales of infringing product. However, in the *Monsanto* case, the one billion dollar award was based on seeds DuPont had developed, but not yet sold. Thus, the precise contours of this damages theory are of interest to practicing attorneys, judges, and academics alike.¹¹⁸

Finally, the *Monsanto* case went to trial, and many of its filings are under seal. Thus, it illustrates the different categories of subject matter that are sealed and the different procedures utilized to keep information from the public. To be clear, the *Monsanto* case is not representative of patent litigation generally. Rather, it represents one end of the spectrum. To provide some context, at the time that this Article was being edited, 601 cases with 50 or more docket entries had been coded in the study. Only one of those cases contains a higher percentage of sealed documents.¹¹⁹

1. The Numbers

Before delving into the details of *Monsanto v. DuPont*, this section assesses the case using methods described above. Monsanto filed its complaint on May 4, 2009, in the Eastern District of Missouri. The jury returned its verdict on August 1, 2012. The case settled in March of 2013, but filings continued through June 18, 2013.

116. AP: *Monsanto Strong-Arms Seed Industry*, CBSNEWS (Dec. 14, 2009, 1:20 PM), http://www.cbsnews.com/2100-500395_162-5978152.html?pageNum=1.

117. Joe Whittington, Andrew Harris & Jack Kaskey, *Monsanto Awarded \$1 Billion Against DuPont by Jury*, BLOOMBERG (August 2, 2012, 8:59 AM), <http://www.bloomberg.com/news/2012-08-01/monsanto-awarded-1-billion-against-dupont-by-jury.html>.

118. For a more in depth analysis of Monsanto's damages theory, see Bernard Chao & Jonathan R. Gray, *A \$1 Billion Parable*, 90 DENV. U. L. REV. ONLINE 185 (2013).

119. Since the study has not finished our quality controls, we will not release the name of that case yet.

There were a total of 1,697 docket entries in this case.¹²⁰ Five hundred ninety-one PACER entries were filed under seal, 34.9% of all the entries in the case. The parties filed seventy motions to seal, all of which the court granted. Additionally, on February 15, 2011, the court issued an order *sua sponte* allowing the parties to submit filings under seal “without leave of Court.”¹²¹ Thus, with one exception, the parties no longer had to seek leave from the court to seal their filings.¹²²

The sealed filings broke down as follows: 183 related to summary judgment motions,¹²³ 140 motions related to discovery, and 271 “other” motions. The court even sealed 34 of its own rulings. Prior to the February 15, 2011 *sua sponte* order, the parties filed public redacted copies of all sealed documents. However, despite the fact that the February 15, 2011 order did not expressly relieve the parties of the responsibility to file redacted copies of sealed documents, the parties stopped filing public versions after the order was issued. Consequently, only 65 of the 592 sealed filings were filed with corresponding public redacted versions. The remaining 527 filings were completely hidden from the public eye. The Court did eventually attempt to unseal six filings, all of them court orders. Nevertheless, two “unsealed” orders remain inaccessible through PACER.¹²⁴ A summary of these findings is found in Table A, below.

Table A

Monsanto v. DuPont, Transparency Metrics¹²⁵

Pacer Entries	1,697
Filings Under Seal ¹²⁶	592
Related to Summary Judgment	183
Related to Discovery	140
Related to Other	271

120. A complete listing of the PACER docket sheet is available at one of the author’s website. See *Faculty Profile*, UNIVERSITY OF DENVER STURM COLLEGE OF LAW, <http://www.law.du.edu/index.php/profile/bernard-chao>. The docket is available under a pull down menu labeled “Information on Empirical Research.”

121. Order relating to Under Seal Pleadings (Feb. 15, 2011), *Monsanto Co. v. E.I. Dupont DeNemours & Co.*, No. 09-CV-00686, 2012 WL 2979080 (E.D. Mo. July 20, 2012) [hereinafter *Monsanto v. DuPont*].

122. After February 17, 2011, the one exception occurred on August 16, 2012 when DuPont filed a Notice Of Intent To Request Redaction. This request related to portions of the August 1, 2012 trial transcript. See *infra* notes 152-154 and accompanying text. The only reason given for the request is that the relevant passages relate to a sidebar out of hearing of the jury and the public.

123. As discussed later, that is the large majority of filings that were related to the parties’ summary judgment motions.

124. An order unsealing four previously sealed court orders was issued on Nov. 16, 2011. The orders that still remain sealed are an order granting a motion for sanctions dated Dec. 21, 2011 and an order that appeared to address motions *in limine* and *Daubert* motions, dated Jun. 29, 2012.

125. All fields are assessed by counting the number of PACER entries that fall under each category. Thus, a summary judgment motion with exhibits is counted as one filing so long as there is only a single PACER entry.

126. Two filings were categorized as related to both summary judgment and discovery. They were a brief and declaration that were filed in opposition to a Monsanto motion for partial summary judgment and in support of DuPont’s own motion for continuance and discovery. *Monsanto v. DuPont* (Dec. 17, 2009).

