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# CAN YOU KEEP A SECRET? THE COURT'S ROLE IN PROTECTING TRADE SECRETS AND OTHER CONFIDENTIAL BUSINESS INFORMATION FROM DISCLOSURE IN LITIGATION

## ABSTRACT

*Two recent trials have sparked interest, not only in their record-breaking verdicts, but also in how the parties and court decided to protect the parties' trade secrets. In Monsanto v. DuPont, the court granted Monsanto's motion to unseal certain court documents after weighing the public's interest in accessing the judicial records against DuPont's interest in keeping them sealed. In Apple v. Samsung, the Federal Circuit reversed the district court's decision to unseal certain court documents—previously sealed under a protective order—even though neither party requested the unsealing. While the public has a right to access court records, parties have an interest in protecting their valuable trade secrets from disclosure in litigation. All courts perform a similar balancing test when weighing these interests, but different jurisdictions start with different presumptions and place different importance on certain factors. Courts should adopt a cautious approach and require only a showing of good cause to seal documents potentially containing trade secrets. Any higher degree of presumption places an improper burden on parties trying to keep their trade secrets away from competitors or the public. The public's interest in the details of complex corporate litigation is minimal compared to the parties' interest in protecting the multimillion- or multibillion-dollar trade secret assets.*

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#### I. INTRODUCTION: THE STAKES ARE GETTING HIGHER

As Judge Richard Posner stated, “The future of the nation depends in no small part on the efficiency of industry, and the efficiency of industry depends in no small part on the protection of intellectual property.”<sup>1</sup> But what role does the court play in protecting this intellectual property? And at what cost? Two recent trials have sparked interest, not only in their record-breaking verdicts, but also in how the courts decided whether to protect the parties’ possible trade secrets from disclosure. Following the *Monsanto v. DuPont* \$1 billion verdict, some commentators were disappointed when certain documents were sealed from the public.<sup>2</sup>

1. Rockwell Graphic Sys., Inc. v. DEV Indus., Inc., 925 F.2d 174, 180 (7th Cir. 1991).

2. See, e.g., Bernard Chao, *Non-Public Litigation: The Hidden Story of Monsanto v. DuPont*, PATENTLY-O (Aug. 11, 2012), <http://www.patentlyo.com/patent/2012/08/non-public-litigation-the-hidden-story-of-monsanto-v-dupont.html>

Monsanto moved to unseal the protective orders, and upon a balancing of interests, the court granted the motion.<sup>3</sup> Prior to the \$1.05 billion *Apple v. Samsung* verdict, the district court judge ordered many protected exhibits unsealed, emphasizing the Ninth Circuit’s “strong presumption of access to judicial records.”<sup>4</sup> However, the Federal Circuit issued an emergency temporary reversal of the order, keeping those documents sealed until after appeal.<sup>5</sup> Ultimately, the Federal Circuit decided the district court abused its discretion in unsealing the documents based on the balancing of interests discussed in this Note.<sup>6</sup>

This Note is dedicated to the balance between the public’s interest in access to judicial records and a business’s interest in protecting its intellectual property—specifically its trade secrets and confidential business information—from disclosure to competitors and the public. Part II discusses the histories and theories behind the common law and First Amendment rights of public access to judicial records. Part III discusses the value of intellectual property, including patents, confidential business information, and trade secrets. Further, Part III presents a few ways to protect this information. Part IV analyzes how the courts have struck a balance between these competing interests. Specifically, Part IV discusses the emphasis on the district court’s discretion, the “good cause” requirement, the “strong presumption” of access, the “information continuum,” and the perspectives of the Eighth Circuit and Iowa courts. Finally, Part V suggests the proper role of the courts in protecting valuable, confidential information in an age of billion-dollar verdicts and billion-dollar secrets.

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(“These briefs and their exhibits were filed entirely under seal. In other words, there is no public redacted version of any of these documents. What’s more there is nothing in the docket that shows how the district court ruled on the DuPont’s motion.”).

3. *Monsanto Co. v. E.I. DuPont De Nemours & Co.*, No. 4:09CV00686 ERW, 2012 WL 5830580, at \*8 (E.D. Mo. Nov. 16, 2012).

4. Order Denying Sealing Motions at 2, *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK (N.D. Cal. July 17, 2012) (quoting *Kamakana v. City of Honolulu*, 447 F.3d 1172, 1177 (9th Cir. 2006)), available at [http://www.rcfp.org/sites/default/files/docs/20120719\\_140434\\_tablet.pdf](http://www.rcfp.org/sites/default/files/docs/20120719_140434_tablet.pdf).

5. Order Staying Orders to Unseal Certain Trial and Motion Exhibits at 2, *Apple Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, at 2 (Fed. Cir. Sept. 18, 2012), available at <http://patentlyo.com/media/docs/2012/09/2012-1600.9-18-12.1.pdf>.

6. *Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1228–29 (Fed. Cir. 2013).

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## II. THE RIGHT OF PUBLIC ACCESS TO JUDICIAL RECORDS

Most courts agree that the public has a general right of access to judicial records. This right derives from two sources: (1) the common law<sup>7</sup> and (2) the First Amendment.<sup>8</sup> While the common law and First Amendment rights of access have many similarities, distinctions exist that warrant a discussion of the history and limitations of both.

### A. Common Law Right of Access

#### 1. Origins of the Right

The common law right of access derives from a long history of American and English common law dating back to the 14th century.<sup>9</sup> Early in American history, the Supreme Court implicitly recognized the right of access to judicial records when it held that “[n]o reporter of the decisions of the supreme court has, nor can he have, any copyright in the written opinions delivered by the court.”<sup>10</sup> Because early opinions of the Court were given orally, prohibiting copyright ownership of the written reporters ensured public access to these opinions.<sup>11</sup> The Court later elaborated on the public policy benefits of this right, finding that the interpretations of the laws should be made freely available to all citizens who are bound by those laws.<sup>12</sup>

By the 20th century, state and federal courts began to expressly recognize the right of access.<sup>13</sup> When confronted with the question of whether there is a common law right to access court documents, the Supreme Court noted in *Nixon v. Warner Communications, Inc.* that “the

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7. See discussion *infra* Part II.A.

8. See discussion *infra* Part II.B.

9. See Erica A. Kaston, Note, *The Expanding Right of Access: Does It Extend to Search Warrant Affidavits?*, 58 FORDHAM L. REV. 655, 661 (1990). For a more detailed history of the English common law development of the right of access to judicial records, see generally Note, *The Common Law Right to Inspect and Copy Judicial Records: In Camera or On Camera*, 16 GA. L. REV. 659, 660–66 (1982) [hereinafter *Common Law Right*].

10. *Wheaton v. Peters*, 33 U.S. 591, 593 (1834).

11. See *Banks v. Manchester*, 128 U.S. 244, 254 (1888) (quoting *Wheaton*, 33 U.S. at 668).

12. *Id.* at 253–54 (citing *Nash v. Lathrop*, 142 Mass. 29, 35 (1886)).

13. See, e.g., *In re Sackett*, 136 F.2d 248, 249 (C.C.P.A. 1943) (refusing to grant a request to prevent publication of a patent decision); *Sloan Filter Co. v. El Paso Reduction Co.*, 117 F. 504, 506 (C.C. Colo. 1902) (“[T]he matter of inspecting and taking copies of public records is as old in the law as the records are old.”).

courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”<sup>14</sup> While it refused to undertake the difficult task of delineating the specific contours of the right among the state and circuit courts,<sup>15</sup> the Court presumed the existence of what has come to be called the “common-law right of access to judicial records.”<sup>16</sup>

Since *Nixon*, courts continue to open judicial documents to the public based upon the common law presumption of access and to promote the policy interests furthered by public access to the courts. For example, in *Federal Trade Commission v. Standard Financial Management Corp.*, the First Circuit upheld the unsealing of sworn personal financial statements because “the people have a right to know the contents of the materials upon which the agency, and ultimately the court, relied” in deciding whether a settlement was fair.<sup>17</sup> Further, the court held that the party seeking the sealing of the documents did not provide a reason “adequate to overcome the presumption of public accessibility.”<sup>18</sup> A majority of circuits agree that the common law right of access exists, and some have even held that overcoming this presumption requires a heavy burden.<sup>19</sup>

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14. *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978) (footnote omitted).

15. *Id.* at 598–99.

16. *Id.* at 597.

17. *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 413 (1st Cir. 1987). Some courts and commentators suggest that the public has a greater interest in accessing court documents specifically related to the court’s judgment. *See, e.g.*, Laurie Kratky Doré, *Settlement, Secrecy, and Judicial Discretion: South Carolina’s New Rules Governing the Sealing of Settlements*, 55 S.C. L. REV. 791, 818 (2004) (“[A] more onerous and particularized showing of good cause should be required to justify sealing documents, including discovery, that are filed with the court and utilized in connection with judicial proceedings.”).

