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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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MICROSOFT CORPORATION,	)	
	)	
Plaintiff,	)	10-01823-JLR
	)	
v.	)	SEATTLE, WASHINGTON
	)	
MOTOROLA INC., et al,	)	May 7, 2012
	)	
Defendants.	)	Motions
	)	

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VERBATIM REPORT OF PROCEEDINGS  
BEFORE THE HONORABLE JAMES L. ROBERT  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:       Arthur Harrigan, Christopher Wion, David Pritikin, Richard Cederoth, Andy Culbert, David Killough, David Howard and Shane Cramer

For the Defendants:     Jesse Jenner, Ralph Palumbo, Norman Beamer, Philip McCune, Kevin Post and Neill Taylor

1 THE COURT: The clerk will please call this matter.

2 THE CLERK: C-10-1823, Microsoft versus Motorola.

3 Counsel, please make your appearance.

4 MR. HARRIGAN: Good morning, Your Honor. Art  
5 Harrigan from Danielson Harrigan, representing Microsoft; and  
6 to the left here my partner Mr. Chris Wion; and David  
7 Pritikin from the Sidley firm; Rick Cederoth from the Sidley  
8 firm; Andy Culbert from Microsoft. And in the bleachers,  
9 David Killough from Microsoft; David Howard from Microsoft;  
10 and Shane Cramer from our firm.

11 MR. PALUMBO: Good morning, Your Honor. Ralph  
12 Palumbo, Summit Law Group for Motorola. Jesse Jenner who you  
13 know from Ropes & Gray.

14 THE COURT: Good morning.

15 MR. PALUMBO: And then starting at the end, Norm  
16 Beamer from Ropes & Gray; David LaComb from Ropes & Gray;  
17 Phil McCune from Summit Law Group; Neill Taylor from  
18 Motorola; and Kevin Post from Ropes & Gray.

19 THE COURT: Counsel, as usual we tried to give you  
20 some direction as to questions that we had that we thought  
21 were important. And we will follow more or less the schedule  
22 that we sent you in terms of who is speaking when.

23 It made more sense to me that each side address what --  
24 not cross motions for summary judgment, but which go to  
25 somewhat the same area at the same time. And then we set

1     aside, at the very end, the question of the injunction. So,  
2     if that doesn't work you can blame me. But it seemed to me  
3     that was the most expedient way.

4             We are going to be issuing a written order on all of this,  
5     but if I feel it's appropriate, at the conclusion of today's  
6     hearing I will give you some preliminary observations, which  
7     would give you a chance to continue to work on your various  
8     matters in a manner with some greater guidance from the  
9     court. So, know that that is the situation that we're in  
10    right now.

11            And I guess the last thing I would say is, in getting  
12    ready for today's hearing, I think my principal frustration  
13    had to do with the fact that you are well into the law. I'm  
14    not sure you have done as helpful a job as I would have hoped  
15    on the facts. So don't be surprised if I interrupt you and  
16    take you back to the facts on some of these matters, because  
17    it would be helpful for us to get a better understanding of  
18    that.

19            So, that having been said, Mr. Jenner, are you carrying  
20    the flag today?

21            MR. JENNER: I'm carrying two-thirds of the flag,  
22    Your Honor, and Mr. Palumbo will carry the rest of the flag.

23            THE COURT: All right. Then I'll hear from you  
24    first, please.

25            MR. JENNER: Your Honor, let me begin by saying a

1 couple of things. First of all, we're as usual providing  
2 bench books of the graphics that we will use. I do want to  
3 point out that because of the nature of what's in these  
4 motions, the bench books contain some company business  
5 confidential information. What we have attempted to do, in  
6 order to try to protect that, is to redact confidential  
7 information from what will show up on the screen, but to  
8 include it in the bench books that Your Honor and counsel  
9 have, so that if I can hopefully adequately refer to things  
10 like "company X" and on the date you see with bullet 4, we'll  
11 call to your attention what I would like you to see without  
12 inadvertently putting confidential business information on  
13 the record.

14 THE COURT: That's fine, thank you.

15 MR. JENNER: The other thing that I would mention is  
16 that we have attempted to work into our presentation what we  
17 think would be helpful on the court's questions from Friday  
18 afternoon. I want to say in advance there's at least one  
19 question where I suspect, in the nature of what I think  
20 you're looking for or might be looking for, we could not get  
21 all of the information that you might want, over the weekend.  
22 I'll deal with that when we come to it, but I just want to  
23 let Your Honor know that we will attempt to address all the  
24 court's questions in going through the material.

25 So we are addressing the first two motions, what I would

1 call the March 30th cross motions. On Motorola's side, did  
2 Microsoft repudiate its claim to a RAND license for the  
3 reasons that we will discuss? And on Microsoft's side, the  
4 two aspects that remain from Your Honor's order. First of  
5 all, did the opening offer need to be RAND as a requirement?  
6 And if it did, was Motorola's opening offer consistent with  
7 RAND? So those are the motions that I'm going to address,  
8 and Mr. Palumbo will take up the injunctive issues later.

9 THE COURT: All right.

10 MR. JENNER: Topically here's what I would like to do  
11 is to give Your Honor a little background in brief in terms  
12 of summarizing what we think is important about Motorola's  
13 licensing program. I will go from that into the contracts  
14 discussing the relevant standards body's documents, what we  
15 think the contract is, and some things that flow from what  
16 the contract is or may not be. And then following on that  
17 I'll talk about Motorola's motion first and how we think the  
18 facts play into that. And then finally Microsoft's motion.  
19 I will, since Your Honor received an extra present on like  
20 Friday, I guess it was, of the determination in the ITC, it  
21 has some information which appears to be on the general  
22 subject matter of RAND licensing. And I would like to take a  
23 little bit of time to talk about two or three things that we  
24 think are salient there.

25 THE COURT: All right. Of that agenda, the one you

1 should probably spend the least amount of time on is  
2 Motorola's licensing program. I'm not sure that's as germane  
3 to me right now as some of the other topics, particularly  
4 your second one, which is the language.

5 MR. JENNER: Okay. So I will probably go into my  
6 accelerated voice mode and try to get that a little faster.  
7 So first of all the program -- I think what I want you to  
8 know about this, because it plays into the expectations  
9 certainly of Motorola, and we think others in the industry,  
10 is that this is a well-established program that people know  
11 about. It's got at least a 20-year history. It's based on  
12 substantial investments by Motorola in the technology. It's  
13 resulted in over 60 standard essential licenses that involve  
14 the various standards you see on the slide, including 802.11  
15 and H.264.

16 What's important here, because I think it relates to the  
17 expectation of parties in the industry, that should be  
18 considered along with the contracts, they've all been the  
19 product of bilateral negotiations. Nobody ever presents a  
20 license agreement and says, "Sign here." Nobody would do  
21 that. These are all situations in which the information is  
22 discussed in bilateral negotiations and the parties, after a  
23 period of time in which they essentially knock out what all  
24 the terms should be, result in a license agreement.

25 THE COURT: Well, let me read you a line out of a

1 letter that -- "Motorola will leave this offer open for  
2 20 days. Please confirm whether Microsoft accepts the  
3 offer." That's the last line in your letter. You're telling  
4 me that that's an invitation to negotiation? Sounds to me  
5 like it's an ultimatum.