Motion/Application to File Under Seal	70
Granted	70
Denied	0
Public Redacted Version Available	65
Subsequently Unsealed	6

2. Light (or No) Judicial Review

This Article looks beyond the numbers and analyzes what kind of material is being placed under seal. Presumably, studying motions to seal would shed light on the general nature of the hidden information, as parties must justify their requests under either the compelling interest or the good cause standards. However, even when the *Monsanto* parties did seek the court's permission to seal filings, the motions were strikingly unhelpful. For the most part, the motions simply characterize information as "confidential" without providing any meaningful detail.¹²⁷ Unsurprisingly, the various orders granting motions to seal are terse and uninformative docket entries.¹²⁸ The orders contain no descriptions of the confidential materials, or anything to suggest that the court made independent determinations that the confidentiality claims were justified. Thus, the motions to seal, and the corresponding orders, suggest that even when the court was reviewing requests to seal, it did not subject the parties' motions to the standards discussed above. Rather, the court appears to have taken the parties' word and allowed them to file any document that they desired under seal. This conclusion is corroborated by the court's failure to deny even one motion to seal. Additionally, the fact that the court instructed the parties to submit filings under seal without judicial approval also suggests that the court was either uninterested in considering the merits of such motions, or too busy to do so.

The court's failure to scrutinize motions to seal presents another, perhaps unforeseen, problem for judicial transparency. It was often difficult to determine even the general nature of some of the *Monsanto* filings. Instead of analyzing the motions to seal, or corresponding orders, the two primary methods available to determine which information was sealed were to examine the portions of the redacted filings that were left intact or to review the docket entries available on PACER. The entries often provided an informal title of the filing. In some cases, even these entries were unavailable. The only evidence that such documents existed was that certain file numbers appeared to be skipped on PACER. Often a later filing referred to a missing file number and provided its title. Due to these difficulties, this essay describes some documents that the authors were unable to read.¹²⁹

127. See, e.g., Defendants' Motion for Leave to File Answer and Counterclaims and Memorandum in Support of Defendants' Motion to Dismiss Under Seal, *Monsanto v. DuPont* (June 16, 2009) (simply noting that the filings contained "confidential and proprietary information."); *DuPont & Pioneer's Request for Redaction of Transcript of October 12, 2010 Hearing, Monsanto v. DuPont* (Nov. 10, 2010) (saying that the identified portions of the transcript is "consistent with the Court's Order dated October 15, 2010." Unfortunately, the October 15 order was also filed under seal and there is no indication in the docket entry of what subject matter it addresses.).

128. One example is the May 20, 2009 entry which says, "Docket Text ORDER: Motion to Seal Documents [doc. #3] is GRANTED. The Unredacted Complaint and Exhibits B and C shall remain sealed by this Court." See *supra* note 120.

129. Where such descriptions are provided, the reasons underlying the analysis are explained.

3. Redacted Pleadings

The very first motion to seal filed in the *Monsanto* case clearly illustrates some of the difficulties in learning precisely what was sealed and why. Monsanto successfully moved to file portions of its Complaint under seal. Monsanto's request was short and conclusory, stating:

Both the Complaint and the License Agreements contain confidential and proprietary information, as defined in the License Agreements. Therefore, it is necessary to seal Exhibits B and C in their entirety, as well as those portions of the Complaint that provide specific terms contained in the License Agreements.¹³⁰

Although this motion reveals Monsanto's attempt to keep some terms of their licenses secret, it does not provide any description of those terms, explain why they are confidential, or suggest any specific harm that would result from disclosure. Unless the court actually compared the sealed version of the Complaint with the redacted version, it could not have identified the confidential material, let alone, assessed the merits of Monsanto's confidentiality claims. There is also no way to determine if the court performed this analysis because the motion was granted with no comment.¹³¹

An examination of the public version of the Complaint reveals that Monsanto redacted more than just a few licensing terms.¹³² Although unredacted parts of the Complaint identify the parties, the general subject matter,¹³³ and the general legal theories,¹³⁴ there is no way for the public to ascertain what the wrong DuPont is alleged to have committed. Large portions of the Complaint are completely blacked out and the surrounding paragraphs do not provide sufficient context to determine what is missing.¹³⁵ Even passages describing the injunction that Monsanto sought are redacted.¹³⁶

Examining the different causes of action illustrates the difficulty of comprehending the Complaint. For example, Count I, entitled "Patent Infringement ('247 Patent'),"¹³⁷ alleges infringement of "one or more claims of the '247 Patent' by [REDACTED] [REDACTED]"¹³⁸ The redaction continues for two lines. Similarly, Count II alleges that the defendants induced others to infringe the '247 patent,' but four paragraphs of the Count are redacted.¹³⁹ Two of these paragraphs were unsealed in a later court ruling, revealing that Monsanto had sought to hide information that

130. Motion for Leave to File Un-redacted Complaint and Certain Exhibits Under Seal at 2, *Monsanto v. DuPont* (May 4, 2009); see *supra* note 120.

131. See *supra* note 128 for the text of the order.

132. Complaint, *Monsanto v. DuPont* (May 4 2009). Again, the authors have made this document available. See *supra* notes 113, 120 at <http://www.law.du.edu/documents/directory/full-time/chaodockets/Monsantos-Complaint-Redacted.pdf> [hereinafter Complaint].