18. *Standard Fin. Mgmt. Corp.*, 830 F.2d at 413.

19. *See Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003); *Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1311 (11th Cir. 2001); *Goldstein v. Forbes (In re Cendant Corp.)*, 260 F.3d 183, 192 (3d Cir. 2001); *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984). *But see Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (recognizing the existence of the common law presumption of access, but stating the presumption can be overcome by showing some “countervailing interests” that “heavily outweigh the public interests in access”); *United States v. Webbe*, 791 F.2d 103, 106 (8th Cir. 1986) (recognizing the common law right of access to judicial records, but “declin[ing] to adopt in toto the reasoning of the Second, Third, Seventh, and District of Columbia Circuits in recognizing a ‘strong presumption’ in favor of the common law right of access”); *Belo*

## 2. *Limitations of the Right*

As the *Nixon* court noted, “[i]t is uncontested . . . that the right to inspect and copy judicial records is not absolute.”<sup>20</sup> Courts have generally exercised discretion in denying access to documents when a party seeks access for improper purposes.<sup>21</sup> While courts have used their discretion to deny access in a variety of factual circumstances,<sup>22</sup> the *Nixon* Court mentioned three examples of when courts may find an interest sufficient to overcome the presumption of access.<sup>23</sup> First, access to judicial documents should not be “used to gratify private spite or promote public scandal.”<sup>24</sup> Second, judicial records should not be used as “reservoirs of libelous statements for press consumption.”<sup>25</sup> Third, records should not be used “as sources of business information that might harm a litigant’s competitive standing.”<sup>26</sup>

The third example is of significant importance to this Note. Courts have cited this Supreme Court limitation when denying access to protect trade secrets.<sup>27</sup> This limitation has also been used to protect companies’ patent portfolios.<sup>28</sup> Limiting access in certain cases is necessary to protect confidential business information—such as trade secrets and patentable inventions—and allowing trial courts to grant protective orders sealing documents from public disclosure prevents those documents from being

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Broad. Corp. v. Clark, 654 F.2d 423, 433–34 (5th Cir. 1981) (“In our judgment, the opinion in *Nixon v. Warner Communications* offers no basis from which one can derive the overpowering presumption in favor of access discovered by the Second and District of Columbia Circuits.”). Most state courts also still recognize the common law right of access. *See generally Common Law Right*, *supra* note 9, at 667–68.

20. *Nixon*, 435 U.S. at 598.

21. *Id.*

22. *See, e.g., Belo Broad. Corp.*, 654 F.2d at 431 (affirming trial court’s denial of access to audiotapes admitted into evidence because of interest in defendant’s right to a fair trial).

23. *Nixon*, 435 U.S. at 598.

24. *Id.* (quoting *In re Caswell*, 29 A. 259, 259 (R.I. 1893)) (internal quotation marks omitted).

25. *Id.* (citing *Park v. Detroit Free Press Co.*, 40 N.W. 731, 734–35 (Mich. 1888)).

26. *Id.*

27. *See Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1221 (Fed. Cir. 2013); *IDT Corp. v. eBay*, 709 F.3d 1220, 1223 (8th Cir. 2013); *Brown & Williamson Tobacco Co. v. FTC*, 710 F.2d 1165, 1180 (6th Cir. 1983).

28. *See, e.g., Microsoft Corp. v. Motorola, Inc.*, No. C10–1823JLR, 2012 WL 5476846, at \*3 (W.D. Wash. Nov. 12, 2012).

used to harm a litigant's competitive standing.<sup>29</sup>

### B. First Amendment Right of Access

#### 1. *Origins of the Right*

Besides the common law presumption of access to judicial records, some courts have also found a right of access derived from the First Amendment.<sup>30</sup> The Supreme Court recognized First Amendment rights of public and press access to criminal trials and preliminary hearings in *Richmond Newspapers, Inc. v. Virginia*<sup>31</sup> and *Press-Enterprise Co. v. Superior Court*.<sup>32</sup> Some lower courts have extended those holdings to apply this right of access to civil proceedings and judicial documents as well.<sup>33</sup>

While the common law presumption of access typically applies to all judicial documents, the First Amendment right typically only applies to a certain, limited set of documents, determined by one of two approaches.<sup>34</sup> The first line of cases utilizes a two-pronged test derived from the Supreme Court's *Press-Enterprise* decision.<sup>35</sup> This "logic and experience" test<sup>36</sup> asks (1) "whether the place and process have historically been open to the press and general public" and (2) "whether public access plays a significant positive role in the functioning of the particular process in question."<sup>37</sup> In

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29. See, e.g., *In re Elec. Arts, Inc.*, 298 F. App'x 568, 570 (9th Cir. 2008) (finding that the trial court committed clear error in refusing to seal confidential and commercially sensitive information from public disclosure).

30. See, e.g., *United States v. Soussoudis (In re Wash. Post Co.)*, 807 F.2d 383, 390 (4th Cir. 1986) ("[T]he First Amendment right of access applies to *documents* filed in connection with plea hearings and sentencing hearings in criminal cases, as well as to the hearings themselves." (emphasis added)); *United States v. Smith*, 776 F.2d 1104, 1111–12 (3d Cir. 1985) (concluding that the public's First Amendment right of access defines the standard that must be met to seal a bill of particulars or an indictment in a criminal case); *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1145 (9th Cir. 1983) (noting that the First Amendment right of access applies to pretrial documents). *But see Perry v. Brown*, 667 F.3d 1078, 1088 (9th Cir. 2012) (assuming, without deciding issue of first impression in the Ninth Circuit, that "the First Amendment right of public access to judicial records applies to civil proceedings").

31. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577–80 (1980).

32. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10–13 (1986).

33. See *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91–92 (2d Cir. 2004) (collecting cases from the First, Second, Third, Seventh, Eighth, and Ninth Circuits).

34. See *id.* at 92–93.

35. *Id.* at 92 (citing *Press-Enterprise Co.*, 478 U.S. at 8).

36. *Id.* (citing *ABC, Inc. v. Stewart*, 360 F.3d 90, 98 (2d Cir. 2004)).

37. *Id.* (quoting *Press-Enterprise Co.*, 478 U.S. at 8).

considering these two inquiries, courts usually find that the common law right of access to judicial records weighs in favor of finding a First Amendment right of access to judicial documents.<sup>38</sup>

The second approach extends the First Amendment right of the press and public to attend court proceedings to necessarily include a right to access the records of those proceedings.<sup>39</sup> As the Third Circuit has stated, “it would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?”<sup>40</sup> Regardless of the approach, many courts have held that the First Amendment does protect a qualified right of access to certain court documents.<sup>41</sup>

## 2. *Limitations of the Right*

Once the First Amendment right of access has been asserted, it is still possible for courts to restrict access to judicial records. And while the First Amendment presumption of access does not apply to all judicial documents (unlike the common law presumption of access), courts do not have the same discretion in limiting access when the First Amendment does apply.<sup>42</sup> When this right of access is asserted, courts must apply the typical strict-scrutiny standard,<sup>43</sup> and their decisions are reviewed by appellate courts de novo.<sup>44</sup> If a district court decides to seal a document and

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38. *Id.*

39. *Id.* at 93.

40. *Id.* (alteration in original) (quoting *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994)) (internal quotation marks omitted).

41. *See, e.g., Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502–05 (1st Cir. 1989) (analyzing both prongs of the *Press-Enterprise* test and discussing the right-to-attend approach before concluding that “a blanket prohibition on the disclosure of records of closed criminal cases [not ending in conviction] implicates the First Amendment”).

42. *See Va. Dep’t of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004) (“When the First Amendment provides a right of access, a district court may restrict access ‘only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest.’” (quoting *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988))).

43. *See United States v. Soussoudis (In re Wash. Post Co.)*, 807 F.2d 383, 390 (4th Cir. 1986) (“Access may be denied if ‘closure is essential to preserve higher values and is narrowly tailored to serve that interest.’” (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984))).

44. *See Va. Dep’t of State Police*, 386 F.3d at 575 (“We review a district court’s decision concerning access under the First Amendment de novo.” (citing *In re*

restrict access when the First Amendment right is asserted, then it must state its reasons and provide specific findings for the record.<sup>45</sup> So while not applicable to all judicial records, the First Amendment right of access sets a heavier burden for a party seeking to seal documents.

### III. PROTECTING TRADE SECRETS AND CONFIDENTIAL BUSINESS INFORMATION

At odds with the right of access to judicial records is a party's interest in keeping its confidential information secret. Trade secrets can be extremely valuable assets to a business, and disclosure of these trade secrets eliminates their value. Thus, businesses have a strong interest in protecting their trade secrets.