6 MR. JENNER: Well, Your Honor, I can see that. But  
7 it is really in an entreaty for a party to respond. Motorola  
8 has done that in other situations. It's extended it when  
9 parties have come back and said, we're not ready to talk yet,  
10 we'd like another few weeks. And the deadline gets extended.  
11 It's really an entreaty to the party to come back and engage  
12 in negotiations.

13 THE COURT: So what you're telling me is you said  
14 that but it didn't really -- that's not what you meant?

15 MR. JENNER: Well, I'm a little constrained here. I  
16 guess something else I probably ought to tell you, Your  
17 Honor, is that -- I think you've probably gleaned by the  
18 papers so far that there have, in fact, been continued  
19 meetings and negotiations between the parties. The parties  
20 did, in fact, engage. I'm limited in what I can say about  
21 that, because of an agreement between the parties. Things  
22 that did not make it into the record, we're not now anyway in  
23 a position to talk about. Things that did make it into the  
24 public record you can see in the briefs and you've seen some  
25 of it. This is something that parties routinely do. And

1 routinely parties either come back and have a first meeting,  
2 or they say, we're not ready yet, we want another three  
3 weeks. And three weeks get granted.

4 So, parties in the business understand that deadlines get  
5 set, the deadlines are flexible. They always have been.

6 THE COURT: I rather enjoy watching you argue with  
7 one hand tied behind your back. So I appreciate the dilemma  
8 that puts you in.

9 MR. JENNER: Well, maybe we'll get to a point some  
10 day that the parties will agree that we ought to lay out for  
11 Your Honor all the discussions that have actually happened,  
12 waive whatever agreements regarding 408 and  
13 non-confidentiality there are, and we can just all let our  
14 hair down. But, we're stuck. Again, there are things I  
15 would like to discuss, I can't discuss.

16 So, these are products of negotiation. There have always  
17 been a variety of terms introduced. Motorola is flexible  
18 that way. The licensing negotiating parties themselves are  
19 flexible that way. We would expect Microsoft to be flexible  
20 that way. You talk. You negotiate. New terms get brought  
21 up, they get changed. And ultimately it results in  
22 agreements.

23 And we've tried to point out to Your Honor by way of one  
24 example in the papers that these are not trivial one-page  
25 October 20th offering letters. That's not a complete offer.

1 This is a complete offer, which was signed by RIM after the  
2 parties had these negotiations and arrived at an 80-page  
3 document fully setting out the agreement between the parties.  
4 So the October letters may have offered certain terms for  
5 discussion, but by no means was that a complete offer that  
6 anybody would ever have contemplated signing as an agreement.

7 THE COURT: In your slide that you have up, you make  
8 the statement, "Over 60 standard essential licenses involving  
9 various standards."

10 MR. JENNER: Yes.

11 THE COURT: Cellular standards for 2G / 3G / 4G.  
12 Wireless communications. The 802.11, and the ITU H.264.

13 MR. JENNER: Yes.

14 THE COURT: We've had a terrible problem trying to  
15 understand what patents are covered, because going back to  
16 the letter that we were just talking about, "Enclosed is  
17 Motorola's 802.11 annex, which includes a non-exhaustive list  
18 of patents included in the license."

19 MR. JENNER: What does that mean?

20 THE COURT: Well, you know, when we talk about  
21 document language, contract language, don't I need to know  
22 what patent is covered by what -- I'll call them a  
23 convention, or an industry-standard agreement.

24 MR. JENNER: I think that's another one of the quirks  
25 -- the term of art at the last hearing was "murky". Today

1 it's going to be quirky or opaque, I suppose. But one of the  
2 quirks of this is, Your Honor, is in the position that the  
3 licensees are ordinarily agreeing, here are a set number of  
4 patents that Motorola believes are essential patents. There  
5 may be others. You may come to us and you may tell us that  
6 we have got a patent that you think you have to have a right  
7 to use to be able to practice wireless technology. And if  
8 you do, and the parties agree that it's an essential patent,  
9 you will be licensed, even though it's not in the annex.

10 So the annex can't cover or anticipate every patent that  
11 might come along, which the parties may agree that a licensee  
12 like Microsoft needs to have a right to use. If it becomes  
13 essential they will get it, even though it's not listed.

14 THE COURT: But how do I ascertain, then, the  
15 language that governs the procedure to get that license? You  
16 can see there are multiple versions of the language.

17 MR. JENNER: Yes.

18 THE COURT: You love the ones that say "negotiate,"  
19 Microsoft loves the one that says, "grant." That's not the  
20 exclusive terms and the language wanders all over the  
21 countryside. So what I'm trying to find out is, I mean, do I  
22 assume that whatever started in 1996 was replaced by multiple  
23 versions along the way, and it's the last one that now is the  
24 controlling language for everything going back to 1996?

25 MR. JENNER: No. The best way I can explain that,

1 which we'll come to, is in the case of the ITU and the  
2 Letters of Assurance, the LOA's that are in exhibit, I think  
3 it's 16 -- 15 for ITU. Those show patents. For each of the  
4 letters, attached to the letter there is normally a list of  
5 patents for which that LOA is being submitted. So you can  
6 correlate the ITU LOAs with patents for which those LOAs were  
7 being submitted.

8 THE COURT: All right. Well, you unfortunately  
9 wandered into something I want to know more about.

10 MR. JENNER: Yes.

11 THE COURT: I'm looking at the Letter of Assurance  
12 for essential patents signed by Jonathan Meyer, senior vice  
13 president, dated April 21st. I've come to the conclusion  
14 that it's 2005. His handwriting is worse than yours and  
15 mine. And it says, "Patent Holder is prepared to grant a  
16 license." There is no attachment to it.

17 MR. JENNER: That's probably an IEEE version.

18 THE COURT: It is.

19 MR. JENNER: For the ITU there are patents, for the  
20 IEEE there are not.

21 THE COURT: But for the ITU you describe them as  
22 non-exclusive lists. Help me with that.

23 MR. JENNER: The parties would negotiate and agree on  
24 a need for additional -- that's the problem with judicial  
25 resolution of a term like this. I understand Your Honor's

1 difficulty in trying to understand what precise set of  
2 patents are we talking about. The parties know that they're  
3 not talking about a precise set of patents, they are talking  
4 about the ones that are listed. That's on the table. But  
5 the parties appreciate that other patents may come along  
6 which are essential for the benefit of the licensee, and they  
7 become included because they are essential. There's no way  
8 for you to know that.

9 THE COURT: Let me ask you this question, then. Is  
10 there any patent which is in dispute in this matter before me  
11 that is not covered by either the ITU or the IEEE?

12 MR. JENNER: Let me answer that one this way: To the  
13 extent that --

14 THE COURT: I think yes or no would be a great  
15 answer.

16 MR. JENNER: Then the answer has to be yes. And I'll  
17 give you a concrete example, because I think we've alluded to  
18 it in our briefs. One of the patents under the IEEE, the  
19 802.11 standard, is a patent that we call Finkelstein.  
20 Finkelstein, the '712 patent. It's one of the patents  
21 litigated in the International Trade Commission case. The  
22 record on Finkelstein is a little bit different, because the  
23 IEEE expects you to submit continuing Letters of Assurance as  
24 additional portions of the standard get added, your letter is  
25 applicable to the new standard and the new portion. And

1 you've seen that.