133. *Id.* at 1-3. The dispute concerns soybean and corn seeds that have been genetically modified to be resistant to Roundup. *Id.* at 3.

134. *Id.* These theories are patent infringement, breach of contract and unjust enrichment. *Id.* at 1.

135. For example, paragraphs 16-29 and 31-44 of the Complaint are completely redacted while paragraph 30 is partially redacted. *Id.* at 6-11.

136. *Id.* at 22-25.

137. The '247 patent' is United States Patent No. RE 39,247E. *Id.* at 3.

138. Complaint, *supra* note 132, at 14-15.

139. *Id.* at 15-16.

was not proprietary, and which was already available to the public.¹⁴⁰ It is unclear why Monsanto redacted these statements considering that it had previously issued a press release announcing the lawsuit, and stating that it was suing DuPont to prevent it from using Roundup Ready technology in crops that already had the Optimum GAT trait.¹⁴¹ Thus, it appears from the court filings that Monsanto redacted information already widely available to the public without any intervention or oversight from the court.

Monsanto also heavily redacted the breach of contract claims. Count VI alleges that the defendants breached two separate agreements, the so-called “Soybean License Agreement” and “Soybean Trademark License Agreement.” However, there is no way for the public to determine what contract terms were at issue or what activity constituted the alleged breach. The count contains eight paragraphs.¹⁴² Five paragraphs are completely redacted and two others are partially redacted. One of the partially redacted paragraphs incorporates by reference other portions of the complaint, which are also mostly redacted. The other partially redacted paragraph alleges that Monsanto suffered some unspecified damage as a result of the defendants’ breach. It is unclear how public disclosure of the scope of the license grant would harm either party. Additionally, studying this dispute might have helped attorneys to draft less ambiguous license agreements in the future. If the court had engaged in any sort of balancing test, it is clear that the court would have favored transparency in the public interest, as no reason for sealing the documents is stated or discernable.

In an apparent about face, Monsanto subsequently filed a motion for judgment on the pleadings that divulged some of the very information that appears to have been redacted from the original Complaint.¹⁴³ Although the specific contract language remained redacted, the subsequent motion provides a much fuller description of the parties’ dispute. It reveals that Monsanto had previously granted DuPont a license to its Roundup resistant technology, but that Monsanto did not interpret the license as allowing DuPont to combine this technology with DuPont’s own Roundup resistant technology, Optimum® GAT®.¹⁴⁴ DuPont disagreed with this interpretation and had publically announced that it was planning to sell seeds with both of these traits. The result was a lawsuit. Because DuPont was using Monsanto’s patented technology in a manner that Monsanto believed was not permitted by the license, it brought both patent infringement and breach of contract claims against DuPont.

140. One of the two paragraphs that were later revealed was Paragraph 72, which alleges: 72. Upon information and belief, [Pioneer’s] statement to . . . third-party licensees that the licensees can permissibly stack Monsanto’s patented 40-3-2 Soybean Event with the Optimum® GAT® gene is inducing these licensees to directly infringe the ‘247 Patent.’

See Plaintiffs’ Memorandum in Support of Their Motion for Partial Judgment on the Pleadings, *Monsanto v. DuPont* (July 22, 2009); *Monsanto Challenges Unauthorized Use of Roundup Ready® Technology by DuPont* (May 5, 2009), available at <http://news.monsanto.com/press-release/monsanto-challenges-unauthorized-use-roundup-ready-technology-dupont>.

141. See *Monsanto Challenges Unauthorized Use*, *supra* note 140.

142. Complaint, *supra* note 132, at 15-16.

143. See Plaintiffs’ Memorandum in Support of Their Motion for Partial Judgment on the Pleadings, *Monsanto v. DuPont* (Jul. 22, 2009).

144. *Id.* at 2. (“At issue in this litigation is whether Defendants have the right under these License Agreements to combine or ‘stack’ their glyphosate-tolerant Optimum® GAT® technology with Monsanto’s glyphosate-tolerant Roundup Ready® soybean or corn technology. Under the clear and unambiguous terms of the License Agreements, the answer is no.”).

Comparing Monsanto's motion for a judgment on the pleadings with its original Complaint reveals that Monsanto's characterization of what constituted "confidential" information was inconsistent. For example, the redacted version of Monsanto's motion for judgment on the pleadings characterizes Count III of the Complaint as pleading "breach of contract based on Defendants' unlawful stacking of Monsanto's 40-3-2 with Defendants' Optimum® GAT®," and Count VIII as pleading a breach of contract based on "Defendant's unlawful stack of Monsanto's NK603 with Defendant's Optimum® GAT®."¹⁴⁵ Although the public version of the Complaint identifies the specific licenses that were the subject of each Count's breach of contract claim, references to Monsanto's 40-3-2 technology, Monsanto's NK60 technology, and Optimum® GAT® are missing, presumably redacted.¹⁴⁶

This inconsistency suggests that at least some of the information Monsanto redacted from its Complaint was not truly confidential. Indeed, the court's opinion granting Monsanto's motion was not redacted at all and quoted the key sections of the license agreements.¹⁴⁷ The opinion also quoted directly from redacted portions of Monsanto's Complaint.¹⁴⁸ Moreover, immediately after the Court granted the motion, Monsanto issued a press release touting the ruling.¹⁴⁹ This press release disclosed some of the same specific subject matter that Monsanto had previously redacted from its Complaint.

