

THE HONORABLE JAMES L. ROBART

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,
Plaintiff,

vs.

MOTOROLA, INC., et al.,
Defendants.

MOTOROLA MOBILITY, INC., et al.,
Plaintiffs,

vs.

MICROSOFT CORPORATION,
Defendants.

Case No. C10-1823-JLR

**MICROSOFT’S CONSOLIDATED
RESPONSE TO (A) MOTOROLA’S
10/29/12 MOTION TO SEAL
DOCUMENTS AND TRIAL
TESTIMONY (ECF No. 495); (B)
JOINDERS THEREIN OF CERTAIN
THIRD PARTIES; AND (C) NON-
PARTY IBM’S MOTION TO SEAL
(ECF No. 498)**

NOTED: November 9, 2012

Microsoft respectfully submits this consolidated response to Motorola’s Motion to Seal Documents and Trial Testimony (ECF No. 495) (“Motorola’s Motion to Seal”), all joinders to Motorola’s Motion to Seal that have been submitted by third parties as of the date and time of this filing (ECF Nos. 508; 515; 518; 522; and 531), and Nonparty International Business Machines Corporation’s Motion for a Limited Sealing Order (“IBM’s Motion to Seal”) (ECF No. 498).

1 **I. INTRODUCTION**

2 Microsoft opposes Motorola’s request to close the courtroom during trial.

3 Microsoft also opposes Motorola’s broad request to seal, in their entirety, dozens of its
4 patent license agreements with third parties. While a number of these third parties have joined
5 in Motorola’s Motion as to their respective license agreements,¹ IBM elected to file its own
6 motion.

7 As explained in Microsoft’s Motion to Seal Trial Exhibits that Disclose Microsoft’s
8 Trade Secrets (ECF No. 510), the financial terms of a patent license agreement are
9 appropriately considered trade secrets that should remain confidential when relied upon at trial.
10 To the extent any of Motorola’s patent license agreements ultimately are admitted into
11 evidence, Microsoft acknowledges that it would be appropriate for the financial terms to be
12 redacted from the versions included in the public record. However, no compelling reason
13 exists for the remaining portions to be sealed.

14 Motorola intends to offer these license agreements as “comparables” in order to support
15 its claim to royalties of 2.25% of Windows and Xbox for a license to its H.264 and 802.11
16 declared essential patents. However, the overwhelming majority of these agreements address
17 the licensing of unrelated patents and unrelated cellular technology standards. The non-
18 financial terms of these agreements demonstrate that they are not appropriate comparables and
19 cannot serve as benchmarks for determining the RAND royalties to which Motorola is entitled.
20 This information should not be sealed.

21
22
23
24

¹ See, e.g., VTech Communications, Inc. (ECF No. 508); Ericsson Inc. (ECF No. 515); LG Electronics, Inc. (ECF
25 No. 518); Kyocera Corp. and Kyocera Communications, Inc. (ECF 522); Koninklijke Philips Electronics N.V.
(ECF No. 531).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

II. ARGUMENT & AUTHORITY

A. The Courtroom Should Not Be Closed During Trial

Motorola has requested that the courtroom be closed during those portions of the trial when certain confidential information is introduced via testimony or documentary evidence.

Motorola specifically requests that the courtroom be closed during the entire testimony of Motorola fact witness Kirk Dailey, Motorola expert Charles Donohoe, and Microsoft expert Matthew Lynde. Motion, p. 16. Motorola also requests that the courtroom be closed during portions of the testimony provided by Motorola experts Michael Dansky and Roger Smith, as well as Microsoft expert Kevin Murphy. Motion, p. 17. Finally, Motorola has requested that the courtroom be closed during any other testimony regarding the confidential information contained in the various trial exhibits that Motorola seeks to have sealed. Motion, p. 18.

Motorola has not established “compelling reasons” for closing the courtroom. *See Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (explaining the heightened “compelling reasons” standard for restricting access to materials used at trial). The courtroom should only be closed where no other reasonable alternatives can adequately protect against the disclosure of trade secrets. *See Publiker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1072 (3rd Cir. 1984) (court should weigh possible alternatives before closing courtroom).

While Microsoft agrees that the financial terms of the parties’ various patent license agreements should be maintained in confidence, this alone does not necessitate closing the courtroom when other reasonable alternative protective measures are available. Both parties understand the sensitivity of the financial terms of the parties’ confidential third-party licenses, as both parties have sought to seal those portions of their respective license agreements. Neither party intends to disclose the financial terms of these licenses at trial. The most efficient way to handle this information at trial is for the Court to instruct the attorneys, witnesses, and experts to avoid audibly disclosing any royalty or pricing terms. Instead, the

1 witnesses and attorneys should refer to the financial terms only through reference to exhibits
2 on which the terms appear – exhibits that will not be displayed to the public.

3 As the Court is aware, the parties have endeavored to avoid disclosing trade secret
4 information during oral argument at a number of pre-trial hearings. Counsel have avoided
5 publicly displaying the contents of confidential documents or otherwise revealing the specific
6 financial terms of various license agreements. A similar approach can be taken at trial. If a
7 witness inadvertently discloses especially sensitive information, Microsoft agrees with
8 Motorola that the parties should be afforded a reasonable opportunity to request appropriate
9 redactions of the trial transcript. This has proven to be a workable solution in the past.