#### A. *The Value of Confidential Business Information*

Intellectual property has become one of the most valuable assets to modern businesses.<sup>46</sup> A business's success greatly depends on the competitiveness of the information it possesses.<sup>47</sup> In fact, "[t]he value of intangible assets relative to the value of physical and financial assets has continuously increased since the early 1980s."<sup>48</sup> By 2000, more than 83 percent of the market value of the S&P 500 companies was comprised of intangible assets.<sup>49</sup> For many well-known companies, this number was even higher: "Johnson & Johnson (87.9%); Proctor & Gamble (88.5%); Merck (93.5%); Microsoft (97.8%); and Yahoo! (98.9%)."<sup>50</sup> Because of the immense value of trade secrets in particular, U.S. companies spend billions of dollars every year to protect this confidential information from

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State-Record Co., 917 F.2d 124, 127 (4th Cir. 1990))).

45. *In re Wash. Post Co.*, 807 F.2d at 391.

46. See Nancy O. Dix et al., *Fear and Loathing of Federal Contracting: Are Commercial Companies Really Afraid to Do Business with the Federal Government? Should They Be?*, 33 PUB. CONT. L.J. 5, 12 (2003) ("Today, more than ever before, a company's intellectual property is increasingly the 'crown jewels' of its business.").

47. See Oliya S. Zamaray, *The Obama Administration's Blanket FOIA Policy Is No Comfort to Federal Contractors: The Need for Executive Branch Guidance on Exemption 4 Within the "Openness Regime,"* 39 PUB. CONT. L.J. 617, 618 (2010) ("Commercial businesses rise and fall with the novelty, ingenuity, and competitiveness of the information they possess.").

48. Ted Hagelin, *A New Method to Value Intellectual Property*, 30 AIPLA Q.J. 353, 354 (2002).

49. *Id.*

50. *Id.* (citing GORDON V. SMITH & RUSSELL L. PARR, VALUATION OF INTELLECTUAL PROPERTY AND INTANGIBLE ASSETS, 131-47 (3d ed. 2000)).

disclosure.<sup>51</sup>

Because of the significant value of intellectual property and confidential business information, the laws protecting this information have become increasingly important to businesses. With regard to trade secrets, Seventh Circuit Judge Richard Posner noted:

[T]rade secret protection is an important part of intellectual property, a form of property that is of growing importance to the competitiveness of American industry. Patent protection is at once costly and temporary, and therefore cannot be regarded as a perfect substitute. If trade secrets are protected only if their owners take extravagant, productivity-impairing measures to maintain their secrecy, the incentive to invest resources in discovering more efficient methods of production will be reduced, and with it the amount of invention.<sup>52</sup>

Judge Posner's observations, along with the increasing value of intellectual property and confidential business information, emphasize the need for businesses to be able to protect these assets.

#### B. *Research and Development: Patents vs. Trade Secrets*

In business, having a large and diverse patent portfolio can provide a huge advantage over competitors.<sup>53</sup> It can increase in-house innovation, increase external innovation, avoid costly litigation, improve bargaining positions, improve defensive litigation positions, increase patent lobby power, and increase attractiveness to investors.<sup>54</sup> However, an important requirement in obtaining a patent from the U.S. Patent and Trademark Office is disclosing the invention in enough detail that one skilled in the art could replicate the invention.<sup>55</sup> While a company may act quickly to obtain

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51. See David S. Almeling, *Four Reasons to Enact a Federal Trade Secrets Act*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 769, 783 (2009) ("As strong evidence of the value of trade secrets, corporations spent \$95 billion in 2005 trying to protect their confidential information.").

52. *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 180 (7th Cir. 1991).

53. See generally Gideon Parchomovsky & R. Polk Wagner, *Patent Portfolios*, 154 U. PA. L. REV. 1 (2005) (discussing the business advantages of a large, diverse patent portfolio and introducing a new theory relating to patent portfolios and the patent paradox).

54. *Id.* at 31–37.

55. Specifically, the U.S. Patent and Trademark Office explains:

a patent for something new from research and development, it may also be prudent to refrain from immediately disclosing everything that has been developed.<sup>56</sup> This is because, even if the new research is unpatented, it may still be protected as a trade secret—as long as it is kept a secret.<sup>57</sup>

There are some advantages to keeping new research as a trade secret rather than disclosing it to pursue a patent. For example, unlike patent law, trade-secret law protects information without any registration process, and the longer a business waits to disclose the information through a patent application, the longer the business may have to exclude competitors from using the information.<sup>58</sup> However, there are also disadvantages. “Unlike all other forms of intellectual property,” trade-secret law only grants a right to exclude information obtained through improper means.<sup>59</sup> Thus, if a business hesitates to apply for a patent or chooses to keep an invention as a trade secret, then it runs the risk of losing the chance to obtain patent protection due to a competitor’s reverse engineering or independent development.<sup>60</sup> Perhaps worse, if a business is unable to establish its own

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The specification must include a written description of the invention or discovery and of the manner and process of making and using the same, and is required to be in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which the invention or discovery appertains, or with which it is most nearly connected, to make and use the same.

U.S. PATENT & TRADEMARK OFFICE, MANUAL OF PATENT EXAMINING PROCEDURE § 608.01 (8th ed. Rev. 9, Aug. 2012) (quoting 37 C.F.R. § 1.71 (a)).

56. See J. Andrew McKinney, Jr., *The Most Significant Practical Effects of the America Invents Act [“AIA”] for Business Owners & Transactional Attorneys*, MD. B.J., Sept. 2012, at 38, 42–43 (discussing new strategies for businesses and patent prosecutors under the newly enacted America Invents Act).

57. Michael Risch, *Why Do We Have Trade Secrets?*, 11 MARQ. INTELL. PROP. L. REV. 1, 11 (2007).

58. *Id.* at 12–13; see also *Patents or Trade Secrets?*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/sme/en/ip\\_business/trade\\_secrets/patent\\_trade.htm](http://www.wipo.int/sme/en/ip_business/trade_secrets/patent_trade.htm) (last visited June 1, 2014) (listing the advantages of trade secrets as not being limited in time, having no registration costs, having immediate effect, and not requiring compliance with government formalities).

59. Risch, *supra* note 57, at 12; see also *Patents or Trade Secrets?*, *supra* note 58 (listing the disadvantages of protecting confidential business information as trade secrets as the ability of competitors to reverse engineer the innovation, the ability of the public to use the secret once it becomes public, the varying degrees of legal protection based on locality, and the ability of independent inventors to patent the innovation for themselves).

60. See Risch, *supra* note 57, at 12.

“prior use” of the invention, a competitor could potentially block the original inventor from being able to use the invention.<sup>61</sup> These possibilities should be considered by any business and its lawyers when considering how to proceed with protecting new ideas, research, and inventions.

### C. What Are Protectable Trade Secrets?

A trade secret is “any information that can be used in the operation of a business or other enterprise” that is “sufficiently valuable and secret to afford an actual or potential economic advantage over others.”<sup>62</sup> This information is not limited to technology and may include confidential business records and financial statements.<sup>63</sup> For years, most state courts adopted the following Restatement of Torts definition of a trade secret: “A trade secret may consist of any formula, pattern, device or compilation of

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61. McKinney, *supra* note 56, at 42. While the risk of subsequent independent inventors blocking prior inventors from using their own inventions may be decreased by the America Invents Act’s new first-to-file system and prior use defense, this risk will still exist if prior use cannot be established. *Id.*

62. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995). *See also* *What is a Trade Secret?*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/sme/en/ip\\_business/trade\\_secrets/trade\\_secrets.htm](http://www.wipo.int/sme/en/ip_business/trade_secrets/trade_secrets.htm) (last visited June 1, 2014) (“Broadly speaking, any confidential business information which provides an enterprise a competitive edge may be considered a trade secret. Trade secrets encompass manufacturing or industrial secrets and commercial secrets. The unauthorized use of such information by persons other than the holder is regarded as an unfair practice and a violation of the trade secret.”). One is liable for disclosure or use of another’s trade secret if:

- (a) he discovered the secret by improper means, or
- (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him, or
- (c) he learned the secret from a third person with notice of the facts that it was a secret and that the third person discovered it by improper means or that the third person’s disclosure of it was otherwise a breach of his duty to the other, or
- (d) he learned the secret with notice of the facts that it was a secret and that its disclosure was made to him by mistake.

RESTATEMENT (FIRST) OF TORTS § 757 (1939).

63. *See, e.g.,* Apple Inc. v. Samsung Elecs. Co., 727 F.3d 1214, 1225 n.3 (Fed. Cir. 2013) (noting that the confidential financial information at issue likely met “the Restatement’s relatively broad definition of ‘trade secret’”).