4. Secret Summary Judgment Proceedings

As the *Monsanto* case progressed, even more of the case was hidden from public view. Summary judgment motions are usually a crucial stage of any patent litigation. The parties typically disclose a detailed theory of their case or risk losing claims or defenses. Consequently, observers should be able to determine the key facts and legal theories of a case by reading the briefs filed in connection with the parties' summary judgment motions.

In the *Monsanto* case, seventeen separate summary judgment motions were filed, eight by the plaintiff and nine by the defendant. These motions are listed in Appendix A, in chronological order. Each motion is referred to by its corresponding number in the appendix. Sixteen of the seventeen memoranda filed in support of the parties' motions were sealed. Only one memorandum was entirely accessible by the public (SJ 2). Of the sixteen sealed briefs, there is only one public redacted filing (in connection with SJ 1).¹⁵⁰ The responses and replies followed the same pattern. Of the 15 sets of responses and replies filed in opposition to these

145. *Id.* at 13.

146. Complaint at 16-17, 21, *Monsanto v. DuPont* (May 4, 2009).

147. *Monsanto v. DuPont* at 6-8, 14 (Jan. 15, 2010) (quoting from six different sections of the Monsanto DuPont license).

148. *Id.* at 12-13.

149. Federal Court Finds DuPont is Not Licensed to Use Monsanto's Roundup Ready® Trait in Combination With the DuPont Optimum® GAT® Trait (Jan. 19, 2010), <http://news.monsanto.com/press-release/federal-court-finds-dupont-not-licensed-use-monsantos-roundup-ready-trait-combination->. "The Court ruled that the Monsanto-DuPont license agreements 'are unambiguous and do not grant Pioneer the right to stack' the Roundup Ready trait with the Optimum GAT trait.")

150. In other words, 15 of the 17 opening briefs, or 88%, were filed completely under seal. *See infra* app. A.

motions,¹⁵¹ only one set of briefs was filed without any restrictions (again SJ 2). One set of briefs was redacted (again SJ 1).¹⁵² The remaining thirteen sets, representing 87% of the briefs filed, were filed completely under seal.

More surprisingly, the court rulings were also sealed. The court *appears* to have issued twelve opinions (SJs 5, 7-17).¹⁵³ The term “appears” is used because *all* twelve rulings were originally sealed with *no* redacted public counterparts. However, the docket entries for each of these orders mention a “Sealed *Memorandum* and Order,” suggesting that the court issued written opinions explaining the reasoning for its decisions. It is clear that this was the case for at least two of the court’s decisions. After the trial, the court granted Monsanto’s motion to unseal the rulings on SJs 11 and 12.¹⁵⁴ Thus, these two formerly secret orders are now available. Oddly, the briefings underlying SJs 11 and 12 remain sealed.

Although some of these summary judgment motions undoubtedly touch on confidential subject matter, many of the motions do not appear to concern anything secret. For example, the titles of SJs 8 and 16 indicate that they involve 35 U.S.C. § 112’s enablement and written description requirements. The enablement requirement is satisfied when a person of ordinary skill in the art, after reading the specification, could practice the claimed invention without undue experimentation.¹⁵⁵ The written description requirement is satisfied when the specifications “allow persons of ordinary skill in the art to recognize that the inventor invented what is claimed.”¹⁵⁶ If either requirement is not satisfied, the corresponding patent claim is invalid. Importantly, the inquiry underlying both defenses is simply whether the patent specification contains sufficient technical detail to justify the claim. Thus, these two defenses involve an analysis of a public document, namely the patent at issue. There is no reason why briefs addressing these issues would delve into the parties’ secrets. Moreover, since both requirements are assessed based on knowledge available at the time the patent was first filed,¹⁵⁷ information after the filing date of the patent is not particularly relevant. Thus, even if briefing in this case touched upon some confidential technical documents, that information was probably at least 20 years old.¹⁵⁸ In sum, SJs 8 and 16 appear to concern ar-

151. In two cases (SJ 3 and SJ 4), no responses were filed. The Court denied the motions with leave to refile the motions at the close of discovery. *See infra* app. A., DE# 550.

152. The PACER entry does not mention that the reply brief was redacted, but a review of the document reveals the redactions. *Monsanto v. DuPont* (Jan. 19, 2010).

153. The Court issued a docket order denying SJs 1-4 with permission to refile them at a later date. *Monsanto v. DuPont* (Aug. 29, 2011). A different docket order dated June 5, 2012.

154. *Monsanto v. DuPont* (Nov. 16, 2012). Ironically, the briefing on the motion to unseal remains completely under seal. *See* Plaintiffs’ Memorandum in Support of Their Motion to Unseal Orders Rejecting Defendants’ Claims That They Had Rights To Stack and Access Monsanto’s Regulatory Data (Aug. 24, 2012); Memorandum in Opposition to Motion to Unseal (Oct. 5 2012); Plaintiffs’ Reply Memorandum in Support of Their Motion to Unseal Orders Rejecting Defendants’ Claims that they had Rights to Stack and Access Monsanto’s Regulatory Data (Oct. 15, 2012).

