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11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN FRANCISCO DIVISION

14 TASH HEPTING, GREGORY HICKS,  
15 CAROLYN JEWEL and ERIC KNUTZEN on  
16 Behalf of Themselves and All Others Similarly  
17 Situated,

18 Plaintiffs,

19 v.

20 AT&T CORP., et al.,

21 Defendants.

CASE NO. CV-06-0672-VRW

AMICI CURIAE BRIEF OF CNET  
NEWS.COM AND CALIFORNIA FIRST  
AMENDMENT COALITION IN SUPPORT OF  
MOTION OF LYCOS AND WIRED NEWS TO  
INTERVENE AND UNSEAL DOCUMENTS

Date: June 23, 2006  
Time: 9:30 AM  
Place: Courtroom 6, 17<sup>th</sup> Floor  
(Hon. Vaughn R. Walker)  
Complaint Filed: January 31, 2006

22 CNET News.com and the California First Amendment Coalition (“CFAC”) submit this amici  
23 curiae brief in support of the motion of Lycos, Inc. and Wired News (collectively “Wired”) to unseal  
24 documents essential for the public to understand and monitor the proceedings in this significant case.  
25 Those documents are also in the hands of non-parties not subject to the Court’s orders, and some  
26 have been published on the Internet. In such a case, the sealing order is ineffective and violates the  
27 constitutional and common law rights of other members of the public to review records filed with the  
28 Court. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609-10 (1982); *In re Charlotte  
Observer*, 882 F.2d 850 (4<sup>th</sup> Cir. 1989); *CBS, Inc. v. United States District Court*, 765 F.2d 823 (9<sup>th</sup>  
Cir. 1985); *Associated Press v. United States District Court*, 705 F.2d 1143 (9<sup>th</sup> Cir. 1983).

## INTEREST OF AMICI CURIAE

CNET News.com is a news organization and CFAC a public interest organization dedicated to protecting the public's right of access to public records. CNET News.com has reported on this case since its inception, both organizations previously appeared to oppose attempts by AT&T to deny the public its right of access to prior court proceedings in this case, and both are aware of the factual and legal issues presented by Wired's motion.

## ARGUMENT OF AMICI CURIAE

As explained by CNET and CFAC in their letter to the Court of May 17 in response to AT&T's request to close a hearing, and by Wired in its moving papers, the public and its surrogates in the press have both a First Amendment and common law right of access to records filed on substantive issues in this case.<sup>1</sup> Consequently, continued sealing of the documents at issue violates both the First Amendment and common law because, *inter alia*, AT&T cannot show that continued sealing "will be effective in protecting against the perceived harm," *Associated Press*, 705 F.2d at 1146, since "most of the information [AT&T] seeks to keep confidential concerns matters that might easily be surmised from what is already in the public record." *CBS*, 765 F.2d at 825.<sup>2</sup>

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<sup>1</sup> The Ninth Circuit has recognized a "strong presumption in favor of access" to court records under the common law. *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9<sup>th</sup> Cir. 2006) (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9<sup>th</sup> Cir. 2003)). The Ninth Circuit has also recognized a First Amendment right of access to "documents filed" in criminal cases, *CBS*, 765 F.2d at 825; *Associated Press*, 705 F.2d at 1170, and, while it has not yet addressed whether that constitutional right extends to civil cases, other circuits have held that it does. 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.*, 457 U.S. at 606); *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); *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> Continued sealing of the records violates the First Amendment unless the Court expressly finds that AT&T has shown: (1) a compelling interest supporting sealing, (2) that cannot be protected by an alternative means short of sealing, and (3) "a substantial probability that closure will be effective in protecting against the perceived harm." *Associated Press*, 705 F.2d at 1146 (internal quotation

1 It has been clear to AT&T since at least May 4 that the documents at issue were in the hands  
2 of non-parties, such as the former AT&T technician who had provided copies to various media,  
3 including the New York Times. See Motion of Mark Klein for Leave to File Brief as Amici Curiae  
4 at 2 (Doc. No. 111). At the hearing on May 17, this Court made clear that it had no authority to  
5 impose restrictions on non-parties, such as Mr. Klein, who had copies of the documents. Yet as far  
6 as amici are aware, AT&T took no separate legal action seeking to prevent further distribution.