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."<sup>64</sup> Further, the Restatement definition required that the subject matter of a trade secret be, in fact, secret, and "[m]atters of public knowledge or of general knowledge in an industry cannot be appropriated" as a secret.<sup>65</sup>

Under the more recent Uniform Trade Secrets Act (UTSA), a trade secret is defined as

information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>66</sup>

Most states, including Iowa,<sup>67</sup> have adopted a version of the UTSA, which defines trade secret very similarly to the Restatement definition.<sup>68</sup> However, there are three key differences between the Restatement definition and the UTSA definition: (1) the Restatement has an exception for "single use" information, which can be a trade secret under the UTSA; (2) the Restatement requires continuous use in business, which is not required under the UTSA; and (3) the Restatement places less emphasis on efforts to maintain secrecy than the UTSA.<sup>69</sup> Further, liability for misappropriation under the UTSA has slightly different requirements.<sup>70</sup>

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64. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b; see Risch, *supra* note 57, at 7 ("For those states that have not implemented the UTSA [Uniform Trade Secrets Act], and for most judicial opinions that predate the UTSA, the definition of a trade secret is set forth in the comment to section 757 of the Restatement (First) of Torts." (footnote omitted)).

65. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b.

66. UNIF. TRADE SECRETS ACT § 1(4) (amended 1985).

67. See, e.g., IOWA CODE § 550 (2013). For a thorough discussion of Iowa trade secret law and the general assembly's passage of the UTSA, see generally Thomas W. Foley, *Keeping a Company's Confidences Secret: Trade Secret Enforcement Under Iowa's Uniform Trade Secrets Act*, 59 DRAKE L. REV. 1, 2-5 (2010).

68. Compare IOWA CODE § 550.2(4), and UNIF. TRADE SECRETS ACT § 1(4), with RESTATEMENT (FIRST) OF TORTS § 757 cmt. b.

69. Risch, *supra* note 57, at 8.

70. Misappropriation liability under the UTSA requires

Regardless of whether a state uses the common law definition or the UTSA definition, a common theme courts must be aware of is the distinction between acquiring trade secrets through improper means and acquiring trade secrets through honest individual development or reverse engineering.<sup>71</sup> In light of this distinction, courts should consider their role in handling confidential information, including trade secrets, and whether, by publicly disclosing a business's trade secret, the judicial system is enabling competitors to escape misappropriation liability.

#### D. Modes of Protection

Because of the immense value of confidential business information and trade secrets, and the need to keep them secret, there are methods available for parties to protect them from disclosure in litigation. One way a party can protect its secrets is by obtaining a protective order during

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(i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(ii) disclosure or use of a trade secret of another without express or implied consent by a person who

(A) used improper means to acquire knowledge of the trade secret; or

(B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was

(I) derived from or through a person who had utilized improper means to acquire it;

(II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) before a material change of his [or her] position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

UNIF. TRADE SECRETS ACT § 1(2) (amended 1985).

71. See Craig L. Uhrich, *The Economic Espionage Act—Reverse Engineering and the Intellectual Property Public Policy*, 7 MICH. TELECOMM. & TECH. L. REV. 147, 167–68 (2001) (discussing the legitimate methods by which a competitor may reverse engineer or independently develop knowledge of another business's trade secrets, but also noting that trade secret protections will be enforced if the competitor acquires them through prohibited conduct).

discovery under Federal Rule of Civil Procedure 26(c)(1)(G)<sup>72</sup> or its state court equivalent.<sup>73</sup> This Rule states, in relevant sections, that

[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

....

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way . . . .<sup>74</sup>

This Rule can be utilized in early stages of litigation to prevent competitors and their lawyers from obtaining sensitive and valuable trade secrets through broad, sweeping discovery requests. While this Rule focuses on the discovery stage, its underlying principle—that a party can seek protection from disclosure upon a showing of good cause—applies any time the court considers whether to seal or unseal certain documents.<sup>75</sup>

Another protection exists in Federal Rule of Civil Procedure 45(c)(3)(B)(i).<sup>76</sup> This Rule allows a court to quash or modify a subpoena “if it requires . . . disclosing a trade secret or other confidential research,

72. FED. R. CIV. P. 26(c)(1)(G).

73. See, e.g., IOWA R. CIV. P. 1.504(1)(a)(7).

Upon motion by a party or by the person from whom discovery is sought or by any person who may be affected thereby, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken:

a. May make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

....

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.

*Id.*

74. FED. R. CIV. P. 26(c)(1)(G).

75. See *infra* Part IV.A.2.

76. FED. R. CIV. P. 45(c)(3)(B)(i).

development, or commercial information.”<sup>77</sup> A party seeking to quash or modify a subpoena under this Rule cannot simply make a broad assertion that the information is confidential and expect the court to protect it from disclosure; the moving party must be prepared to “describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.”<sup>78</sup>

A protective order is a useful tool for litigants, and ultimately judges, to protect confidential business information and trade secrets in the judicial process.<sup>79</sup> Courts should be aware of the important consequences of granting or denying these protective orders. Emphasizing the importance of respecting protective orders, one judge noted:

The use of protective orders is vital to the efficient litigation of every stage of many intellectual property disputes. If protective orders were not issued to safeguard the confidentiality of trade secrets and other confidential commercial information when warranted by the circumstances, litigants would be forced to choose between fully presenting their claims or defenses (and thereby destroying their trade secrets through disclosure to competitors or the public), or foregoing their claims or defenses (in order to keep their trade secrets and other sensitive information confidential). In addition, if protective orders were widely believed to be ineffective, the litigation of intellectual property claims would become even more complex and protracted than the nature of such cases already requires. Among other things, discovery disputes would proliferate, as parties struggled desperately to withhold confidential information from potentially ruinous disclosure whenever possible.<sup>80</sup>

Thus, the protective order is the primary tool for a judge to protect a party’s intangible secret assets, and courts should be mindful of a party’s interest in protecting those assets when deciding whether to grant protective orders.

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77. *Id.*

78. FED. R. CIV. P. 45(d)(2)(A)(ii).

79. *See* Beam Sys., Inc. v. Checkpoint Sys., Inc., No. CV95-4068-RMT (AJWX), 1997 WL 364081, at \*1 (C.D. Cal. Feb. 6, 1997) (“One of the principal tools enabling courts to strike an appropriate balance [between private interests in confidentiality and public interests in open access] is a protective order.”).

80. *Id.* at \*2 (citation omitted).

#### IV. STRIKING A BALANCE: STANDARDS AMONG THE COURTS

When deciding whether to grant a protective order sealing confidential information in judicial documents, courts use a balancing test and weigh the interest of public access against the parties' interest in protecting their trade secrets, as discussed in Parts II and III, respectively. Courts use this balancing test when considering both motions for a Rule 26 discovery protective order and substantive motions to seal or unseal judicial records under one of the theories of access.<sup>81</sup> While all courts recognize similar competing interests, various jurisdictions place different emphasis on these interests and use different analyses for making their decisions.

##### A. General Principles of the Federal Courts

###### 1. District Court's Discretion

The Supreme Court confirmed that district courts are given great discretion when balancing interests and deciding whether to keep judicial records under seal.<sup>82</sup> This discretion is consistent with a district court's duty to oversee the pretrial discovery process, during which the court is also given discretion regarding whether to grant protective orders.<sup>83</sup> District courts are required to balance the competing interests discussed in Parts II and III and determine the appropriate mode of protection, if warranted.<sup>84</sup>

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81. See, e.g., *Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1310–13 (11th Cir. 2001).

Before disclosure is appropriate, a court must first conduct the common-law right of access balancing test. Because in this context the common-law right of access, like the constitutional right, requires the court to balance the respective interests of the parties, the Press's common-law right to the Firestone documents filed in connection with the motion for summary judgment may be resolved by the Rule 26 good cause balancing test.

*Id.*

82. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 599 (1978) (“The few cases that have recognized [a common law right of access] do agree that the decision as to access is one best left to the sound discretion of the trial court . . .”).

83. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31 (1984).