2 One of the portions is 802.11-I, had to do with new  
3 security techniques. Finkelstein relates to new security  
4 techniques. Finkelstein would relate to 802.11-I. Motorola  
5 did not submit a Letter of Assurance for 802.11-I. There is  
6 no LOA covering Finkelstein, even though Finkelstein would be  
7 considered in the 802.11 patent. So that's a wrinkle. There  
8 may be other patents like that that we're not litigating at  
9 this point that fall into a similar wrinkle.

10 And I just don't know, because when we saw your order on  
11 Friday and thought about what it might mean, one of the  
12 things I thought it might mean is that you're, in fact,  
13 wanting to know how can we correlate at least the 802.11  
14 patents with the individual Letters of Assurance. And Friday  
15 afternoon at 5 o'clock I can't get Motorola engineers to help  
16 me with that. If Your Honor wants that information, we will  
17 get it for you. But it's going to take time to get engineers  
18 to dive into the standard, which is about 1400 pages long of  
19 technology, and to figure out how to correlate the individual  
20 listed patents with the adds to the standard, which patents  
21 go with 802.11-I, which ones go with N, which goes with E.  
22 That's not a trivial exercise to go through, and I just can't  
23 do that today.

24 THE COURT: Well, I think what would be helpful for  
25 us and you've already answered this, you've said it's a

1 non-exclusive listing, so there may be additional ones. Some  
2 of them may be in the wrinkle-free zone, and some may be in  
3 wrinkles.

4 MR. JENNER: Or others, yes.

5 THE COURT: But I can look to IEEE or ITU as the  
6 mechanism that's being employed for those patents which are  
7 industry essential.

8 MR. JENNER: Yes. And as I will get to, we don't  
9 think it makes a difference. Microsoft may disagree with  
10 that. We don't think the analysis that the court should go  
11 through will cause that to make a difference, and I'm  
12 prepared to explain why.

13 THE COURT: All right.

14 MR. JENNER: So just to kind of wrap up with a little  
15 bit on the standard. I've mentioned aspects of the program  
16 that many companies have joined in, large substantial  
17 companies, all of whom negotiated with Motorola the way we  
18 think is required in a sensible industry like way. They  
19 arrived at agreements.

20 We're dealing with what that offer is. And the reason I  
21 include slide 6 is because we're in part dealing with the  
22 reasonableness of Motorola offering to Microsoft, as a  
23 starting point, what it offered to all these other companies.  
24 It's, "2.25 percent of the net selling price of the end  
25 product, subject to a grant-back of licensee's essential

1 patents." That's by no means a license agreement. It's some  
2 fundamental terms to consider. There were issues. Microsoft  
3 apparently thought that 2.25 percent for each license meant  
4 4.5 percent total. We call that stacking. Motorola has  
5 never stacked any of the licenses. That's something you find  
6 out by negotiating. If Microsoft had asked, they would have  
7 been told.

8 "Subject to the grant-back license" means logically if  
9 you've got patents to grant back to me, I'm going to value  
10 them. My demand from you is going to go down. And that's  
11 also what happens in all Motorola licenses. There are lower  
12 resulting royalty rates. There are some royalty rates with  
13 substantial companies -- that I could whisper in your ear,  
14 but I won't say out loud -- where, in fact, it's a zero/zero  
15 cross license, because they had a lot to come back with. So  
16 the idea that it's a royalty-free license that Motorola was  
17 asking for is just wrong, as shown by history.

18 THE COURT: Let me take you down another rabbit hole,  
19 then. You just used a phrase that appears frequently in your  
20 pleadings, but is inconsistent with your position, which is  
21 you said, "I'm going to value them," referring to Microsoft's  
22 patents. Your position in the litigation is, you don't value  
23 the patents, you value the product. I've run into this  
24 dichotomy --

25 MR. JENNER: We value both. We value both. One of

1 the things that would be given credit is the patent portfolio  
2 that Microsoft would be willing to license back. If they  
3 have valuable patents to license back, that's enormously  
4 important to Motorola. It would decrease what it asks for.

5 You also value the products in terms of what the resulting  
6 royalty cost will be that the licensee has to pay. And if  
7 the licensee comes in and says in a negotiation, here is what  
8 you're asking from me, it's too much, it's too much, you need  
9 to decrease your royalty, then to use the words of Judge  
10 Posner, that I'm going to show you later, "Tell them that  
11 they're asking too much, and negotiate." And the price for  
12 the products comes down. People put in place caps, for  
13 example.

14 THE COURT: We've done a fairly exhaustive literature  
15 search, and there's this fellow who is a law school  
16 professor, he's at Berkeley but seems to be on leave to  
17 Stanford right now, and his writing is as close as I can find  
18 to addressing the issue of valuing royalties. And what he  
19 says is, "You don't look to the value of the end product, you  
20 look to the contribution of the patent and determine its  
21 value in the context of the value of the product."

22 I need you to pick which argument you want to make.

23 MR. JENNER: Your Honor, it has to be both. The man  
24 said what he said in his article, and I'm happy that he said  
25 it. I don't think he's right. I think that when you

1 negotiate licenses you look at the licensee's portfolio in  
2 terms of value going back to them, and the impact on the  
3 product line, which will dictate the value coming to you.  
4 And you start to negotiate trade-offs. You negotiate both.  
5 And I respectfully say to that author, if he thinks it's one  
6 and not the other, he doesn't know what he's talking about,  
7 Your Honor. That's my position. I don't know how many  
8 licenses he's negotiated. Maybe he's an Ivy Tower guy, I  
9 don't know.

10 But when you license portfolios, you look at the value of  
11 the adversary's portfolio as a benefit to them. You look at  
12 the royalty that will relate by applying royalties to their  
13 products, which will either be cash payment, they could be  
14 lump sum, they could be percentage royalty rates, they could  
15 be cap numbers, all of this gets negotiated as to what's  
16 coming back to you. And you have to factor both in. It's  
17 both not one or the other.

18 THE COURT: Well, then how can you tell me, then,  
19 that you have this 2.25 standard royalty rate that you  
20 offered everyone at the start? I mean, that seems to me to  
21 be intellectually inconsistent with what you've just said.

22 MR. JENNER: I don't see why, Your Honor. We say  
23 this is a rate that we've offered to others, we're offering  
24 it to you. The probable first thing that's going to happen,  
25 in a typical negotiation, is that the potential licensee is

1 going to come to a first meeting and say, here's why that  
2 doesn't work for us. It's going to result in too high a  
3 payment. We have certain enduser products you shouldn't be  
4 able to reach. There could be a panoply of things that  
5 people come back and say as to why we've got to get off your  
6 opening number and go on and negotiate different terms.  
7 That's why these things have to be negotiated.

8 THE COURT: But help me here. Let's assume two  
9 situations: One, a company that has an extremely valuable  
10 library of patents.