7 Not surprisingly, at least one of the media entities that had obtained a copy of the documents  
8 ultimately decided that it was in the public interest to allow the public to see those documents, on  
9 which plaintiffs have based a lawsuit of profound public significance. As CNET and other media  
10 have reported, Wired published on the Internet “the full text” of several of the sealed documents.  
11 *Wired News publishes AT&T's NSA-leak papers*, [http://reviews.cnet.com/4531-10921\\_7-](http://reviews.cnet.com/4531-10921_7-6530123.html)  
12 [6530123.html](http://reviews.cnet.com/4531-10921_7-6530123.html). As is standard in online reporting, CNET and other online media, such as E-  
13 Commerce Times, subsequently provided their readers with links to the Wired web pages where the  
14 documents can be found. *Id.*; *AT&T's Sealed Documents Exposed as Domestic Surveillance*  
15 *Controversy Heats Up*, <http://www.ecommercetimes.com/story/50704.html>.

16 Publication of these documents forecloses continuation of the sealing order. There is no  
17 question but that AT&T could not obtain an order purporting to require online media to remove the  
18 documents from the Internet, for such an order would “constitute[] a ‘transparently invalid prior  
19 restraint on pure speech.’” *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226 (9<sup>th</sup> Cir.  
20 1996) (quoting *In re Providence Journal Co.*, 820 F.2d 1342, 1344, *as modified on reh'g*, 820 F.2d  
21 1354 (1<sup>st</sup> Cir. 1986)). Consequently, to continue the sealing order “‘at this time and under these  
22 circumstances would be similar to ‘closing the barn door after the horse is gone’” and would be  
23 unconstitutional for that reason. *In re Charlotte Observer*, 882 F.2d at 855 n. 3 (quoting *New York v.*  
24 *Harris*, 6 Media L. Rptr. 2107 (N.Y. Co. Ct 1980), which denied a motion to close a hearing in the  
25 Scarsdale Diet murder case for that reason).

26  
27 omitted). Under the common law, the proponent of sealing also must “meet[] the ‘compelling  
28 reasons’ standard,” *Kamakana*, 447 F.3d at 1178, and must show sealing would be effective. *CBS*,  
765 F.2d at 825 (applying First Amendment and common law right of access to vacate sealing  
order).

1 It is not only the published documents that should be unsealed for this reason. Unless AT&T  
2 can establish that there are legitimate trade secrets in other sealed documents that are materially  
3 different than – and cannot “be surmised” from – the published documents, the seal must be lifted on  
4 all the records. *CBS*, 765 F.2d at 825. “Where closure is wholly inefficacious to prevent a perceived  
5 harm, that alone suffices to make it constitutionally impermissible.” *In re Charlotte Observer*, 882  
6 F.2d at 855 (citing *Globe Newspaper Co.*, 457 U.S. at 609-10).

7 **CONCLUSION**

8 Regardless of how the Court rules on the motion to unseal, non-parties can continue to  
9 disseminate and publish copies of the documents in their possession. Continuing the seal would only  
10 prevent other members of the public and the media from monitoring the performance of their  
11 government, and the judicial system in this case, by reviewing the records filed with the Court. It  
12 would turn the right of access on its head to require the public to rely solely on the sufferance of  
13 strangers – private non-parties who may or may not decide to make their copies publicly available –  
14 in order to read documents on file with the Court that the public has a presumptive right to view  
15 whenever it wants. For this reason and those set forth in Wired’s moving and reply papers, CNET  
16 News.com and the California First Amendment Coalition file this amici curiae brief to respectfully  
17 urge the Court to grant the motion to intervene and unseal the records at issue.

18 Dated: June 21, 2006

HOLME ROBERTS & OWEN LLP

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21 By: \_\_\_\_\_ /s/  
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