Not All That Is Public Should Be Publicized

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Adam Sherman, a partner in the Vorys Cincinnati office and a member of the litigation group, authored an article for *Law360* titled "Not All That Is Public Should Be Publicized." The full text of the article is included below.

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Not All That Is Public Should Be Publicized

Until recently, public access for court decisions still required time, effort or expense. Court decisions used to be filed away in musty courthouses. Some were printed in expensive, hardback volumes available only in law libraries. But now, it's easier to find court decisions than ever before. Federal circuit court decisions are readily accessible through Internet search engines. While perhaps good in theory, this has actually become problematic and needs to stop.

Although court decisions are public records, that doesn't mean they should be publicized by the courts on search engines, such as Google. Access alone isn't the problem. The issue is that these decisions appear prominently atop search results — even when browsing parties are not looking for them — because some courts have opened their websites to the search engines. Easy access is not always a good thing. In many instances, the high ranking of court decisions in search engine results can harm people's reputations.

The Internet provides quick, easy access to a lot of data. Searching a person's name has become common practice. People search contacts they meet at networking events and even blind dates. These searches are also being used in ways that can directly impact job prospects. In a 2014 survey, Careerbuilder.com found that 45 percent of employers research job candidates online, and 20 percent do so frequently or always. According to the survey, these numbers are on the rise.

For parties in any federal appellate court litigation, a court's decision is likely to appear at the top of their search results. This is particularly true

with Google, the most popular search engine. Accordingly, when a potential employer searches for a name of an applicant that was involved in a court proceeding, the court decision will often be one of the first results. Since the common view of litigation is unfavorable, the mere existence of a lawsuit can harm a job applicant.

While court decisions are not the only records found online, they are found more often than other court documents. The problem also goes beyond the federal circuit courts. Various state courts make their decisions and records public on the search engines also. But access varies from court to court. Some state courts do not make their decisions available online. And currently, the federal court decisions consistently rank higher in search results than their state counterparts. All 12 federal circuit courts follow the same policy of making their decisions available on the search engines. And they rank highly in search results.

Sometimes the harm goes beyond mere involvement in a lawsuit. Lawsuits rarely arise from our finer moments. If a case involved any embarrassing facts, the damage could be much worse. Few people become litigants lightly. Defendants become litigants involuntarily. While plaintiffs choose to file lawsuits, it is often a difficult choice. Someone should not be forever linked to a lawsuit just because of search engine results.

To be fair, the issue could be solved by either the search engines or the courts. The search engines could exclude the decisions from their indices. But it is the courts whose policies are served removing their decisions from search engine results. Restricting access by the search-engine robots, discussed below, would continue to preserve public access, but not publicize the litigation every time a party's name is searched. The policy of open-court records is to provide access, which the courts do more than ever by posting decisions on their websites. Courts have opened their doors, but they need not remove them entirely.

Courts can make their decisions publicly available on their websites without having them indexed by Google through use of the robots exclusion protocol. This is a system where search engines are instructed not to index certain documents on a website. By applying the protocol, the decisions would still be available to anyone looking for them, but they would have to look for them. Researchers could use free services, such as Google Scholar or Justia, to search for and read opinions. And the opinions would still be available directly from the courts' websites. The only difference is that the opinion would not appear in the general search results, including name searches.

Of course, this would not, by itself, solve the problem of court decisions appearing in general search results. If another website hosts the decision, it still may appear. But the issue here is whether courts should be the ones making their decisions prominent in search results. If other websites make the decisions available, it is closer to the reporting role the media has traditionally played. And in practice, nongovernment websites are more open to, and better equipped to handle, individual requests to remove items from the search indexes.

Perhaps by default, many courts publicize their decisions on the Internet search engines. These decisions rank highly in the search results, causing needless harm to litigants' reputations. Traditionally, courts have not publicized decisions in this manner. They could reverse the current practice by making simple changes to their websites and still preserve public access to the court decisions. Courts should do so immediately.