10 Closing the courtroom is impractical. Repeatedly opening and closing the courtroom
11 during examinations of at least the six live witnesses identified by Motorola (and potentially
12 others) is likely to be a time-consuming distraction. If the Court is inclined to grant Motorola's
13 request, Microsoft requests that any time lost during this process be subtracted from
14 Motorola's allotted trial time.

15 In sum, Microsoft does not anticipate that the introduction of sealed documents at trial
16 will require closure of the courtroom or that the courtroom otherwise will need to be closed to
17 adequately protect the confidentiality of trade secret information.

18 **B. Any Licensing Agreements Admitted Into Evidence Should Be Redacted, But Not**
19 **Sealed in Their Entirety**

20 Motorola has not established compelling reasons for sealing the entirety of its various
21 license agreements. In its own Motion to Seal, Microsoft requested permission to redact the
22 financial terms of its patent license agreements, in the event that such agreements are admitted
23 into evidence. Microsoft believes that this approach properly balances the parties' (and non-
24 parties') interest in maintaining the confidentiality of legitimate trade secret information with
25 the public's right to access judicial records.

1 As explained in Microsoft’s Motion to Seal, the financial terms of a patent license
2 agreement constitute trade secrets that may be sealed at trial. *See, e.g., In re Electronic Arts,*
3 298 Fed. App’x 568, 569 (9th Cir. 2008) (finding that “pricing terms, royalty rates, and
4 guaranteed minimum payment terms” in license agreements “plainly fall[] within the definition
5 of ‘trade secrets’”); *Apple, Inc. v. Samsung Electronics Co., Ltd.*, 2012 WL 3283478, *4 (N.D.
6 Cal. Aug. 9, 2012) (same).

7 In the *Apple* case, both the parties and various third parties (including Motorola,
8 Microsoft, RIM, Koninklijke Philips, and IBM) moved to seal the financial and non-financial
9 terms of the various license agreements expected to be introduced at trial. Those motions were
10 denied in part, and granted in part. The court held that “pricing terms, royalty rates, and
11 guaranteed minimum payment terms’ plainly fall within the definitions of ‘trade secrets’ for
12 purposes of sealing motions.” *Id.*, at *10, *citing In re Elec. Arts*, 298 Fed. Appx. 568, 569 (9th
13 Cir. 2008). However, while these financial terms were deemed to be trade secrets not
14 appropriate for public disclosure, “all other licensing information, however, will not be
15 sealed.” *Id.* The non-financial terms that were not sealed included the names of the license
16 parties, the license term, products covered, the scope of the license, and whether each license
17 included a cross license. *Id.*, at *6, *10.

18 In light of the guidance provided by the Ninth Circuit, as recently applied in the *Apple*
19 case, Microsoft has provided the Court with redacted copies of its own confidential patent
20 license agreements, with the financial terms redacted.

21 Motorola has taken a different approach, asking the Court to seal over 50 of its license
22 agreements in their entirety. Motion, pp. 8-11.

23 The non-financial terms of the agreements Motorola seeks to seal include the terms that
24 establish that these license agreements are not appropriate comparables for purposes of
25 determining the RAND royalty to which Motorola is entitled for its H.264 and 802.11 declared

1 essential patents. Not only do the non-financial terms show that the agreements relate to
 2 different patents and different standards (relating primarily to cellular technology), other
 3 provisions, including cross-licensing provisions, confirm that these agreements simply cannot
 4 serve as a rational benchmark from which to derive the value of Motorola's H.264 and 802.11
 5 portfolios or an appropriate RAND royalty. No compelling reason has been offered for sealing
 6 this information.

7 **C. Microsoft Agrees that Certain Specific Trial Exhibits Should Be Sealed**

8 Both parties have identified certain of the same documents that should be sealed – Trial
 9 Exhibits 84, 524, 3333, and 3335.² For the reasons outlined in Motorola's Motion and the
 10 separate reasons advanced by Microsoft in its own Motion to Seal, the parties agree that these
 11 documents disclose the trade secrets of Microsoft, Motorola or third parties, and therefore
 12 should be sealed.

13 **D. Motorola's Remaining Requests to Seal**

14 Except as otherwise stated above, Microsoft believes that Motorola generally has
 15 outlined the correct legal standards applicable to its various remaining requests to seal.
 16 However, Microsoft takes no position as to whether Motorola has made a sufficient showing of
 17 compelling reasons to seal any specific evidence.