11 MR. JENNER: Like Motorola.

12 THE COURT: All right, Motorola. Well, actually  
13 since you're going to get the money, I'll pick Microsoft. I  
14 have no idea if they do or not.

15 MR. JENNER: They do.

16 THE COURT: Okay. They've got valuable patents and  
17 you ask 2.25 percent of the end value of the product.

18 MR. JENNER: Right.

19 THE COURT: If we had a company that had one patent  
20 and it was worthless, but it's an industry-essential patent  
21 that's easily duplicated technology from other sources, you  
22 would still say, cross license that worthless patent, but by  
23 the way pay us 2.25 percent.

24 MR. JENNER: No, it may get some value back.

25 Motorola would like the cross license, because one of the

1 things you're trying to do is get what we call freedom of  
2 action. You don't want to find yourself a year later being  
3 sued by that patent. So, it will be assessed as to having  
4 some value. And it could result in a cross payment or a  
5 reduction of the royalty rate. If it's one patent that's a  
6 crummy patent, as you say, it's not going to get a lot of  
7 value. And the likelihood is that a company like Microsoft  
8 or Motorola is not going to make a huge diminution of the  
9 royalty rate.

10 But if you take a completely different situation where you  
11 have a company, and I won't get into details, but think in  
12 terms of the Ericssons, the Nokias, the IBMs of the world,  
13 that show substantial patent portfolios, those are going to  
14 be valued very highly, and they can result in incredible  
15 diminution of the royalty rate from 2.25 percent all the way  
16 to zero, or maybe money going to the other company.

17 THE COURT: So logically, then, what I hear you  
18 saying is 2.25 is a ceiling. You would never ask above it  
19 and you go down from there.

20 MR. JENNER: As a practical matter, that's right.

21 THE COURT: You're making this offer knowing nothing  
22 about the other side's patent.

23 MR. JENNER: As a practical matter 2.25 is the  
24 starting point, show me what you've got. That's the  
25 "subject to the grant-back." Show me what you've got and it

1 will go down. There have been a couple of higher numbers.  
2 We mentioned in our papers the agreement with Simple  
3 Technologies, for example, where there was a six percent jury  
4 award. There was another number that was higher. But  
5 typically Motorola starts with this number as a starting  
6 point, because it's where the starting point has been, and  
7 says, show me what you've got and I'll work with you. And  
8 the number goes down. It doesn't go up.

9 THE COURT: All right. Why don't you go to slide 10,  
10 because I've used up a bunch of your time here.

11 MR. JENNER: I'll breeze quickly by slide 7, because  
12 I want you to see there are these substantial companies, they  
13 provide grant-back rights, and that's been important.

14 So breezing through to slide 10, this is the first slide  
15 of the section on the contract. We wanted to hit quickly  
16 some principles of contract interpretation. The only one  
17 I'll linger on, Your Honor, is the one at the bottom,  
18 "Washington courts follow the context rule which permits you  
19 to look at extrinsic evidence, whether or not there is  
20 ambiguity." So you can, and we submit you should, look at  
21 information outside the contract.

22 Slide 11 is simply to show you the typical operative  
23 language of the Letters of Assurance. The Patent Holder will  
24 grant or is prepared to grant a license to applicants, an  
25 unrestricted number of applicants. And that, as you know,

1 leads to some of our arguments. This is typical language,  
2 it's not the only language, and I'll show you some more  
3 language shortly.

4 On slide 12, here I want to stick my neck out, Your Honor,  
5 and tell you as of today what I think the operative contract  
6 is. And the reason I'm sticking my neck out is that I admit  
7 in advance this is a little bit different from the conclusion  
8 you came to in February. But I'm going to tell you I don't  
9 think it leads to a different result.

10 We believe at this point that the Letters of Assurance are  
11 unilateral offers made by Motorola that it will grant  
12 licenses on reasonable terms, and that offerees, like  
13 Microsoft, if they satisfy the conditions to apply for a  
14 license in some form and negotiate, are entitled to the  
15 license.

16 So the offer is -- there's never a signed piece of paper  
17 constituting the contract. The offer is unilaterally made by  
18 Motorola. It's like, I'll give a reward of \$500 to somebody  
19 who brings my cat. Show up with the cat, then you've  
20 accepted and you get the reward. You didn't have to sign a  
21 piece of paper. If you apply for a license and negotiate  
22 with me, then you have formed a contract under the Letter of  
23 Assurance.

24 THE COURT: Just a minute. I may not understand your  
25 entire argument, but I think you've changed the entire

1 footing of your case.

2 MR. JENNER: I think it gets to the same result.  
3 Give me one more slide to explain it.

4 THE COURT: All right.

5 MR. JENNER: I think what happens here is that you  
6 have a contract where Microsoft is obliged to be an applicant  
7 for a license, as you've heard endlessly from us in some form  
8 or another, and they are required to negotiate in good faith  
9 towards a contract.

10 If you look at slide 13, there are two other ways that  
11 we've seen this formulated, but I believe they come back to  
12 the same point. Your Honor has -- I think Your Honor has  
13 concluded, I'm always worried about putting words in your  
14 mouth, but I think Your Honor has concluded that the LOA is  
15 in agreement with the SSO. Microsoft is therefore a  
16 third-party beneficiary. And we agreed to that back in  
17 February. But that still gets you to the implementation of  
18 an agreement. That still requires Microsoft to comply with  
19 the Letter of Assurance on its part. It's still going to  
20 call upon Microsoft to do the same things. I don't think it  
21 leads to a different result.

22 The other implementation is from the Apple case. I don't  
23 know if you've seen this, but in the Apple case, Apple took  
24 the position that it's a flip. It's the SSOs who make the  
25 offer through their policies. And a company like Motorola,

1 by joining into the SSO and participating, accepts the SSO  
2 policies. And that makes the LOA just something submitted  
3 pursuant to the policies. And Microsoft can be a third-party  
4 beneficiary of that.

5 Judge Crabb essentially didn't rule on that, but for  
6 purposes of a motion to dismiss, she acknowledged Apple's  
7 position and discussed it in her order.

8 I submit to the court that no matter which of these three  
9 ways you look at it, there is ultimately an arrangement  
10 between Motorola, as the submitter of the LOA, and Microsoft  
11 as the intended beneficiary of the LOA, where if Microsoft  
12 applies for the license and negotiates in good faith, it's  
13 entitled to the grant of a RAND license. I don't think  
14 there's any difference in result.

15 THE COURT: Didn't you just read the industry  
16 essential patents out of your argument, then? I mean, what  
17 you're telling me is that everyone is going to do this  
18 unilaterally. Motorola on one side, Microsoft on the other.  
19 I'm missing something. You just took away the whole concept  
20 of industry essential.

21 MR. JENNER: No, it doesn't, Your Honor, because the  
22 LOA is still submitted to the standards organization in  
23 relation to a portion of the standard that invokes the  
24 standards essential patent. So the LOAs all relate to  
25 standards essential patents. The patents are still there.

1 For example, Motorola submits an LOA for 802.11-N.  
2 802.11-N has certain patents that relate to it. Microsoft  
3 wants the license. Microsoft simply applies for a license  
4 and negotiates in good faith with Motorola. It is entitled  
5 to the grant of a license negotiated by the parties that will  
6 apply to those standards essential patents.

