

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

GILBERT P. HYATT,

Plaintiff,

v.

JOSEPH MATAL,

Defendant.

Civil Action No. 05-2310 (RCL)

Civil Action No. 09-1864 (RCL)

Civil Action No. 09-1869 (RCL)

Civil Action No. 09-1872 (RCL)

**Plaintiff's Opposition to Defendant's Emergency  
Motion to Seal Protected Material**

The Patent and Trademark Office seeks to seal the PowerPoint presentation Mr. Hyatt provided to the Court and displayed in open Court during his Opening Statement in the Prosecution Laches trial (attached as Exhibit 4 to his Motion to Designate PTO Documents as Protected). *See* Trial Tr. at 55:7-1 (Oct. 6, 2017 A.M. Session). The PTO offered no objections to its documents being publicly shown and discussed. *See id.* at 60-74 (addressing documents cited in Opening Statement PowerPoint). Indeed, counsel for Mr. Hyatt specifically discussed with counsel for the PTO whether it wished to claim protection for its materials prior to Mr. Hyatt's Opening Statement; at that time, it was the PTO's position that it wanted all court proceedings without exception to be public. Decl. of Mark W. DeLaquil (Nov. 9, 2017). This was also the Court's position in its ruling regarding sealed proceeding. ECF No. 132, 05-cv-2310 (May 2, 2017) at 8 ("The trials in these cases will not be sealed. Parties should expect evidence, hearings, and proposed findings of fact and conclusions of law to be available to the public); *see also id.* at 2-3 ("Additionally, as one of the parties is the PTO, the public's interest is higher still.").

Mr. Hyatt submitted his Opening Statement with his recent motion to demonstrate that a number of documents the PTO contends are “Protected” lost any protection when publicly displayed in open Court. *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) (“[O]ur cases leave little doubt that audio tapes aired publicly in open court become a part of the public domain . . . .”); *Smith v. U.S. Dist. Court for S. Dist. of Illinois*, 956 F.2d 647, 650 (7th Cir. 1992) (“Courts have also held that judicial records include transcripts of proceedings, everything in the record, including items not admitted into evidence. The memo at issue here was, at least in part, read in open court, and thus was part of the court proceedings.”) (citation omitted); *Nat’l Polymer Prod., Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 421 (6th Cir. 1981) (“[W]e begin with the well-established principle of American jurisprudence that the release of information in open trial is a publication of that information and, if no effort is made to limit its disclosure, operates as a waiver of any rights a party had to restrict its further use.”); *see also United States v. Quattrone*, 402 F.3d 304 (2d Cir. 2005) (Sotomayor, J.) (explaining jurors’ names became part of the public domain once read aloud at trial); *In re Charlotte Observer*, 921 F.2d 47, 50 (4th Cir. 1990) (“Once announced to the world, the information lost its secret characteristic . . . .”); *cf. Bank of Am. Nat. Tr. & Sav. Ass’n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339 (3d Cir. 1986) (unsealing confidential settlement filed with the court because “[w]e cannot permit the expediency of the moment to overturn centuries of tradition of open access to court documents and orders”); *Cobell v. Norton*, 213 F.R.D. 16, 24 (D.D.C. 2003) (“The case law in this Circuit is clear that confidentiality does not survive such a disclosure to a third party—to say nothing of disclosure in open court.”).

“A trial is a public event. What transpires in the court room is public property.” *Craig v. Harney*, 331 U.S. 367, 374, 67 S. Ct. 1249, 1254, 91 L. Ed. 1546 (1947). This is especially so when the PTO, a Federal agency, is involved *Doe v. Pub. Citizen*, 749 F.3d 246, 271 (4th Cir. 2014) (“The interest of the public and press in access to civil proceedings is at its apex when the government is a party to the litigation. Indeed, the public has a strong interest in monitoring not only the functions of the courts but also the positions that its elected officials and government agencies take in litigation.”), *cited in* ECF No. 132, 05-cv-2310 (May 2, 2017) at 3.

For the foregoing reasons, the PTO’s emergency motion to seal protected material should be denied. A proposed Order denying the motion is also attached.

Dated: November 9, 2017

Respectfully submitted,

/s/ Paul M. Levine  
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*Attorneys for Plaintiff Gilbert P. Hyatt*

**Certificate of Service**

I hereby certify that on November 9, 2017, I electronically filed the foregoing Opposition, and all supporting materials, with the Clerk of the Court by using the Court's ECF system.

/s/ Paul M. Levine  
Paul M. Levine

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**Declaration of Mark W. DeLaquil**

I, Mark W. DeLaquil, declare under the penalty of perjury as follows:

1. I am counsel for Gilbert P. Hyatt in these matters.
2. On October 6, 2017, I conferred with Philip Warrick, counsel for the Patent and Trademark Office (“PTO”), before my opening statement. I specifically informed Mr. Warrick that the PowerPoint slide deck accompanying my Opening Statement included documents that the PTO had marked as “Protected” under the protective orders in these actions.
3. In light of the “Protected” designation the PTO had placed on these documents when it produced them, I asked Mr. Warrick whether the PTO wished to seek leave of Court to close the proceedings when I made my Opening Statement.
4. Mr. Warrick responded that the PTO wished for all Court proceedings without exception to be public proceedings.

November 9, 2017

/s/ Mark W. DeLaquil  
Mark W. DeLaquil

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**ECF**

**[Proposed] Order**

Upon consideration of Plaintiff's Emergency Motion to Seal Protected Material, it is hereby

ORDERED that Plaintiff's Motion is DENIED.

SO ORDERED.

Date: \_\_\_\_\_, 2017

\_\_\_\_\_  
Royce C. Lamberth  
United States District Judge