155. *Hybritech, Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1367, 1384 (Fed. Cir. 1986).

156. *Ariad Pharm., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc).

157. *In re Wands*, 858 F.2d 731, 735-37 (Fed. Cir. 1988) (discussing the enablement requirement); *Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1563-64 (Fed. Cir. 1991) (discussing the written description requirement).

158. The filing date of the patent at issue, RE 39,247, was September 13, 1994. *See USPTO Patent Full-Text and Image Database*, <http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=%2Fnetacgi%2FPTO%2Fsrchnum.htm&r=1&f=G&l=50&s1=RE39247.PN.&OS=PN/RE39247&RS=PN/RE39247>.

guments regarding publicly available information, yet no version of either the briefs or the court's decisions were made available to the public.

Other summary judgment motions also appear to focus on issues of public concern. For example, SJ 14 involves another § 112 requirement, that a patent contain definite claims. Because the claims are intended to give the public notice of the scope of the inventor's patent, a claim that is "insolubly ambiguous" is invalid as indefinite.¹⁵⁹ Again, the underlying inquiry is an assessment of publicly available material; a reading of the patent's claims in view of the specification. And once again, both the briefing and ultimate ruling are unavailable.

SJ 15 concerns the defendants' allegations of inequitable conduct. If proven, this defense bars enforcement of a patent. Typically, inequitable conduct occurs when the inventors or their representatives intentionally withhold prior art or make false statements during the prosecution of a patent.¹⁶⁰ Thus, an inquiry into potential inequitable conduct delves into the patentee's behavior during the prosecution of the patent. Although disclosure of such information is potentially embarrassing, it does not involve trade secrets. Presumably, no court would allow allegations of fraud against Enron to be sealed simply because they might shame its corporate officers. Neither should a court allow allegations of misconduct against Monsanto to be placed under seal.¹⁶¹ But again, the SJ 15 briefing and ruling are completely sealed.

In other instances, the summary judgment motion may have involved confidential subject matter, but it is likely that such motions also addressed issues of public interest. For example, SJs 4, 9 and 15 concern issues of infringement. Infringement is determined by comparing the accused technology to the patent's claims. Thus, these motions likely contain both technical details about the accused DuPont seeds, and interpretations of Monsanto's patent claims. Although DuPont may have had a legitimate interest in sealing some of the technical details regarding its genetically modified seeds, the public has a strong interest in learning about the precise boundaries of Monsanto's patent.¹⁶² The solution is simple: redact descriptions of DuPont's secrets and leave the remainder of the filings intact.¹⁶³

The parties' own positions reveal another reason to question the "confidentiality" of some of the motions. Soon after the trial ended, Monsanto moved to unseal various filings, including the court's rulings on SJs 11 and 12.¹⁶⁴ Although the briefing on this motion is under seal, the Court's ruling was public and it characterizes the parties' positions.¹⁶⁵ Monsanto argued:

159. *Star Scientific, Inc. v. R.J. Reynolds Tobacco Co.*, 537 F.3d 1357, 1371 (Fed. Cir. 2008).

160. *Therasense, Inc. v. Becton, Dickinson and Co.* 649 F.3d 1276, 1291-92 (Fed. Cir. 2011) (en banc).

161. *See, e.g., Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 484 (3d Cir. 1995) (holding that embarrassment that may result from the distribution of judicial documents is insufficient under the good cause standard to warrant the sealing of documents).

162. *See supra* Part I(B).

163. *See Bernard Chao, Not So Confidential: A Call for Restraint in Sealing Court Records*, 2011 PATENTLY-O PAT. L.J. 6, 10-11 (2011), available at <http://patentlyo.com/media/docs/2011/07/chao.sealedrecords.pdf> (arguing that parties should be forced to file public versions of any documents they file under seal).

164. *Monsanto v. DuPont* at *2 (Nov. 16, 2012) (under seal).

165. *Monsanto v. DuPont* at *1 (Aug. 24, 2012).

[T]here is no compelling reason to shield from the public this Court's decision relating to its determination of Monsanto's breach-of-contract claims, its declaration of the parties' rights under the seed license agreements, its rejection of Defendants' position that it should be entitled to access Monsanto's technology under the Hatch-Waxman Act, or its finding that Defendants committed fraud upon this Court in an effort to manipulate the judicial process for their own business interests.¹⁶⁶

Moreover, the "Defendants agree[d] that there [was] no reason to maintain under seal the two June 6, 2012 orders..."¹⁶⁷ Consequently, the court unsealed the rulings on SJs 11 and 12. These comments beg the question: Why were the briefs filed completely under seal when the parties were apparently unconcerned about disclosing the court's entire ruling? What is more, why do the briefs remain under seal when the decisions are now public? Do the briefs contain some confidential material that the decisions do not, or did everyone just overlook the sealed briefs?