84. See *Centurion Indus., Inc. v. Warren Steurer & Assocs.*, 665 F.2d 323, 326 (10th Cir. 1981).

It is within the sound discretion of the trial court to decide whether trade secrets are relevant and whether the need outweighs the harm of disclosure. Likewise, if the trade secrets are deemed relevant and necessary,

This is true even in situations in which no parties in the litigation oppose the protective order.<sup>85</sup>

While the district court judge is given broad discretion in granting protective orders or granting access to records, there are some principles that courts typically follow when determining whether there is a sufficient showing to seal certain documents from the public. First, as Judge Posner notes, a “standardless, stipulated, permanent, frozen, [or] overbroad blanket order” is generally improper.<sup>86</sup> However, a “document-by-document” determination of a record containing thousands of documents may impose an excessive burden on the judge.<sup>87</sup> Specifically, in the context of protecting trade secrets and other confidential business information, a judge may properly grant a protective order when (1) the parties have demonstrated a good-faith effort to identify actual trade secrets, and (2) the public has the opportunity to challenge the sealing of those documents containing the secret information.<sup>88</sup>

## 2. *The “Good Cause” Requirement*

The balancing test adopted by most federal courts derives from the Federal Rules of Civil Procedure’s requirements for a protective order.<sup>89</sup> Rule 26 requires “a showing of ‘good cause’ made by the party seeking protection.”<sup>90</sup> “Federal courts have superimposed a balancing of interests approach for Rule 26’s good cause requirement. This standard requires the district court to balance the party’s interest in obtaining access against the

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the appropriate safeguards that should attend their disclosure by means of a protective order are also a matter within the trial court’s discretion.

*Id.*

85. See, e.g., *Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1219 (Fed. Cir. 2013) (“These appeals are unique in that neither the appellant, Apple, nor the cross-appellant, Samsung, opposes the other party’s requested relief.”).

86. *Citizens First Nat’l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 946 (7th Cir. 1999). Posner stresses the importance of good cause in rejecting such “blanket orders”: “The determination of good cause cannot be elided by allowing the parties to seal whatever they want, for then the interest in publicity will go unprotected unless the media are interested in the case and move to unseal.” *Id.* at 945.

87. *Id.* at 946.

88. *Id.*

89. See FED. R. CIV. P. 26(c)(1); see also Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439, 444–45 (2006) (discussing district courts’ local rules for sealing civil court documents).

90. *Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1313 (11th Cir. 2001); see also FED. R. CIV. P. 26(c)(1).

other party's interest in keeping the information confidential."<sup>91</sup> Although some commentators believe that broad protective orders stipulated by both parties promote the efficiency of complex pretrial discovery, the weight of authority now permits the sealing of court documents with a showing of sufficiently good cause.<sup>92</sup> Beyond the discovery context, many district courts require only a showing of good cause to overcome the presumption of access—and ultimately keep certain documents under seal—when conducting the burden-shifting or balancing analysis.<sup>93</sup>

### 3. *A “Strong Presumption” of Public Access*

Some courts begin the balancing of interests “with a strong presumption in favor of access to court records.”<sup>94</sup> But this presumption can be overridden by a sufficiently compelling reason.<sup>95</sup> To meet this high burden, “the party 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.”<sup>96</sup>

In the Ninth Circuit, the strength of the presumption differs depending on the type of court document at issue.<sup>97</sup> For example, documents obtained during discovery or documents related to

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91. *Chi. Tribune Co.*, 263 F.3d at 1313 (citations omitted). Additionally, the Supreme Court found that protective orders survive First Amendment scrutiny based on the required showing of good cause and limited application because any order satisfying that standard is narrowly tailored to promote the substantial government interest of efficient pretrial discovery. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32–36 (1984).

92. *Citizens First Nat'l Bank*, 178 F.3d at 945–46 (discussing the trend of courts moving away from blanket protective orders and requiring good cause to seal documents).

93. *See Estate of Migliaccio v. Allianz Life Ins. Co. of N. Am. (In re Midland Nat'l Life Ins. Co. Annuity Sales Practices Litig.)*, 686 F.3d 1115, 1119 (9th Cir. 2012) (“Thus, a particularized showing of ‘good cause’ under Federal Rule of Civil Procedure 26(c) is sufficient to preserve the secrecy of sealed discovery documents attached to non-dispositive motions.”).

94. *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003); *see also United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982); *United States v. Criden*, 648 F.2d 814, 823 (3d Cir. 1981).

95. *Foltz*, 331 F.3d at 1135.

96. *Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1221 (Fed. Cir. 2013) (quoting *Kamakana v. City of Honolulu*, 447 F.3d 1172, 1178–79 (9th Cir. 2006)) (internal quotation mark omitted).

97. *See Kamakana*, 447 F.3d at 1179–80.

nondispositive motions may be sealed by overcoming the ordinary presumption with a showing of good cause.<sup>98</sup> Parties seeking to seal documents related to dispositive motions, however, must meet a high threshold by showing “compelling reasons” for sealing the documents.<sup>99</sup> “A ‘good cause’ showing will not, without more, satisfy a ‘compelling reasons’ test.”<sup>100</sup> This heightened threshold arises because different interests are at stake.<sup>101</sup> While good cause may be sufficient to seal confidential information unrelated to the merits of a case, the public’s interest in access to the judicial system warrants a heightened threshold to seal dispositive motions and related materials from the public.<sup>102</sup>

#### 4. *The Information Continuum*

In the Second Circuit, the weight given to the presumption of access is determined on a continuum.<sup>103</sup> If the information sought to be sealed is related to “the exercise of Article III judicial power” or important to monitoring the federal courts, then there is a strong presumption in favor of public access.<sup>104</sup> As the information becomes less related to these interests, “the weight of the presumption declines.”<sup>105</sup> For example, information related to a *denial* of a summary judgment motion, which merely delays a final determination of the substantive rights of the parties involved, carries a lighter presumption than information related to a *grant* of a summary judgment, which is a final adjudication of those rights.<sup>106</sup> When information falls in the middle of this continuum, “the weight to be accorded to the presumption of access must be determined by the exercise of judgment.”<sup>107</sup> Relevant factors in determining the weight include the traditional availability of the information and the motive of those seeking access.<sup>108</sup> Once the weight of the presumption is determined, the court evaluates the competing interests in keeping the information sealed to

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98. *Id.* at 1180.

99. *Id.* (citing *Foltz*, 331 F.3d at 1136).

100. *Id.*

101. *Id.*

102. *Id.* at 1179–80.

103. *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1049–50.

108. *Id.* at 1050 (using examples to explain the range of the continuum and the factors used in determining where the information falls on this continuum).

determine whether these interests have overcome the weight of the presumption.<sup>109</sup>

When the weight of the presumption is high, a “[m]ovant must prove that disclosure would work a clearly defined and very serious injury.”<sup>110</sup> But a showing of “[p]otential damage from [the] release of trade secrets is a legitimate basis for sealing documents and restricting public access during trial.”<sup>111</sup> To keep documents containing trade secrets sealed and overcome the presumption of access, “[a] party seeking to preclude disclosure of trade secrets has the burden to show that the information in fact constitutes a trade secret, that disclosure would harm [the party’s] competitive position and that the asserted harm outweighs the presumption of public access.”<sup>112</sup> Further, “[w]ith respect to proof of competitive harm, vague and conclusory allegations will not suffice.”<sup>113</sup>

### 5. *The Eighth Circuit*

While the Eighth Circuit historically has been hesitant to explicitly recognize a common law right to access judicial records from civil proceedings,<sup>114</sup> it recently joined the majority of circuits in expressly recognizing the existence of this right.<sup>115</sup> In *IDT Corp. v. eBay*, the court

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109. *Id.*

110. *Encyclopedia Brown Prods., Ltd. v. Home Box Office, Inc.*, 26 F. Supp. 2d 606, 613 (S.D.N.Y. 1998) (quoting *Turick v. Yamaha Motor Corp.*, 121 F.R.D. 32, 35 (S.D.N.Y. 1988)) (internal quotation marks omitted).

111. *Id.* at 612.

112. *Id.* at 613.

113. *Id.* (citing *Dep’t of Econ. Dev. v. Arthur Andersen & Co.*, 924 F. Supp. 449, 487 (S.D.N.Y. 1996)).

114. *See Goff v. Graves*, 362 F.3d 543, 550 (8th Cir. 2004) (“Any right of access to records from civil proceedings, if it exists (a question we never have decided), is not absolute.”). While the Supreme Court assumed a common law right of access in *Nixon*, it did not expressly hold that the right existed or define the contours of the right. *See Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597–99 (1978). Thus, the circuit courts were not bound to this common law right.