7 So they are basically there by virtue of the Letters of  
8 Assurance. They relate to standards essential patents. It  
9 doesn't read them out at all.

10 THE COURT: All right. I mean, it seems to me that  
11 you're missing what the court is inclined to see as the way  
12 that this works, which is that you have, in effect, a hybrid  
13 situation. You have -- at this point Microsoft has a license  
14 to use these industry essential patents that you have given  
15 to the licensing organization. They, however, in their  
16 bylaws disclaim any involvement in the negotiation of the  
17 terms. That's why I say, you know, we basically have got a  
18 dual situation. And I'm not quite sure why they did this,  
19 but the IEEE and the ITU both say, we don't have a dog in  
20 that fight. You, and in this instance Motorola and  
21 Microsoft, you sort that out.

22 However, you have already conceded that they have the  
23 right to use this patent.

24 MR. JENNER: No.

25 THE COURT: I think you need to let me finish.

1 MR. JENNER: Oh, I'm sorry.

2 THE COURT: You have conceded that they have the  
3 right to use this patent. What you're fighting about is the  
4 terms for it. Otherwise, the whole industry-essential patent  
5 system collapses. Why go through this? Why list them in the  
6 first place, if I accept your analysis?

7 MR. JENNER: Let me first jump ahead to slide 17 and  
8 point out some of the language in the LOA. If you look at  
9 the bottom box, there is explicit language --

10 THE COURT: Hold on a minute. Let me get to slide  
11 17. Okay.

12 MR. JENNER: There is explicit language in all the  
13 LOAs that says, "No license is implied simply by submission  
14 of the letter." And it has to be that way. The parties have  
15 to negotiate in order to create a license. It is disavowed  
16 that simply submitting LOAs creates a license. There is no  
17 license until the parties negotiate and sign one.

18 So, I think there is a misimpression if merely submitting  
19 LOAs is thought to create licenses. They do not. And that's  
20 well understood by everybody in the business. You need to  
21 negotiate a license. I think we have some quotes in the  
22 briefs from people, even at Microsoft, that acknowledge that.  
23 And that every license will be different.

24 Every license is going to be different after you negotiate  
25 it, because the circumstances of the parties in any bilateral

1 situation are always different. Somebody may wind up paying  
2 a lot of money, somebody may not. Somebody may have a lot to  
3 cross license, somebody may not. Somebody may want different  
4 terms in China, somebody else may not care about China.  
5 Somebody may want a defensive suspension clause in order to  
6 protect themselves in future litigation, somebody else might  
7 not care about it. There is no license implied by a  
8 submission of a Letter of Assurance. There is no license  
9 until one is negotiated and executed.

10 THE COURT: What is a defensive suspension clause?  
11 Either that or tell me that it doesn't matter.

12 MR. JENNER: It matters only because it's another  
13 important term. In brief what it does is it allows a  
14 licensing party to suspend a license as to customers of a  
15 licensee. If the customer of the licensee turns around and  
16 sues me, it gives me the ability to get my patents back. It  
17 doesn't negate your license as to all the rest of your  
18 customers. But if customer X sues me, I can defensively  
19 suspend my license to you, so that X is no longer licensed, I  
20 can fight back with them, I can defend myself. And parties  
21 negotiate for this. There was extensive testimony by  
22 Jennifer Oakes in the ITC about defensive suspension clauses.

23 THE COURT: Counsel, I want to make sure I choose my  
24 words carefully here. I understand and accept your argument  
25 that -- and you don't like my phrase, "they have a license."

1 I'm using that in a slightly different sense than you are.  
2 They have a right to a license. What you are arguing about  
3 are the terms for that license.

4 However, the fact that you all are here and asking the  
5 court to ultimately determine the terms of that license,  
6 seems to me to imply that there is an obligation on the part  
7 of Motorola by having sent in this Letter of Assurance.

8 MR. JENNER: Well, the thrust of our motion, leaving  
9 aside Microsoft's, is that if Microsoft had responded to our  
10 letters by effectively becoming an applicant, if they had  
11 engaged, put it that way, and sat down to negotiate with us  
12 in good faith, they would have satisfied the only conditions  
13 of these licenses that apply to them. And they would be  
14 entitled to proceed.

15 They chose not to do that for strategic reasons. They  
16 chose not to do it. And we submit by doing that they  
17 preferred litigation for strategic reasons over engaging with  
18 Motorola pursuant to these policies and Letters of Assurance  
19 to lead to a license. Now they cry foul because they find  
20 themselves in situations where courts are saying, "Microsoft,  
21 you lose."

22 And, Your Honor, we've submitted extensive statements by  
23 people in the industry, showing the knowledge of the  
24 industry, that say that the licensor, until such time as  
25 there's a license, the licensor retains all the benefits of

1 the patents, as they must, so that the licensee will have an  
2 incentive to negotiate.

3 In the absence of a threat of an injunction, even as to  
4 essentials, until there's a license, Microsoft has no  
5 incentive to do anything. They can sit back and litigate for  
6 years. They can decline to engage. They have no incentive,  
7 because the usual incentive in licensing negotiations is  
8 stripped away. That's been noted -- I anticipate  
9 knowledgeably that Mr. Palumbo may have something to say  
10 about that. But that is basically part of the negotiation  
11 process. And I submit that, Your Honor, we would all be  
12 better off if you left that out there so that they would have  
13 an incentive to come to the table and negotiate.

14 THE COURT: Well, the pleadings in this case, both  
15 sides now say that you have an offer out there, and they have  
16 unambiguously accepted that offer, which is why we're on  
17 point 3, and not on point 1, of our analysis.

18 MR. JENNER: No, we said that they're a third-party  
19 beneficiary. We didn't say they accepted anything. Point 2  
20 of the motion is are they a third-party beneficiary? And  
21 under one formulation or another, they are. They have the  
22 right to accept the offer. They never accepted it. We never  
23 said they accepted it. We say quite clearly they rejected  
24 it. They could accept it. They could have done that by  
25 being a third-party beneficiary. They simply didn't do it.

1 THE COURT: You've got about 20 minutes left. So I'm  
2 going to stop asking you questions unless you provoke another  
3 one here.

4 MR. JENNER: I'm happy to have them, because I want  
5 to know what you're interested in. I appreciate that. So  
6 let me go back to the extent that this is something else on  
7 Your Honor's mind.

8 These are the various iterations of the IEEE, the 802.11  
9 LOAs. And I suspected that Your Honor was caught up on all  
10 of this. This was the one where we simply could not, over  
11 the weekend, deal with engineers in a way that would enable  
12 us to tie individual patents to individual letters. We  
13 submit that it doesn't make any difference, because all of  
14 these say the Patent Holder is prepared to grant a license,  
15 and will grant a license to somebody who comes in and asks  
16 for one.

17 The thing that flows from that is it's granting a license.  
18 There's nothing in the LOAs that says the initial offer must  
19 somehow be a precise set of RAND terms. Nobody knows what  
20 RAND is going in, in a particular case.

