



**Holme Roberts & Owen LLP**  
*Attorneys at Law*

SAN FRANCISCO

May 17, 2006

The Honorable Vaughn R. Walker  
Chief Judge  
United States District Court for the Northern District of California  
450 Golden Gate Avenue  
San Francisco, CA 94102

BOULDER

COLORADO SPRINGS

Re: *Hepting, et al. v. AT&T Corporation, et al.*, Case No. C-06-672 VRW

Dear Chief Judge Walker:

DENVER

We write on behalf of CNET News.com, Wired News and the California First Amendment Coalition to oppose the 11<sup>th</sup> hour attempt of AT&T Corp. to close the courtroom during today's hearing.

LONDON

Where a right of press and public access attaches, there are two procedural prerequisites to closing the hearing (or sealing a record): (1) those sought to be excluded "must be afforded a reasonable opportunity to state their objections" and (2) "the reasons supporting closure must be articulated in findings" satisfying the test for closure. *United States v. Brooklier*, 685 F.2d 1162, 1167-68 (9<sup>th</sup> Cir. 1982). In this case, there is both a constitutional and common law right of access to today's hearing (and to the records at issue), AT&T offered no justification for its failure to provide reasonable notice of its closure request, and its letter provides no basis for the findings necessary to close the hearing.

LOS ANGELES

The Ninth Circuit has recognized a strong common law presumption of access to civil court records filed on substantive issues, *see, e.g. Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1134-45 (9<sup>th</sup> Cir. 2003), a right that flows from a general common law right of access to civil and criminal proceedings. *See, e.g., San Jose Mercury News v. U.S. Dist. Court*, 187 F.3d 1096, 1102 (9<sup>th</sup> Cir. 1999); *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659-60 (3d Cir. 1991) (cited and followed in *Foltz*, 331 F.3d at 1134-35).

MUNICH

SALT LAKE CITY

In addition, the factors that led to recognition of a First Amendment right of access to criminal cases apply equally to civil cases, *see Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 n.17 (1980) ("historically both civil and criminal trials have been presumptively open"); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177-78 (6<sup>th</sup> Cir. 1983) ("[t]he Supreme Court's analysis of the justifications for access to the criminal courtroom apply as well

Roger Myers 415.268.1955 roger.myers@hro.com

560 Mission Street, 25th Floor San Francisco, California 94105-2994 tel 415.268.2000 fax 415.268.1999

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to the civil”), and the circuits are nearly unanimous in finding that a constitutional right of access attaches to civil proceedings and records.<sup>1</sup>

In light of the constitutional and common law rights of access, today’s hearing cannot be closed (and the seal cannot be continued on the documents) except to the limited extent that “public access would reveal legitimate trade secrets.” *Brown & Williamson*, 710 F.2d at 1180.<sup>2</sup> This exception does not extend to anything that AT&T may prefer to keep confidential. “Simply showing that the information would harm the company’s reputation is not sufficient to overcome [even] the strong common law presumption in favor of public access to court proceedings and records.” *Id.* at 1179; *Littlejohn v. BIC Corp.*, 851 F.2d 673, 685 (3d Cir. 1988) (“non-trade secret but confidential business information is

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<sup>1</sup> The Ninth Circuit has not addressed the issue, but many others have. See *Westmoreland v. Columbia Broadcasting Sys.*, 752 F.2d 16, 23 (2d Cir. 1984) (“the First Amendment does secure to the public and to the press a right of access to civil proceedings”); *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) (recognizing First Amendment right of access to civil cases to “permit[] the public to participate in and serve as a check upon the judicial process – an essential component of our structure of self-government”) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982)); *Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4<sup>th</sup> Cir. 1988); *Doe v. Stegal*, 653 F.2d 180, 185 & n.10 (5<sup>th</sup> Cir. 1981); *Brown & Williamson*, 710 F.2d at 1177-78; *In re Continental Ill. Secs. Litig.*, 732 F.2d 1302, 1308 (7<sup>th</sup> Cir. 1984); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8<sup>th</sup> Cir. 1983); *Newman v. Graddick*, 696 F.2d 796, 801 (11<sup>th</sup> Cir. 1983); accord, e.g. *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4<sup>th</sup> 1178 (1999).

<sup>2</sup> Under the First Amendment, “[c]losed proceedings, although not absolutely precluded, *must be rare* and only for cause shown that outweighs the value of openness.” *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509 (1984) (emphasis added). “The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Id.* The test to overcome the common law right of access is similarly strict. See *Foltz*, 331 F.3d at 1135.

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not entitled to the same level of protection"). "Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know." *Brown & Williamson*, 710 F.2d at 1180.

AT&T cannot show that closure is essential to protect legitimate trade secrets or that its interest in closure outweighs the value of public access to the hearing. It is implausible that AT&T could not argue this case in open court without revealing a trade secret. If need be, it can point the Court to pages and lines it contends contain trade secrets, and discuss why those passages meet the legal test for a trade secret, all without revealing the substance of any alleged secret.<sup>3</sup>

As the Court is no doubt aware, this case presents issues of enormous public interest and importance. A significant portion of the public is understandably concerned about the secret actions of its government and the potential complicity of corporations aiding government surveillance of their customers.

Granting AT&T's motion to close portions of today's hearing (or, for that matter, its motion to compel return of, and deny public access to, evidence filed in support of plaintiff's motion for preliminary injunction) would not only deny the public the ability to monitor this important case through the press, it would further fan the flames of public suspicion. As the Supreme Court has recognized, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572. At this point in our history, and on this issue in particular, it is essential that the judicial system "satisfy the appearance of justice,' ... and the appearance of justice can best be provided by allowing people to observe it." *Id.* at 571-72.

Respectfully submitted,

  
Roger Myers

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<sup>3</sup> At most, if the Court found discussion of an actual trade secret was essential, that limited discussion could be deferred until the end of the public hearing.

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cc: Cindy Cohn, Esq. (via facsimile)  
Bruce Ericson, Esq., and David Anderson, Esq. (via facsimile)