115. *IDT Corp. v. eBay*, 709 F.3d 1220, 1222 (8th Cir. 2013); *see also Mann v. Boatright*, 477 F.3d 1140, 1148–49 (10th Cir. 2007); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119–24 (2d Cir. 2006); *SEC v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993); *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659–62 (3d Cir. 1991); *EEOC v. Erection Co.*, 900 F.2d 168, 169–70 (9th Cir. 1990); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252–54 (4th Cir. 1988); *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408 & n.4 (1st Cir. 1987); *Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1570–72 (11th Cir. 1985); *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1308–10 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*,

considered “whether there were sufficient grounds [based on the parties’ interests in confidentiality] to override the common-law right of access and to justify the district court’s order sealing the entire antitrust complaint.”<sup>116</sup> The balancing in this case, like similar cases involving trade secrets, required the judge to weigh “the degree to which sealing a judicial record would interfere with the interests served by the common-law right of access” against the “the salutary interests served by maintaining confidentiality of the information sought to be sealed.”<sup>117</sup>

Once the parties stipulated that the complaint fell under the common law presumption for judicial documents,<sup>118</sup> the court found the Second Circuit’s continuum test particularly useful in deciding the weight of this presumption.<sup>119</sup> Applying this approach, documents involving the adjudication of a case carry heavy weight, while documents presented to the court solely to show their irrelevance carry little weight.<sup>120</sup> In other words, the common law right of access is stronger in documents related to the disposition of the case, and the sealing of these documents has a higher degree of interference with the public’s interest than nondispositive documents.

After reiterating the great discretion given to the district courts in granting protective orders,<sup>121</sup> the Eighth Circuit addressed the important question of whether the party seeking access has a “generalized interest in access to the complaint.”<sup>122</sup> Finding that the public’s interest in access to this complaint was minimal, the court again cited the Second Circuit’s continuum test and emphasized that the general interest in these documents is weak when they have little relation to the district court’s exercise of judicial power.<sup>123</sup>

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710 F.2d 1165, 1177–79 (6th Cir. 1983). Additionally, while not expressly finding a common law right of access to civil proceedings, the D.C. Circuit has “take[n] it as a given that there is a tradition of public access to court records.” *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1333 (D.C. Cir. 1985).

116. *IDT Corp.*, 709 F.3d at 1223.

117. *Id.*

118. The Eighth Circuit later questioned this notion. *See id.* at 1222–23 (“There may be a historical case to be made that a civil complaint filed with a court, but then soon dismissed pursuant to settlement, is not the sort of judicial record to which there is a presumption of public access.”).

119. *Id.* at 1223.

120. *Id.*; *see supra* Part IV.A.4.

121. *IDT Corp.*, 709 F.3d at 1223.

122. *Id.* at 1224.

123. *Id.*

### B. Iowa Courts

While issues concerning the protection of trade secrets often arise in federal court litigation, trade secrets are protected by state law.<sup>124</sup> Thus, trade secret issues are also litigated in state courts. When these issues are litigated, state courts must consider the same interests that federal courts consider when deciding whether to keep certain documents sealed or open them to the public.

Like most states, Iowa statutes mandate public access to court records.<sup>125</sup> The statutes serve the policy interests of exposing government functions to public scrutiny and preventing government from “secreting its decision-making” from the people it is intended to serve.<sup>126</sup> However, the statutes contain an exception that protects trade secrets from public disclosure.<sup>127</sup> A party seeking protection from disclosure bears the burden of showing that (1) “the harm posed by dissemination will be substantial and serious,” (2) “the protective order is precisely and narrowly drawn,” and (3) no “alternative means of protecting the public interest is available that would intrude less directly on expression.”<sup>128</sup> While district courts have wide discretion in granting protective orders, the same good cause requirement from the federal rules must be shown.<sup>129</sup> Iowa courts enforce this requirement even when the protective order is stipulated to by both parties.<sup>130</sup> Thus, it is up to Iowa’s district courts to weigh the competing

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124. See, e.g., *Boeing Co. v. Sierracin Corp.*, 738 P.2d 665, 674 (Wash. 1987) (en banc) (“While it is true that all state legal and equitable rights equivalent to copyright are preempted by federal law, we do not believe that federal copyright law preempts state trade secrets claims.”).

125. See *Iowa Film Prod. Servs. v. Iowa Dep’t of Econ. Dev.*, 818 N.W.2d 207, 217 (Iowa 2012) (“The Iowa Open Records Act (Iowa Code chapter 22) generally requires state and local entities to make their records available to the public.”); see also IOWA CODE §§ 22.1(3), .2(1) (2013).

126. *Iowa Film Prod. Servs.*, 818 N.W.2d at 217 (quoting *City of Riverdale v. Diercks*, 806 N.W.2d 643, 652 (Iowa 2011)).

127. See IOWA CODE § 22.7(3) (2013) (“The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information: . . . (3) Trade secrets which are recognized and protected as such by law.”).

128. *Comes v. Microsoft Corp.*, 775 N.W.2d 302, 305–06 (Iowa 2009) (citing *State ex rel. Miller v. Nat’l Dietary Research, Inc.*, 454 N.W.2d 820, 823 (Iowa 1990)).

129. *Id.* at 306; see also *id.* at 305 n.5 (noting that “Iowa [R]ule [of Civil Procedure] 1.504(1)(a) is virtually identical to its federal counterpart,” Federal Rule of Civil Procedure 26(c), in its description of the circumstances under which a protective order may be granted).

130. *Id.* at 306. Indeed, upon review, Iowa appellate courts “have scrutinized

interests in deciding whether to grant a broad-reaching protective order both when a party challenges the protective order and when neither party challenges the motion.<sup>131</sup>

## V. THE PROPER ROLE OF THE COURTS

### A. *Proper Balancing Considerations*

Courts typically begin their “balancing of interests” analysis with a discussion on the right of access. Depending on the court, it will cite either the common law right of access or the First Amendment right of access (or both) and discuss the important interests the right of access protects.<sup>132</sup> Then, the court will note that the right of access is not absolute when it comes to improper commercial purposes (i.e., obtaining competitor’s trade secrets) and cite a rule giving it permission to grant a protective order.<sup>133</sup> While the court will likely note the good cause requirement, or some other limiting factor, courts should further consider the significance of the Supreme Court’s explicit exception to access in *Nixon* and Federal Rule 26(c)(1)(G)’s mechanism for protecting trade secrets.<sup>134</sup> While the Court’s discussion in *Nixon* may have been limited to cases involving the common law right of access, and Rule 26 applies only to discovery, these limitations do not detract from the clearly important interest in protecting parties from trade secret disclosure.<sup>135</sup> Courts should also be cognizant of the malicious motives behind parties seeking access and the reality that companies closely watch their competitors’ litigation.

#### 1. *The Nixon Exception*

The Supreme Court’s third *Nixon* exception to the common law right of access should not be taken lightly. In carving out this exception, the Court explicitly rejected the right of access when the documents can be used “as sources of business information that might harm a litigant’s

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the record to determine whether the need for secrecy was justified.” *Id.*

131. See *id.*; see also *Farnum v. G.D. Searle & Co.*, 339 N.W.2d 384, 390 (Iowa 1983) (“These criteria strike a balance between the policy favoring discovery and free expression on one side and a party’s interest in avoiding commercial damage and preventing an abuse of discovery on the other.”).

132. See *supra* Part II.

133. See *supra* Parts II.A.2, III.D.

134. See *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978); FED. R. CIV. P. 26(c)(1)(G).

135. See *supra* Part III.A.

competitive standing.”<sup>136</sup> This indicates the Court’s recognition of the high importance of protecting these interests.<sup>137</sup> Courts that impose heavy burdens on parties wishing to keep their trade secrets under seal do not truly appreciate this importance. While balancing the interests in favor of nondisclosure may burden the public’s small interest in monitoring complex business litigation (if any exists), disclosing a business’s trade secrets has the potential to destroy the majority of a business’s financial assets.<sup>138</sup> Thus, rather than requiring more detailed identification of protectable materials from the party who has already made a good cause showing that a trade secret is at stake, courts should place the burden on the party seeking access and require that party to show it has a significant interest in the information.

## 2. *Federal Rule of Civil Procedure 26(c)(1)(G)*

Courts should also recognize the importance of the specific exception to broad discovery for information containing trade secrets in Rule 26(c)(1)(G).<sup>139</sup> This Rule highlights the importance of protecting trade secrets from improper disclosure by limiting access to information, even during the discovery process.<sup>140</sup> While a party may show a specific need for access to the confidential information,<sup>141</sup> there is still a risk that some information useful to the litigation will not be disclosed if the party is unaware of the information or is unable to show a specific need. Thus, this Rule shows that even the strong interests in certain aspects of our fair judicial system (e.g., broad discovery) can be outweighed by an even stronger interest in protecting a business’s trade secrets.<sup>142</sup>

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136. *Nixon*, 435 U.S. at 598.

137. *See also* *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 180 (7th Cir. 1991) (remarking that “trade secret protection is an important part of intellectual property” and of “growing importance to the competitiveness of American industry”).

138. *See supra* Part III.A.

139. FED. R. CIV. P. 26(c)(1)(G).

140. *See id.*

141. *See In re Remington Arms Co.*, 952 F.2d 1029, 1032 (8th Cir. 1991) (“[T]he party seeking discovery [must] show that the [trade secret] is relevant to the subject matter of the lawsuit and is necessary to prepare the case for trial.”).