5. Trial

After *Monsanto v. DuPont*, there is both good news and bad news for the future of open access. First, the bad news: Immediately, before the *Monsanto* trial began, the parties filed their motions *in limine*, proposed jury instructions, exhibit lists, and corresponding objections. Most, if not all, of these documents were filed under seal. As previously discussed, by this point in the case the parties were no longer seeking court permission to seal. Thus, there is no explanation for why some of the most basic trial documents are sealed. This section analyzes the motions *in limine* filed, which are representative of the larger set of filings.

All together the parties appear to have filed twenty-eight motions *in limine*. However, there are no docket entries for twenty-six of these motions. The only indications of their existence are corresponding responsive briefs. The docket entries for the responses reference missing docket entries that should be associated with the original motions *in limine*.¹⁶⁸ Additionally, both the transcripts of the hearings on these motions,¹⁶⁹ and the court's rulings,¹⁷⁰ are unavailable. It is clear that at least some of these motions should not have been filed under seal. For example, it is difficult to imagine why a secret proceeding is required to determine the sequence of a patent trial.¹⁷¹

166. *Id.* at *3.

167. *Id.*

168. For example, the docket skips entries 1353-54, 1356, 1358-1372. Although most of these numbers correspond with the missing motions *in limine*, for some docket entries there is no publicly available information, making it impossible to determine the nature of the missing filings. Appendix B lists all the motions *in limine* that the authors were able to identify and indicates whether the briefs were sealed or entirely missing from the docket. See *infra* app. B.

169. The docket entries of June 26 and 27, 2012 indicate that there was pretrial conferences concerning Daubert motions and motions *in limine* on those days. The entries also say that the Court ordered that the proceeding be "sealed and that any transcript prepared from this proceeding be filed under seal." See *supra* note 124; see also *infra* app. B.

170. *Monsanto v. DuPont* (Jun. 29, 2012). See *supra* note 124; see also *infra* app. B.

171. See *infra* app. B, DE# 1363.. Another example is Defendants' Motion in Limine No. 4 for Clarification that Inequitable Conduct is to be tried before a Jury. See *infra* app. B. Arguments about whether a particular defense is to be heard by the judge or jury are extremely unlikely to contain information that will be harmful if disclosed.

Finally, there was a small bit of good news. The *Monsanto* trial transcripts appear to be largely intact. There were eighteen days of jury trial transcripts designated as Volumes I thru XVIII. All the transcripts were made publicly available except for two.¹⁷² For the proceedings on the morning of July 27,¹⁷³ and the entire day of August 1,¹⁷⁴ there are docket entries reflecting both a redacted transcript and a transcript that was filed completely under seal. Three different relatively short portions of the July 27 transcript are redacted.¹⁷⁵ Three different portions of the August 1 transcript are similarly redacted.¹⁷⁶ Although each redaction is prefaced with a statement providing that the redacted material related to sealed portions of the transcript “by Order of the Court,” no such order, nor any filings explaining the bases for these redactions, could be found. Thus, while most of the trial appears open to the public, it is impossible to determine if the court applied the correct legal standards when it sealed testimony.

In sum, this article analyzed three phases of the *Monsanto* case, the pleadings, motions summary judgment, and trial, in order to demonstrate that the large majority of the case was hidden from the public eye. Not until the trial commenced, did the Court begin to provide the public some level of access to this case. Even so, the parties’ court filings still remain hidden from the public to this very day.¹⁷⁷ Consequently, companies that would like to make their own genetically modified seeds cannot study the court records to assess whether Monsanto’s patent is likely to be valid, let alone, learn more precisely what it covers.

V. CONCLUSION

This article analyzes the *Monsanto v. DuPont* case in order to highlight the pervasive lack of transparency in patent litigation. Although sealing 34.9% of the docket is hardly representative, this case is still quite informative. This case demonstrates the need for procedural safeguards to protect the public’s right to know the contents of patent suit dockets, and for courts to take such safeguards seriously. Otherwise, when litigants are given an essentially unfettered ability to seal their filings, they seal far too much. Some of the most basic pleadings and important motions in the *Monsanto* case were hidden. The habit of sealing documents even crept into the court’s practice as numerous rulings were sealed in their entirety. Admittedly, the authors have not offered a comprehensive solution in this article. Nonetheless, our hope is that greater awareness of the transparency prob-

172. This assessment was made by examining the title of the docket entry. If the docket entry said that the transcript was under seal or redacted, it was categorized accordingly. In addition, each public unredacted transcript was downloaded. An automated search for the terms “redact” and “seal” was conducted to verify that there were no “redacted” portions. For more on these docket entries, see *Monsanto Company et al v. E.I. Dupont De Nemours and Company et al*, <http://www.plainsite.org/dockets/index.html?id=1883924> (last visited Mar. 12, 2014).

173. *Id.* at DE ## 1574, 1575.

174. *Id.* at DE ## 1581, 1582.

175. Transcript of Trial – Volume XV-A at 96, 98, 126, 127, *Monsanto v. DuPont* (August 16, 2012); see also *supra* note 120, at 175.

176. Transcript of Trial – Volume XVIII at 115, 117, 245, 246, 248, *Monsanto v. DuPont* (August 1, 2012). See also *supra* note 120, at 177-78.