18 **E. Response to MPEG LA's Joinder**

19 On November 5, 2012, MPEG LA filed Non-Party MPEG LA LLC's Joinder in
 20 Defendants' Motion to Seal Documents (ECF No. 519), pursuant to which it seeks to seal the
 21 following Trial Exhibits in their entirety: 21, 22, 72, 103, 104, 1141, 1636, and 3024. MPEG
 22 LA Joinder, pp. 3-4. These documents consist of MPEG LA's form license agreements

23
 24 ² Trial Exhibits 84 and 524 are technical data sheets that disclose trade secrets of non-party Marvell
 25 Semiconductor, Inc. relating to certain 802.11-enabled chips. Trial Exhibit 3343 contains similar trade secret
 relating to the 802.11-enabled chips manufactured by non-party Atheros. Motorola asserts that this exhibit should
 be sealed. Motion, p. 14. Microsoft agrees.

1 relating to its H.264 patent pool as well as documents relating to the negotiation of these
2 agreements and related correspondence. *Id.* MPEG LA asserts that disclosure of the
3 “agreements and correspondence ... would grant MPEG’s competitors and prospective
4 counterparties an undue advantage in future negotiations and transactions with MPEG.” *Id.*, at
5 5.

6 As stated above in Section II.B, while the financial terms of a license agreement often
7 qualify as protectable trade secrets, the remaining terms generally do not. Here, no compelling
8 reason exists to seal the financial terms of MPEG LA’s standard agreement with its licensees,
9 which already are a matter of public knowledge. Potential licensees interested in licensing the
10 patents in MPEG LA’s H.264 pool can review the standard terms of such a license (including
11 the financial terms) on MPEG LA’s public website, which includes detailed summaries of the
12 license terms (*see* <http://www.mpegla.com/main/programs/AVC/Pages/Agreement.aspx>).

13 Patent pools can only succeed if their licensing terms are publicized. MPEG LA’s licensing
14 terms are well known, publicly available, and intended to be. Over 1,100 licensees have
15 accepted the financial terms offered by MPEG LA for a license to its H.264 patent pool. While
16 there is no basis to seal MPEG LA’s standard pool licensee agreement (Exs. 72, 103 and 104),
17 if MPEG LA has reason to believe its other materials contain actual trade secrets, MPEG LA
18 may wish to propose appropriate redactions.

19 III. CONCLUSION

20 For the reasons stated above, both Motorola’s and IBM’s Motions to Seal should be
21 denied in part, and granted in part.
22
23
24
25

1 DATED this 7th day of November, 2012.

2 CALFO HARRIGAN LEYH & EAKES LLP

3 By s/ Arthur W. Harrigan, Jr.
4 Arthur W. Harrigan, Jr., WSBA #1751
5 Christopher Wion, WSBA #33207
6 Shane P. Cramer, WSBA #35099

7 By s/ T. Andrew Culbert
8 T. Andrew Culbert
9 David E. Killough
10 MICROSOFT CORPORATION
11 1 Microsoft Way
12 Redmond, WA 98052
13 Phone: 425-882-8080
14 Fax: 425-869-1327

15 David T. Pritikin
16 Richard A. Cederoth
17 Constantine L. Trela, Jr.
18 William H. Baumgartner, Jr.
19 Ellen S. Robbins
20 Douglas I. Lewis
21 David C. Giardina
22 John W. McBride
23 David Greenfield
24 SIDLEY AUSTIN LLP
25 One South Dearborn
Chicago, IL 60603
Phone: 312-853-7000
Fax: 312-853-7036

Carter G. Phillips
Brian R. Nester
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
Telephone: 202-736-8000
Fax: 202-736-8711
Counsel for Microsoft Corp.

CERTIFICATE OF SERVICE

I, Linda Bledsoe, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On the 7th day of November, 2012, I caused the preceding document to be served on counsel of record in the following manner:

Attorneys for Motorola Solutions, Inc., and Motorola Mobility, Inc.:

Ralph Palumbo, WSBA #04751
 Philip S. McCune, WSBA #21081 _____ Messenger
 Lynn M. Engel, WSBA #21934 _____ US Mail
 Summit Law Group _____ Facsimile
 315 Fifth Ave. South, Suite 1000 _____ X ECF
 Seattle, WA 98104-2682
 Telephone: 206-676-7000
 Email: Summit1823@summitlaw.com

Steven Pepe (*pro hac vice*) _____ Messenger
 Jesse J. Jenner (*pro hac vice*) _____ US Mail
 Ropes & Gray LLP _____ Facsimile
 1211 Avenue of the Americas _____ X ECF
 New York, NY 10036-8704
 Telephone: (212) 596-9046
 Email: steven.pepe@ropesgray.com
 Email: jesse.jenner@ropesgray.com

Norman H. Beamer (*pro hac vice*) _____ Messenger
 Ropes & Gray LLP _____ US Mail
 1900 University Avenue, 6th Floor _____ Facsimile
 East Palo Alto, CA 94303-2284 _____ X ECF
 Telephone: (650) 617-4030
 Email: norman.beamer@ropesgray.com

Paul M. Schoenhard (*pro hac vice*)
Ropes & Gray LLP
One Metro Center
700 12th Street NW, Suite 900
Washington, DC 20005-3948
Telephone: (202) 508-4693
Email: Paul.schoenhard@ropesgray.com

_____ Messenger
_____ US Mail
_____ Facsimile
 X ECF

DATED this 7th day of November, 2012.

s/ Linda Bledsoe
LINDA BLEDSOE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25