142. *See id.* (noting that in cases in which Rule 26(c) properly applies, “discovery of trade secrets should either be limited or not permitted”).

### 3. *Motive*

Lastly, judges should be mindful that businesses closely watch their competitors' litigation and even bring lawsuits to "fish" for trade secrets.<sup>143</sup> Additionally, there are books instructing businesses on how to search their competitors' court documents for disclosed trade secrets.<sup>144</sup> Contrary to the Second Circuit's view that "motive generally [is] irrelevant to defining the weight accorded the presumption of access,"<sup>145</sup> courts should consider the motive of a party seeking access to documents containing trade secrets.<sup>146</sup> The public's interest is not served by competitors digging through each other's litigation to uncover confidential business information. Courts should not become a vehicle for such questionable business practices.<sup>147</sup>

#### B. *Improper Presumption*

The strong presumption of access<sup>148</sup> is improper in the context of trade secret cases. Regardless of the type of court document,<sup>149</sup> under the common law right of access, judicial records containing trade secrets or other confidential business information do not warrant a strong presumption of access.<sup>150</sup> The *Nixon* Court expressly stated an exception to the common law right of access for judicial documents that could be used "as sources of business information that might harm a litigant's competitive

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143. See generally Keith J. Broady & Timothy C. Matson, *Do Companies Sue Competitors to Learn the Competitors' Trade Secrets?*, CORP. COUNS., Jan. 2, 2013, available at LEXIS (search title, then click "Legal News" tab).

144. See JAMES H. A. POOLEY, TRADE SECRETS: A GUIDE TO PROTECTING PROPRIETARY BUSINESS INFORMATION 169–70 (1987) ("To find out what lawsuits in which a company has been involved, go to the state trial clerk's office in your area and ask to see the 'plaintiff-defendant index.' Frequently the basic information of a case name and number can be gleaned from data bases.").

145. *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995).

146. See POOLEY, *supra* note 144, at 178 ("In fact, litigation itself can be used as an anticompetitive tool. Established companies sometimes pursue a groundless lawsuit to destroy an incipient competitor.").

147. See *United States v. McDougal*, 103 F.3d 651, 658 (8th Cir. 1996) ("We agree, as a matter of public policy, that courts should avoid becoming the instrumentalities of commercial or other private pursuits.").

148. See *supra* Part IV.A.3.

149. See *supra* notes 97–102 and accompanying text (discussing the Ninth Circuit's use of different presumptions of access for dispositive and nondispositive motions).

150. See *McDougal*, 103 F.3d at 657–58 (declining to interpret precedent as "incorporating a strong presumption favoring public access for purposes of the common law right").

standing.”<sup>151</sup> Based on the policy considerations for carving out this exception in *Nixon*, it is incorrect for courts to begin their balancing of interests analysis with a heavy presumption weighing against protection when confidential business information is at stake. Although the Ninth Circuit notes that the protection of trade secrets is usually a compelling reason sufficient to overcome the strong presumption of access,<sup>152</sup> this strong presumption is still an improper starting point for the court’s analysis. It places too high of a burden on parties trying to protect their valuable trade secrets without risking disclosure in the courtroom.<sup>153</sup> District courts should be able to use their sound discretion in weighing the competing interests for and against sealing court documents without such a misbalanced starting presumption. Many circuits agree and have declined to adopt this strong presumption in these cases.<sup>154</sup>

### C. Proper Procedures

“Motions to seal generally must itemize the particular document(s) for which sealing is sought, identify a legitimate interest in confidentiality and the clearly defined and serious injury that would occur from disclosure, and explain why less restrictive alternatives than sealing do not exist.”<sup>155</sup> Courts must then perform the balancing of interests analysis to determine whether to seal—or keep sealed—documents containing confidential information. Such motions occur at various points in litigation, including at the onset of litigation and after judgment is entered.<sup>156</sup> While the same

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151. *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978).

152. *Kamakana v. City of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (“In general, ‘compelling reasons’ sufficient to outweigh the public’s interest in disclosure and justify sealing court records exist when such ‘court files might have become a vehicle for improper purposes,’ such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets.” (quoting *Nixon*, 435 U.S. at 598)).

153. *See generally* Risch, *supra* note 57, at 38–41 (discussing the economic value in maintaining the secret aspect of trade secrets and the high cost of their forced disclosure).

154. *See, e.g., McDougal*, 103 F.3d at 657 (citing *United States v. Webbe*, 791 F.2d 103, 106 (8th Cir. 1986) (reiterating the Eighth Circuit’s rejection of the strong presumption of access followed by the Second, Third, Seventh, and District of Columbia Circuits)).

155. Laurie Kratky Doré, *Public Courts Versus Private Justice: It’s Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 475 (2006).

156. *See id.* (discussing statutes requiring courts to explicitly consider certain “public interests” in the ensuing balancing analysis).

major interests are at stake, there are procedural nuances courts should consider in the different contexts of litigation.

1. *Discovery Burden Shifting*

A party's "foremost goal in discovery is to glean as much pertinent information as possible as quickly as possible to support its claims."<sup>157</sup> Federal Rule 26(c) and related rules protect trade secrets and other confidential information from unwarranted disclosure through discovery.<sup>158</sup> But "[i]t is well established that trade secrets are not absolutely privileged from discovery in litigation."<sup>159</sup> Thus, courts must reconcile the goals of discovery with the goals of protecting confidential information.<sup>160</sup>

Courts typically reconcile the competing interests in trade secret discovery disputes through a burden-shifting analysis.<sup>161</sup> For example, in the Eighth Circuit, the party seeking the protective order must show that a document contains a

"trade secret or other confidential research, development, or commercial information," under Rule 26(c)[(1)(G)] and that its disclosure would be harmful to the party's interest in the property. The burden then shifts to the party seeking discovery to show that the information is relevant to the subject matter of the lawsuit and is necessary to prepare the case for trial.<sup>162</sup>

Upon a showing of both relevance and need, "the court must weigh the injury that disclosure might cause to the property against the moving party's need for the information."<sup>163</sup> The judge then ultimately decides whether the documents will be sealed upon a balancing of competing

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157. ARTHUR J. SCHWAB & DAVID J. PORTER, *GUARDING THE CROWN JEWELS: A GUIDE TO PROTECTING YOUR TRADE SECRETS* 56 (2002).

158. *See In re Remington Arms Co.*, 952 F.2d 1029, 1032 (8th Cir. 1991).

159. *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288, 292 (D. Del. 1985).

160. *See Remington Arms*, 952 F.2d at 1032 ("In light of the protection afforded to trade secrets by Rule 26(c)[(1)(G)], courts have attempted to reconcile the competing interests in trade secret discovery disputes.").

161. *See, e.g., Coca-Cola Bottling*, 107 F.R.D. at 292-99 (collecting cases discussing burden shifting and balancing the harm of disclosure of the defendant's trade secret against its displayed relevance and necessity to the plaintiffs' case).

162. *Remington Arms*, 952 F.2d at 1032 (quoting FED. R. CIV. P. 26(c)(1)(G), formerly FED. R. CIV. P. 26(c)(7)).

163. *Id.* (citing *Coca-Cola Bottling Co.*, 107 F.R.D. at 293).

interests.<sup>164</sup> This standard appears to be consistent with most other circuits.<sup>165</sup>

A burden-shifting analysis that places the final burden of persuasion on the party seeking disclosure is proper for resolving trade secret discovery disputes for two reasons. First, placing the final burden on the party seeking disclosure emphasizes the importance of protecting this valuable confidential information from possible disclosure unless absolutely necessary. Second, in matters involving trade secrets, there is a greater risk of harm from an underinclusive protective order than an overinclusive protective order.<sup>166</sup> A business has potentially everything to lose from disclosure of its trade secrets, but the public has little legitimate interest in judicial documents related to trade secret disputes.<sup>167</sup> Potential harm to the opposing party's interests is mitigated by the opportunity to show that the information is needed and relevant.

## 2. *Umbrella Protective Orders*

Parties may attempt to seal an entire case file “in exceptional or ‘extreme cases’ that implicate a ‘compelling interest in secrecy.’”<sup>168</sup> “Because of the benefits of umbrella protective orders in complex cases,

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164. *See id.*

165. *See, e.g.,* Am. Standard, Inc. v. Pfizer Inc., 828 F.2d 734, 740–41 (Fed. Cir. 1987); Centurion Indus., Inc. v. Warren Steurer & Assocs., 665 F.2d 323, 325 (10th Cir. 1981); Hartley Pen Co. v. U.S. Dist. Court, 287 F.2d 324, 331 (9th Cir. 1961); Empire of Carolina, Inc. v. Mackle, 108 F.R.D. 323, 326 (S.D. Fla. 1985); *Coca-Cola Bottling Co.*, 107 F.R.D. at 291; *see also* James A. Napier, Case Note, *The Protection of Trade Secrets from Discovery in the Eighth Circuit*: In Re Remington Arms Co., 26 CREIGHTON L. REV. 963, 981 (1993) (“The procedure outlined by the Eighth Circuit in *Remington Arms* is similar to the mechanisms applied by the other circuit courts that have addressed the issue.”).