177. For example, the following motions were all filed under seal on August 16, 2012: 1) Motion for Judgment as a Matter of Law and/or a New Trial, 2) Plaintiffs’ Motion for Finding of Objective Willful Infringement and Enhanced Damages, 3) Motion to Vacate Damages Award or, in the Alternative, for Remittitur or a New Trial on Damages. See *supra* note 120, at 179-80.

lem will lead to a robust conversation and eventually cause courts to take their duty to safeguard the public's rights to access judicial records more seriously.

APPENDIX A

Summary Judgment Motions

R=Filed Under Seal with Redacted Public Version Available

S= Filed Completely Under Sealed

Numbers refer to docket entry numbers in the PACER docket.

#. Title of Summary Judgment Motion	Motion, Memorandum¹⁷⁸ Response, Reply	Court Ruling
1. Monsanto's Motion for Partial Summary Judgment of Infringement of Claims 116, 119, 122 and 125 of the '247 RE Patent" by Plaintiffs Monsanto Technology LLC, Monsanto Company	94, 95R, 118R, 137R ¹⁷⁹	550 DENIED with leave to refile
2. Defendants' Motion for Partial Summary Judgment of Invalidity for Improperly Broadened Reissue Claims	215, 216, 280, 306	550 DENIED with leave to refile
3. Defendants' Motion for Partial Summary Judgment of Anticipation of the Asserted Plant Genus Claims of the '247 RE Patent Over PCT Application No. WO 92/0449 Based on Acquiescence	599S, 601S, None, None	849 DENIED with permission to refile
4. Defendants' Motion for Partial Summary Judgment of Absolute Intervening Rights by Defendants E.I. Dupont De Nemours and Company	610S, 611S, None, None	849 DENIED with permission to refile
5. Plaintiff's MOTION for Partial Summary Judgment of Count Nine for Invalidity of the '247 Patent Claims Reciting Seq ID No: 70	1068, 1069S, 1160S, 1278S	1383S MSJ DENIED
6. Defendants' MOTION for Partial Summary Judgment of Claims Regarding Corn Products (Counts I, VIII and IX and Counterclaim Counts Eight and Eleven)	1085, 1086S, 1169S, 1290S	1307 DENIED AS MOOT
7. Defendants' MOTION for Partial Summary Judgment <i>Declaring That The Earliest Effective Filing Date For The Plant Genus Claims Of The '247 Re Patent Is September 13, 1994 Based On Acquiescence</i>	1091, 1092S, 1191S, 1285S	1394S MSJ DENIED

178. The parties filed motions for summary judgment that simply provide a short description of each motion separately from the actual memorandum of points and authorities. *See supra* note 120, at 13-19.

179. The court does not list these documents as redacted. But when the documents are downloaded they are clearly redacted. *Monsanto v. DuPont* (Jan. 19, 2010).

8. Defendants' MOTION for Partial Summary Judgment on Counterclaim Count Nine Declaring Claims 1, 2, 115-119, 122-125 and 145-148 of the '247 Re Patent Invalid Based on Nonenablement	1099, 1100S, 1259S, 1282S	1321S MSJ DENIED)
9. Defendants' MOTION for Partial Summary Judgment on Counterclaim Count Eight Finding Noninfringement of the '247 Re Patent Claims Reciting SEQ ID NO:3	1105, 1107S, 1217S, 1287S	1381S MSJ GRANTED
10. Defendants' MOTION for Partial Summary Judgment on Damages for Breach of Contract	1113, 1114S, 1211S, 1284S	1310S MSJ GRANTED IN PART AND DENIED IN PART
11. Defendants' MOTION for Partial Summary Judgment on their License Affirmative Defense and Counterclaim Count Twelve	1123S, 1124S, 1166S, 1281S	1309S MSJ DENIED
12. Plaintiff's Motion for Summary Judgment on Counts III, IV, V, VIII and IX of Monsanto's Complaint, on Defendants' License Affirmative Defense, and on Count XII of Defendants' Counterclaims	1128, 1129S, 1218S, 1292S	1308S MSJ GRANTED IN PART AND DENIED IN PART (SEALED MEM ORDER)
13. Plaintiffs' MOTION for Partial Summary Judgment on Defendants' Sixth and Seventh Defenses and Counts IX and X of Defendants' Counterclaims	1133, 1134S, 1268S, 1295S	1313S MSJ DENIED
14. Plaintiffs' MOTION for Partial Summary Judgment on Defendants' Indefiniteness Allegations	1136 1138S 1178S 1301S	1438S MSJ GRANTED
15. Plaintiffs' MOTION for Summary Judgment on Defendants' Inequitable Conduct Counterclaim	1137S 1141S 1222S 1294S	1382S MSJ GRANTED IN PART AND DENIED IN PART
16. Plaintiffs' MOTION for Partial Summary Judgment on Defendants' Defenses that the Isolated and Recombinant DNA Claims of the '247 Patent Are Invalid for Failure to meet the Enablement and Written Description Requirements of 35 U.S.C. 112	1143 1148S 1206S 1299S	1439S MSJ GRANTED IN PART AND DENIED IN PART
17. Plaintiffs' MOTION for Summary Judgment on Defendants' Improper Reissue Allegations	1146 1147S 1186S 1297S	1384S MSJ DENIED

