

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DISH NETWORK, L.L.C., AT&T SERVICES, INC.,
and DIRECTV, LLC,¹
Petitioner,

v.

BROADBAND iTV, INC.,
Patent Owner.

IPR2020-01267
Patent 10,028,026 B2

Before JEFFREY S. SMITH, JUSTIN T. ARBES, and
DANIEL J. GALLIGAN, *Administrative Patent Judges*.

ARBES, *Administrative Patent Judge*.

ORDER

Granting Patent Owner's Revised Motion to Seal
37 C.F.R. §§ 42.14, 42.54

¹ AT&T Services, Inc. and DIRECTV, LLC filed a motion for joinder and a petition in Case IPR2021-00556, which were granted, and, therefore, have been joined as petitioners in this proceeding.

Patent Owner filed motions to seal Exhibits 1053–1055, 1068, 2035–2038, 2047, 2050–2061, 2063–2068, 2070, 2073–2102, 2104–2109, 2117–2127, 2129–2151, 2154–2166, 2177–2179, and 2181–2185, as well as portions of Patent Owner’s Response, Petitioner’s Reply, and Patent Owner’s Sur-Reply referring to the exhibits filed under seal. Papers 37, 50, 53. We granted the motions only as to Exhibits 2050–2054, 2063, 2070, 2093, 2123–2127, 2129, 2132–2135, 2137, 2142, 2150, 2151, 2154, 2157, 2158, 2164, 2165, and 2178 (collectively, “the technical documents”) and authorized Patent Owner to file a revised motion to seal any other exhibits and papers that it still believed should be maintained under seal. Paper 57.

Patent Owner filed a revised motion to seal portions of Exhibits 1053–1055, 1068, and 2036, and portions of the parties’ substantive papers. Paper 58 (“Mot.”). The parties filed revised redacted versions of the exhibits and Patent Owner’s Response (Paper 59), Petitioner’s Reply (Paper 61), and Patent Owner’s Sur-Reply (Paper 60).² Patent Owner states that it does not seek to seal any other exhibits for which it originally filed a motion to seal. Mot. 2 n.2. Petitioner does not oppose the revised motion. *Id.* at 1.

There is a strong public policy in favor of making information filed in an *inter partes* review open to the public, especially because the proceeding determines the patentability of claims in an issued patent and, therefore, affects the rights of the public. Under 35 U.S.C. § 316(a)(1) and 37 C.F.R. § 42.14, the default rule is that all papers filed in an *inter partes* review are

² The parties labeled the revised redacted versions as “REVISED PUBLIC.” To ensure a clear record, the originally filed versions (labeled as “PUBLIC”) will be expunged.

open and available for access by the public; a party, however, may file a concurrent motion to seal and the information at issue is sealed pending the outcome of the motion. Only “confidential information” is protected from disclosure. 37 C.F.R. § 42.54. In that regard, the Patent Trial and Appeal Board Consolidated Trial Practice Guide (Nov. 2019), 19, *available at* <https://www.uspto.gov/TrialPracticeGuideConsolidated> (“Trial Practice Guide”), provides:

The rules aim to strike a balance between the public’s interest in maintaining a complete and understandable file history and the parties’ interest in protecting truly sensitive information.

...

Confidential Information: The rules identify confidential information in a manner consistent with Federal Rule of Civil Procedure 26(c)(1)(G), which provides for protective orders for trade secret or other confidential research, development, or commercial information. 37 C.F.R. § 42.54.

The standard for granting a motion to seal is “for good cause.” 37 C.F.R. § 42.54(a).

“Good cause” for sealing is established by a “sufficient explanation as to why” the “information sought to be sealed is confidential information,” a demonstration that the information is not “excessively redacted,” and a showing that, on balance, the strong “public[] interest in maintaining a complete and understandable record” is outweighed by “the harm to a party, by disclosure of information” and “the need of either party to rely specifically on the information at issue.” Consequently, a movant to seal must demonstrate adequately that (1) the information sought to be sealed is truly confidential, (2) a concrete harm would result upon public disclosure, (3) there exists a genuine need to rely in the trial on the specific information sought to be sealed, and (4), on balance, an interest in maintaining confidentiality outweighs the strong public interest in having an open record.

Argentum Pharms. LLC v. Alcon Research, Ltd., IPR2017-01053, Paper 27 at 3–4 (PTAB Jan. 19, 2018) (informative) (citations omitted). The filing party bears the burden of proof in showing entitlement to the relief requested in a motion to seal. 37 C.F.R. § 42.20(c).

Patent Owner argues that the redacted portions of Exhibits 1053–1055, 1068, and 2036, and the Response, Reply, and Sur-Reply “discuss or reference information found in [the technical documents] for which the Board previously found good cause to seal.” Mot. 3. According to Patent Owner, the information in the technical documents “would be valuable to Patent Owner’s competitors and harmful to Patent Owner and possibly third parties if made public” and “would significantly harm Patent Owner’s competitive and strategic position” if disclosed. *Id.* at 3–4. Patent Owner states that the revised redacted versions of the exhibits and papers “redact only portions specifically discussing or referencing the previously sealed technical documents.” *Id.* at 4. Upon reviewing the materials sought to be sealed, it appears that Patent Owner’s characterization is accurate and the redactions are narrowly tailored to only confidential information. Patent Owner has established good cause to seal the redacted portions of Exhibits 1053–1055, 1068, and 2036, and the Response, Reply, and Sur-Reply.

We again advise the parties that “[c]onfidential information that is subject to a protective order ordinarily would become public . . . 45 days after final judgment in a trial.” Trial Practice Guide at 21–22. “There is an expectation that information will be made public where the existence of the information . . . is identified in a final written decision following a trial.” *Id.* at 22. “A party seeking to maintain the confidentiality of information,

however, may file a motion to expunge the information from the record prior to the information becoming public.” *Id.*; see 37 C.F.R. § 42.56.

In consideration of the foregoing, it is hereby:

ORDERED that Patent Owner’s revised motion to seal (Paper 58) is *granted*, and the confidential versions of Exhibits 1053–1055, 1068, and 2036, and Patent Owner’s Response, Petitioner’s Reply, and Patent Owner’s Sur-Reply shall remain under seal pursuant to the default protective order previously entered in this proceeding;

FURTHER ORDERED that Exhibits 2035, 2037, 2038, 2047, 2055–2061, 2064–2068, 2073–2092, 2094–2102, 2104–2109, 2117–2122, 2130, 2131, 2136, 2138–2141, 2143–2149, 2155, 2156, 2159–2163, 2166, 2177, 2179, and 2181–2185, which Patent Owner has not requested to be kept under seal, shall be changed from “Parties and Board Only” to “Public” in the Board’s electronic filing system; and

FURTHER ORDERED that the originally filed versions of Exhibits 1053–1055, 1068, and 2036 labeled as “PUBLIC,” and the originally filed versions of the Response, Reply, and Sur-Reply labeled as “PUBLIC” (Papers 36, 49, and 54), shall be expunged from the record of this proceeding, as they have been replaced by the “REVISED PUBLIC” versions addressed herein.

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