21 THE COURT: Well, here is what is troubling me,  
22 Mr. Jenner. I'm looking at the ITU what I think is  
23 Exhibit 4, Document 79. The operative language signed by a  
24 representative of General Instrument Corporation, looks like  
25 a Mr. Bawel, B-A-W-E-L. He checks the box that says, "The

1 Patent Holder will grant a license," then the language  
2 continues. "Will grant." In that context, it's mandatory.  
3 It says, "You will grant."

4 Then I look at the IEEE, the same Letter of Assurance, or  
5 same form Letter of Assurance signed in this case by  
6 Mr. Meyer, and it says, "The Patent Holder is prepared to  
7 grant a license." Now, you make a big, big thing out of the  
8 difference in the language here. And now when it serves both  
9 sides, they kind of sweep that whole argument away and say,  
10 this is what it means. And that's what's troubling me, the  
11 language changes.

12 MR. JENNER: Your Honor, I submit to you that the  
13 important aspect of the language doesn't differ. Because I  
14 think all of these formulations say that the patent owner is  
15 prepared to or will grant a license. The patent owner will  
16 grant a license to applicants who request a license and  
17 negotiate in good faith. And there is an intention to do  
18 this. That doesn't mean, as we see here, that the parties  
19 are going to be able to get through negotiations.

20 You can have good-faith negotiations by parties on both  
21 sides and not get there. Just as a matter of logic, these  
22 things are so complicated, it is quite possible for each  
23 party to get hung up on the other end of various terms and  
24 simply not be able to figure out where the middle is.

25 So the fact that you agree to negotiate in good faith does

1 not guarantee that you can get to a license. And these  
2 organizations acknowledge that. They don't tell you what the  
3 terms should be. They don't tell you what any of the terms  
4 are. They don't tell you how to negotiate an agreement.  
5 Totally ambiguous on that. They leave it silent. They just  
6 say it's left to the parties to figure out how to do it.

7 So, there's no formulation anywhere in the world on what a  
8 RAND license is in a particular circumstance or how to get  
9 there. And the only way that anybody has been able to try to  
10 steer you there is to say, "We want you to negotiate -- we  
11 want you to agree to negotiate in good faith. We want you to  
12 negotiate towards granting a license on RAND terms." Then  
13 it's left to the parties to do that.

14 The parties ordinarily are able to do that. The parties  
15 ordinarily negotiate. The parties here, at least prior to  
16 the filing of the complaint, did not negotiate. And I hasten  
17 to say to you in my footnote, in fact, there have been  
18 further negotiations.

19 THE COURT: Counsel, the good faith argument doesn't  
20 get very far with me, because I'm troubled by the fact that  
21 Microsoft's position in this litigation is, your initial  
22 offer -- not you personally -- but Motorola's initial offer  
23 was not in good faith. And, judge, on that basis you should  
24 find they breached the contract.

25 You say, their rejection of your offer was not in good

1 faith in their decision to pursue a court resolution. And,  
2 you know, they have obligation of good faith, and therefore  
3 they've, in effect, repudiated the contract.

4 It strikes me that I'm back to my dilemma. It is nearly  
5 impossible for me to evaluate either of those until I know  
6 what RAND terms are. And I'm not going to know what RAND  
7 terms are until November 19th when you start your trial.

8 MR. JENNER: That's a problem. It is a fundamental  
9 flaw that everybody acknowledges in the SSO policies and  
10 procedures. It's what led some people, and we've alluded to  
11 this in the past, it's what's led some people to say that  
12 these are nothing more than agreements to agree, that don't  
13 mean anything, because they've got no substance to them, that  
14 tell you anything about what it is you're agreeing on.  
15 That's the problem with these policies. And as a result of  
16 that, no other adjudicator has ever adjudicated what RAND is,  
17 or RAND should be, from one of these 80-page agreements.

18 THE COURT: Well, let me stop you there. And I  
19 apologize, because I'm using up your time here still. It  
20 strikes me that we have been unable to find a legal authority  
21 for the proposition that a failure to agree on RAND terms  
22 then goes to a court, and the court sets up RAND terms.  
23 Mostly because every time that nightmare scenario has arisen,  
24 the parties have retreated to being reasonable.

25 MR. JENNER: Right.

1 THE COURT: And entered into, many times, some  
2 industry-wide resolution of this.

3 However, there is abundant case law, Black Letter  
4 authority for the proposition that the parties can have a  
5 contract and the court can impose terms which are not  
6 determined in the contract. Do you disagree that that's the  
7 status of the law?

8 MR. JENNER: I think I've seen one case, maybe, where  
9 a court declined to enforce an obligation to negotiate in  
10 good faith, went on to say what a substitute damages remedy  
11 might look like, and said, I can deal with that by figuring  
12 out what the parties would have agreed to. Of course, the  
13 court never went on to do it. I don't know of any other case  
14 -- well, there was the earlier RIM litigation in Texas, where  
15 the court on a motion to dismiss reserved the ability to do  
16 this, but never went forward and did anything or said how to  
17 do anything.

18 I don't know of any court that's ever said how you would  
19 go about trying to do this. I know of one agency that tried  
20 to do it. And after a year or two's worth of proceedings and  
21 a multi-hundred page report, it was vacated by the district  
22 judge.

23 I don't know of anyone who has ever said anything more  
24 than courts have various powers to do various things. Nobody  
25 has ever suggested how to do this, much less done it. Ever.

1 THE COURT: Okay. And I'm going to put words in your  
2 mouth now. You're agreeing that you don't know a court  
3 that's done it in this context. But you don't disagree that  
4 that's a fairly common procedure in courts supplying missing  
5 terms in contracts.

6 MR. JENNER: In relatively simple -- yes, in  
7 certainly non-standard settings, in ordinary garden-variety  
8 non-patent contract cases, courts are asked to look at  
9 disagreements between the parties about whether or not a  
10 contract has been made, so as to enforce the contract. And  
11 they specify missing terms if they can determine the intent  
12 of the parties. I think that's light years away from what  
13 we've got here.

14 THE COURT: Because I don't want you to run out of  
15 time here, another issue that's troublesome to us is both  
16 sides interchangeably drop in the bylaws periodically when  
17 they help their particular position. What is the  
18 relationship of the bylaws to the Letters of Assurance?

19 MR. JENNER: Your Honor, I submit that -- if I could  
20 help myself here a little bit -- the bylaws are incorporated  
21 by reference. And there's even a Washington case that tends  
22 to support that. If you look at slide 12.

23 THE COURT: Well, let's take the Letter of Assurance  
24 in the IEEE. It has some language that says, "In accordance  
25 with clause 6 of the IEEE standards review bylaws."

1 MR. JENNER: That's the patent policy.

2 THE COURT: Should I assume that those are then  
3 incorporated into the Letters of Assurance?

4 MR. JENNER: Absolutely. If you look at the footnote  
5 at the bottom of slide 12 there's a Washington court case  
6 that construed the term "in accordance with" to result in  
7 incorporation by reference of the reference document. We  
8 believe and we submit, and consistent with this case, that  
9 the patent policies are, indeed, incorporated with --  
10 incorporated by the Letters of Assurance.