APPENDIX B

Motions in Limine

DE# = Docket Entry Number in Pacer

MD = Missing Docket Entry

S = Filed Completely Under Seal

	DE# Mtn	DE# Response	Title of Motion
1	1344MD	1399S	Plaintiffs Motion in Limine to Exclude all Evidence Regarding (1) Alleged Antitrust Conduct, Damages, or Issues, (2) Unrelated Litigation Involving Different Patents and Events, and (3) Saved-Seed Litigation
2	1345MD	1400S	Motion in Limine to Exclude Evidence that Plaintiffs Seek to Extend the Life of the 247 RE Patent by Requiring Post-Expiration Royalties
3	1346 MD	1398S	Monsanto's Motion in Limine to Exclude Evidence Regarding Defendants' Hatch-Waxman Safe Harbor Defense
4	1347MD	1401S	Plaintiffs Motion in Limine to Exclude Expert Opinions and Testimony Containing Legal Conclusions or on Ultimate Issues of Invalidity for Lack of Enablement, Written Description, or Incorrect Inventorship
5	1350MD	1402S	Memorandum in Opposition to Motion in Limine to Exclude Evidence that Defendants No Longer Plan to Commercialize an OGAT/RR Stacked Product
6	1351MD	1403S	Plaintiffs Motion in Limine to Exclude Evidence and Arguments Inconsistent with the Courts Sanctions Order and the Courts Breach of Contract Orders
7	1353(MD)	1423S	Defendants Motion in Limine No. 1 to Preclude Plaintiffs from Referencing The Courts Order of December 21, 2011
8	1354MD	1422S	Defendants' Motion in Limine No. 2 to Sequence Trial on Willfulness and Damages After Trial on Patent Liability
9	1355S	1426S	Defendants' Motion in Limine No. 3 to Preclude Plaintiffs from Referencing the Parties' Contracts and the Court's Summary Judgment Orders of June 6, 2012
10	1356MD	1427S	Motion in Limine No. 7 1356 to Preclude Defendants from Creating a Negative Inference from Invocation of the Attorney-Client Privilege
11	1357S	1429S	Defendants' Motion in Limine No. 4 for Clarification that Inequitable Conduct is to be Tried to a Jury

12	1358MD	1434S	Defendants' Motion in Limine No. 5 1358 to Preclude Monsanto from Offering Evidence of Patent Infringement Damages
13	1359 MD	1404S	Plaintiffs Motion in Limine to Exclude all Evidence and Argument Regarding the Potential for Injunctive Relief or Nominal Damages
14	1360MD	1436S	Defendants Motion in Limine No. 6 1360 to Preclude Monsanto from (1) Referencing Prior Litigation Between the Parties and Facts or Allegations at Issue in Such Prior Litigation and (2) To Bar Evidence of Any Settlement Discussions
15	1361(MD)	1424S	Defendants' Motion in Limine No. 7 1361 to Preclude to Exclude Plaintiffs from Arguing Patent Infringement Under the Doctrine of Equivalents of the SEQ ID NO:3 Claims
16	1362(MD)	1412S	Defendants' Motion in Limine No. 8 to Preclude Plaintiffs from Relying on "Secret Prior Art" and Commercial Services as Evidence on Enablement
17	1363MD	1411S	Defendants' Motion in Limine No. 9 to Set the Order of Proof
18	1364MD	1405S	Monsanto's Motion in Limine and Supporting Memorandum to Preclude Defendants from Contradicting or Challenging the Courts Claim Construction at Trial
19	1365MD	1406S	Plaintiffs Motion in Limine to Exclude Evidence or Allegations of Equitable Issues from the Jury Trial
20	1366MD	1407S	Plaintiffs Motion in Limine to Exclude Evidence of Two Categories of Subject Matter as Not Constituting Legal Prior Art Under 35 U.S.C. 102(e), 102(g) OR 103 (Dkt. 1366))
21	1367MD	1408S	Plaintiffs Motion in Limine to Exclude all Evidence Regarding Purported Yield Drag in Roundup Ready Soybeans
22	1368MD	1397S	Plaintiffs' Motion in Limine to Exclude All Evidence Regarding Agent Orange and PCB Lawsuits
23	1369MD	1416S	Monsanto's Motion to Exclude Testimony of Professor David C. Hricik (Dkt. 1369)
24	1371MD	1417S	Plaintiffs' Daubert Motion to Exclude Testimony of Dr. William Folk and Dr. Alan McHughen on "On Sale Bar" and "Prior Public Use"
25	1372MD	1410S	Monsanto's Motion in Limine to Exclude Testimony of Dr. Alan McHughen for Failure to Comply with Rule 26(a)(2)(B) (Dkt. 1372)
26	1374MD	1413S	Monsanto's Motion in Limine to Exclude Expert Testimony Cumulative with Testimony of Elected Experts
27	1376MD	1414S	Monsanto's Motion in Limine to Exclude Evidence Regarding Plastid Transformation

28	1377MD	1415S	Plaintiffs Motion in Limine to Exclude Defendants' Double Patenting Allegations
----	--------	-------	---