166. Competitors may acquire a party's trade secret by being an opposing party in the litigation or by merely closely following the litigation. *See* POOLEY, *supra* note 144, at 169 (discussing strategies for acquiring a competitor's trade secrets in court documents and noting that “[a]lthough much of this material can be sealed from public inspection, more often it is not”).

167. In fact, the *Nixon* Court held the public does not have a common law interest in access to court records for use “as sources of business information that might harm a litigant's competitive standing.” *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978); *see also* Napier, *supra* note 165, at 983 (noting that the public interest in “commercial morality often will be supported when trade secrets are protected from unrestricted discovery by business competitors”).

168. Doré, *supra* note 155, at 476 (quoting *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002)).

the court may construct a broad ‘umbrella’ protective order ‘upon a threshold showing by one party (the movant) of good cause.’<sup>169</sup> In the Third Circuit, the burden of persuasion begins with the party moving to seal the entire record, who must make a good faith designation that confidential information exists in those documents.<sup>170</sup> The opposing party may then challenge specific documents within the record as nonconfidential.<sup>171</sup> If challenged, the moving party bears the burden of proving a particularized need for continued secrecy.<sup>172</sup>

While the Third Circuit recognizes the benefits of these umbrella protective orders, it improperly places the final burden on the party whose confidential information is at stake.<sup>173</sup> Given the already high costs and complexity of most intellectual property disputes, a party should not be further burdened by being required to prove a particularized need for continued secrecy for each and every document containing secret information.<sup>174</sup> Rather, the umbrella protective order burden shifting should end in a similar position as the burden shifting in the Eighth Circuit’s discovery disputes: with the final burden on the party opposing the order.<sup>175</sup> This would protect litigants from accidental disclosure due to cost and time restraints in identifying their secrets in each and every document.<sup>176</sup> It also ensures that the party claiming to have a legitimate interest in accessing the documents proves that their interest is legitimate. Finally, there is the procedural safeguard of Federal Rule of Civil Procedure 11—specifically, the risk of sanctions—to deter abuse of unwarranted protective orders.<sup>177</sup>

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169. *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 166 (3d Cir. 1993) (quoting *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1122 (3d Cir. 1986)).

170. *Id.*

171. *Id.*

172. *Id.*

173. *See id.*

174. Kevin M. Lemley, *I’ll Make Him an Offer He Can’t Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes*, 37 AKRON L. REV. 287, 310 (2004) (noting the great expense of burdensome discovery and complex facts in intellectual property disputes).

175. *See In re Remington Arms Co.*, 952 F.2d 1029, 1032 (8th Cir. 1991).

176. This is particularly necessary when courts reject stipulated protective orders or stipulated seal agreements, which parties typically reach “in order to minimize discovery disputes and eliminate the need to litigate confidentiality on a document-by-document basis.” Doré, *supra* note 155, at 473 n.60.

177. FED. R. CIV. P. 11(b)(3) (requiring that all “factual contentions have evidentiary support” in written motions before the court).

### 3. *Postlitigation Unsealing*

A court's duty to protect both a party's interest in its confidential information and the public's interest in access to the judicial system does not end when the litigated dispute is over. Even after litigation has concluded and judgment has been ordered, district courts may modify protective orders to unseal previously protected court documents.<sup>178</sup> Like the original protective order, the decision to modify the order or unseal the protected documents is made upon a balancing of interests under the sound discretion of the district court judge.<sup>179</sup> The motion to unseal a protective order can come from one of the litigating parties<sup>180</sup> or from an intervening third party.<sup>181</sup>

Regardless of who seeks to unseal the documents, district courts should show restraint in unsealing documents previously sealed under a protective order.<sup>182</sup> The court has already weighed the interests in sealing these documents and found that good cause—or a similar showing under the applicable standard—exists to seal them in the first place.<sup>183</sup> A strong presumption of access to these already-sealed documents “would surely undermine, and possibly eviscerate, the broad power of the district court to fashion protective orders.”<sup>184</sup> When one of the litigating parties seeks to unseal documents, the court should be cautious because the litigating parties are often direct competitors who would be very interested in

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178. See, e.g., *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990); *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 781–82 (1st Cir. 1988); *In re “Agent Orange” Prod. Liab. Litig.*, 821 F.2d 139, 145 (2d Cir. 1987).

179. *United Nuclear Corp.*, 905 F.2d at 1427 (citing *Wyeth Labs. v. U.S. Dist. Court*, 851 F.2d 321, 323 (10th Cir. 1988)).

180. See, e.g., *Monsanto Co. v. E.I. DuPont De Nemours & Co.*, No. 4:09CV00686 ERW, 2012 WL 5830580 (E.D. Mo. Nov. 16, 2012) (ruling on “Monsanto’s Motion to Unseal Orders”).

181. See *Third-Party Reuters Am. LLC’s Unopposed Administrative Motion to Intervene* at 4, *Apple Inc. v. Samsung Elecs. Co.*, No. 11-cv-01846-LHK, 2012 WL 3000311 (N.D. Cal. July 17, 2012) (“The pleadings should be unsealed in their entirety so that ‘the very openness of the process [can] provide the public with a more complete understanding of the judicial system and a better perception of its fairness.’” (alteration in original) (quoting *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993))).

182. See *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002) (agreeing with other courts that the common law right of access and the strong presumption of access do not apply to documents previously filed under seal).

183. See *id.*

184. *Id.*

discovering the other's trade secrets.<sup>185</sup> When a nonlitigating third party seeks to unseal protected documents, courts should keep in mind that the public usually has a minimal "generalized interest in access" to the documents.<sup>186</sup> Thus, it is very unlikely that, upon a balancing of interests, the public's minimal interest will outweigh the party's interest in protecting its confidential information.<sup>187</sup>

#### D. *The Need for Uniformity*

While the Supreme Court has confirmed the district court's discretion in granting protective orders, greater uniformity is needed regarding the standard courts should apply and the factors they should consider. As discussed in Part III, intangible assets, such as trade secrets, can often constitute the overwhelming majority of a company's value.<sup>188</sup> With this much on the line, parties may unnecessarily choose to litigate in inconvenient forums if they feel their valuable trade secrets may be at risk of disclosure. For example, future Silicon Valley adversaries may be wary of litigation in local California courts due to the Ninth Circuit's strong presumption of access.<sup>189</sup> Thus, a more uniform standard should be adopted by all courts when trade secrets and other confidential business information are contained in judicial documents. This standard should reject the strong presumption of access and require courts to be mindful of the unique interests at stake in these cases. Although commentators and other third-party interests might call for more access to court documents, the realities of corporate litigation and the element of confidentiality required to maintain trade secret protection favor the adoption of a more cautious approach.

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185. Broady & Matson, *supra* note 143 (recognizing the need for a party to protect its trade secrets from "a possible fishing expedition by a competitor").

186. IDT Corp. v. eBay, 709 F.3d 1220, 1224 (8th Cir. 2013).

187. See, e.g., Apple Inc. v. Samsung Elecs. Co., 727 F.3d 1214, 1226 (Fed. Cir. 2013). As the Federal Circuit emphasized in this case,

[s]hareholders' interests in determining financial risks and consumers' interests in manufacturing and pricing decisions simply are not relevant to the balancing test. In fact, if anything, by highlighting, for example, consumers' interests in such things as pricing decisions, it further underscores the potential harm that Apple and Samsung could face if their detailed financial information becomes public.

*Id.*

188. See *supra* Part III.A.

189. See *supra* Parts I, IV.A.3.

## VI. CONCLUSION

Trade secret disclosure is a very real risk in modern litigation. Disclosure could cost businesses millions of dollars. But the public traditionally has a right of access to judicial records. When a party moves for a protective order to seal documents containing its trade secrets, the trial court judge must weigh these competing interests when deciding the outcome. Courts have applied slightly different standards, with varying consequences. For trade secret cases, a burden-shifting standard with the final burden resting on the party opposing the protective order properly considers the valuable interests a business has in protecting its trade secrets. Courts should put less emphasis on the traditional rights of access to judicial documents and consider the unique situation of trade secret disclosure. The costs are just too high for parties that lose their secrets.

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