11 THE COURT: All right.

12 MR. JENNER: And you consider them together.

13 THE COURT: Thank you.

14 MR. JENNER: Your Honor, I'm never going to get  
15 through all of this. Let me just hit some highlights.

16 THE COURT: Please do.

17 MR. JENNER: We've made a number of references to the  
18 understanding of people in the industry, notably Microsoft,  
19 I'd like to just stop briefly on slide 19, where there are  
20 several statements that have been made by Microsoft which  
21 demonstrate that before they had litigation motives they  
22 repeatedly recognized the obligation to negotiate in good  
23 faith. That includes the redacted second item.

24 Similarly, on slide 20, there are three additional  
25 statements made by Microsoft that explain that the RAND

1 framework is a framework to allow people to negotiate. And  
2 that's what you have to get to, is to negotiate. It's a  
3 mistake to focus unduly on an opening offer, especially where  
4 it's consistent with what Motorola has ever done. I've posed  
5 the question, Your Honor, in terms of thinking of a starting  
6 point, which would not be just a giveaway, what more logical  
7 place would there be to start than where you did it in the  
8 past.

9 Surely Motorola can come in and say, we'll come up with  
10 some low-ball offer and just give Microsoft what they want,  
11 bid against ourselves. I'm sure Microsoft would be happy to  
12 have that. We'll give you everything you want for a penny a  
13 pop. That's not rational. No licensor is going to do that.  
14 The rational starting place has to be where you did it  
15 before. And other people negotiated with you. They arrived  
16 at licenses. That shows that it's reasonable.

17 The argument that Microsoft ultimately makes as the  
18 supervening argument, is when you run the numbers the way  
19 they ran the numbers, you come up with \$4 billion. And  
20 that's got to be unreasonable. First of all, put aside the  
21 fact that Microsoft is a very big company, so that any  
22 royalty rate you apply to their products is going to look a  
23 lot larger than anybody else. But get into the context of  
24 negotiations, and what is going to happen here is Microsoft  
25 is going to say, okay, that's your "ask," here's what I don't

1 like about your "ask," including the fact that it's large.  
2 Here is my "ask." I've got a lot of patents I want back from  
3 you, I want so much money for phones, I want so much money  
4 for set-top boxes. I would say to Your Honor, even though  
5 this is not what is going to happen, when you have a  
6 fully-formed negotiated contract, you could have as much as  
7 \$4 billion going one way, and \$3.96 billion going the other  
8 way, so that the net is a cross license with not much money  
9 following at all.

10 So, if you were to ask me the question, I'll put it with  
11 apologies in the court's mouth, is this an offer that  
12 Microsoft could have accepted? Because that came up in the  
13 ITC. The answer is, there was no offer that could be  
14 accepted, because the letters of October 2010 were not  
15 offers. Fully-formed license agreements with all the terms  
16 negotiated might or might not have had this kind of a  
17 2.25 percent royalty. Maybe yes, maybe no. But in the  
18 context of a fully-formed offer, sure it could have been  
19 accepted. Now, I would like --

20 THE COURT: At the risk -- it is the philosophy of  
21 this court that we're here to resolve disputes. But I think  
22 for the fourth time today I've heard you say, if they would  
23 just talk. And you've also said, outside the four corners of  
24 the docket those discussions are underway. Are you  
25 implicitly asking me to order you to go somewhere, or are you

1 doing that on your own?

2 MR. JENNER: I wouldn't put it in terms of an order.  
3 I think Your Honor can recognize, if you don't grant our  
4 repudiation motion, which would end the whole thing for now,  
5 but Your Honor could simply recognize that there's a duty to  
6 negotiate in good faith, and advise the parties, for example,  
7 that if we don't have a result based on good faith by  
8 negotiations by November 26th, that I'm --

9 THE COURT: 19th.

10 MR. JENNER: The 19th? November 19th.

11 THE COURT: It moved to the 19th. We wanted you to  
12 have Thanksgiving in Seattle.

13 MR. JENNER: We appreciate that. If it's like it is  
14 today, we'll stay for weeks.

15 Your Honor, you could say, I'm going to do whatever it is,  
16 I the court, figure out that I need to do, if you the parties  
17 don't do it first. And by the way, maybe one of the things  
18 that I will look at is how you negotiated to see whether I  
19 think somebody didn't negotiate in good faith, because that  
20 could lead to results, too.

21 But basically what you could say if you choose to do it is  
22 you've got whatever the time is, six months, eight months to  
23 continue to process this. And if you succeed, God bless you.  
24 If you don't succeed, I the court, am going to figure out  
25 exactly what it is I think I should be deciding, have the

1 authority to decide, and then you're all going to be sorry  
2 because I'm going to do what I think is right.

3 THE COURT: To open the door to the skeleton in that  
4 closet is you all have asked for a jury. I'm just going to  
5 sit up here and watch six good citizens of the Pacific  
6 Northwest decide what the royalty is. So, if you don't want  
7 that to happen, you want to start discussing that question,  
8 because that's where you're headed right now.

9 MR. JENNER: Your Honor, let me take you quickly to  
10 slide 48. Because I anticipate Microsoft feels that they got  
11 some good things out of Judge Shaw and the ITC. And I don't  
12 want you to think that we agree necessarily with that. I've  
13 quoted three of the judge's conclusions from pages 300 to 303  
14 where the judge focused on RAND.

15 THE COURT: Before do you that, Judge Shaw is an  
16 administrative law judge?

17 MR. JENNER: Yes.

18 THE COURT: And there's an appeal process?

19 MR. JENNER: There's a petition for review by the  
20 full commission. The petitions are actually getting filed  
21 today. I think they are getting filed today. That will  
22 result in a determination by the commission of what it wishes  
23 to review, probably further briefing. And they will issue a  
24 final determination sometime in late August.

25 THE COURT: So, would it be correct to characterize

1 Judge Shaw's comments, then, as informed opinion but not  
2 legally binding precedent?

3 MR. JENNER: Certainly not res judicata. Nothing  
4 that you are bound to follow. You can take it for what it's  
5 worth because it's not a final determination. In fact, it's  
6 called an initial determination.

7 THE COURT: I just wanted to make sure I understood  
8 that.

9 MR. JENNER: So the first thing he said, quoted on  
10 slide 48, is that the offer, "Could not possibly have been  
11 accepted by Microsoft." And I think I've spoken to that a  
12 little bit. Nobody contends that anybody would simply accept  
13 what was in the October 20th letter. It was not a  
14 fully-formed offer that could be accepted. And again it  
15 requires negotiation. Providing a rate was not providing a  
16 complete offer. There was nothing to accept. The terms had  
17 to be acknowledged.

18 And very significantly, the last bullet on that page, Your  
19 Honor, that I call your attention to was Judge Shaw's  
20 conclusions. He says on page 302, "Motorola's offers may not  
21 be the same as the terms that might eventually be contained  
22 in a RAND license." To the extent that what Judge Shaw says  
23 you find persuasive, he's actually answered from his  
24 perspective the first part of Microsoft's motion by saying,  
25 it doesn't have to be a RAND offer, it needs to get to RAND

1 terms.

2 And I end with that statement by Judge Posner, "If you  
3 think it's too high, just tell them they're charging too  
4 much."

5 The second slide, 49, Judge Shaw said, "The offers made to  
6 Microsoft show that although Motorola assured the standards  
7 organizations and the public that it would provide reasonable  
8 non-discriminatory licenses, those communications were  
9 misleading." That sounds bad. It's in the context of  
10 deciding legal estoppel. Estoppel requires a determination  
11 of whether the statements to the SSOs were misleading when  
12 made. We're not talking October 2010. We're talking the  
13 original Letters of Assurance. Those were made over a period  
14 of 15 years. And what we do know that happened in those  
15 15 years is that Motorola has signed dozens of agreements  
16 with licensees, none of them contend the agreement was not  
17 RAND.

18 So, given that Judge Shaw found the opening offer doesn't  
19 have to be RAND, and that Motorola has repeatedly negotiated  
20 RAND licenses, how could the Letters of Assurance have been  
21 misleading when they were made? I submit the judge did not  
22 have an evidentiary basis to say that. Just the fact that  
23 there's an unresolved dispute with Microsoft doesn't make the  
24 Letters of Assurance themselves misleading.

25 And finally on slide 50, Judge Shaw said, "The evidence

1 supports Microsoft's conclusion that Motorola was not  
2 interested in good-faith negotiations in extending a RAND  
3 license to it."

4 Well, the evidence here is quite different and includes  
5 things Judge Shaw didn't have. The evidence here includes  
6 Mr. Taylor's deposition where he explained, at length, how  
7 Motorola intended and expected to have negotiations with  
8 Microsoft. And Microsoft's Gutierrez testified, far from  
9 saying, we didn't think they had any interest in negotiating,  
10 he testified he had no idea what Motorola would do if  
11 Microsoft countered, he simply turned it over to the  
12 litigators, and the litigators proceeded with what they  
13 characterized as "litigation tactics."

14 So, there's no support in this case for Judge Shaw's  
15 belief that Motorola had no intention to negotiate in good  
16 faith. And all the slides between 20 and 50 that I haven't  
17 had a chance to show you, but they're in our briefs, lay out  
18 all the factual basis on which negotiations have always  
19 proceeded, terms have always been arrived at, cross licenses  
20 have been agreed to, caps have been put in place for parties  
21 like Microsoft that think they're going to have to pay too  
22 much, termination and term clauses have been determined.  
23 Some cases -- some licenses have different rates in different  
24 countries, which is something else you may have to think  
25 about some day. All of these different things wind up in

1 these 80-page agreements. And that's why you have to do it,  
2 and everybody always does it, the way that Motorola submits  
3 was required here.

4 THE COURT: We got started about ten after nine, so  
5 you technically have about two minutes left.

6 MR. JENNER: That's kind of why I'm into my windup.

7 THE COURT: Well, tell me what happened in Germany.  
8 I will tell you, we have not had the opportunity to analyze  
9 that in the care that I would like.

10 MR. JENNER: I will tell you in brief. It may be  
11 that Mr. Taylor, who had been there, can elaborate. But  
12 basically in Germany, as everybody expected, the German court  
13 came down with a decision in which it concluded that  
14 Microsoft had infringed Motorola H.264 patent. Two patents,  
15 sorry, two patents. And the court found Microsoft had not  
16 complied with the German Orange Book, that its offer of one  
17 cent and two cents per unit, it was not unreasonable for  
18 Motorola to reject that offer.

19 So as the matter sits right now, were it not for your TRO  
20 which of course I'd love to ask you to vacate, but were it  
21 not for Your Honor's TRO, there would be the normal pressures  
22 of an adjudicated court decision that would be giving impetus  
23 from the bottom to Microsoft to up it's offer, just as  
24 Motorola has impetuses in Germany to bring down an offer.  
25 There would be offers made of additional rates. That isn't

1 going to happen, because everything in Germany is now on dead  
2 hold because of the preliminary injunction.

3 THE COURT: Help me with one aspect of this, because  
4 I want to make sure I have the chronology right. Microsoft  
5 files the pending lawsuit, and eight months later you file an  
6 action in Germany. Is that basically the chronology?

7 MR. JENNER: Roughly, right. Eight months, yeah.  
8 I'd say so.

9 THE COURT: I mean, didn't you put yourself in the  
10 crosshairs of inconsistent rulings? I mean, it sounds to me  
11 like you were attempting to manufacture, for negotiating  
12 leverage, which is an honorable trait, the potential of a  
13 conflicting resolution of this.

14 MR. JENNER: Let me not be cute in answer to that.  
15 Number one, we were certainly looking for additional ways to  
16 defend ourself. Don't forget, they started this. We didn't  
17 start this. They filed the initial lawsuits on October 1st.

18 THE COURT: Spare me that argument. There's already  
19 way too much --

20 MR. JENNER: Okay. Just so you don't think that we  
21 were out there in the woods with rifles, the remedies in  
22 Germany are certainly additional remedies that can be brought  
23 to bear in order to try to get this to a resolution. They're  
24 not inconsistent results. If you litigate the U.S.  
25 counterparts of those two German patents, you could find the

1 U.S. counterparts invalid not infringed, at the same time  
2 they're found valid and infringed, because they're different  
3 instruments being interpreted differently in two different  
4 legal systems.

5 THE COURT: All right.

6 MR. JENNER: So, it's not circumventing this court.  
7 And I have to tell you, Your Honor, we filed that German  
8 action before they ever actually asked Your Honor to make a  
9 rate determination. They did not do that in the complaint.  
10 They didn't do it until September, two months after we filed  
11 in Germany. We did not jump the gun.

12 THE COURT: Why don't you take one minute further and  
13 then we'll take our morning break.

14 MR. JENNER: All right, Your Honor. I will eschew  
15 any further slides. I appreciate that there are some aspects  
16 of these agreements, which to use my anticipated word, are a  
17 little opaque. But the fact of the matter is all of these  
18 agreements, properly interpreted, require that Microsoft have  
19 been an applicant and have negotiated in good faith with  
20 Motorola. There's nothing to their argument that we usurped  
21 their ability to be an applicant by sending the letters  
22 first. All they had to do is respond and they're an  
23 applicant. So that's silly. They needed to respond to the  
24 letter to engage and negotiate. They didn't do that. That's  
25 all over the LOAs and the patent policies. You really ought

1 to end this inquiry by saying, if the words of the contract  
2 mean what they say, and we enforce the words of the contract  
3 for what say, there was repudiation because they did not  
4 fulfill either of the conditions precedent in order to come  
5 in and get the RAND license.

6 If you don't go there, then the fact of the matter is,  
7 number one, there is no rational requirement to make a RAND  
8 offer. Nobody has any idea what a RAND offer is in any  
9 particular case. Judge Shaw found that, for the sake that it  
10 is of interest to Your Honor. You need to come in with  
11 something that's reasonable.

12 I know Microsoft now loves "blatantly unreasonable."  
13 Well, the counterpart of that is "reasonable." And once you  
14 get rid of the patent pools they love to run to, which have a  
15 completely different purpose, and one of their own people  
16 admitted it is a non-revenue generating purpose, it has  
17 nothing to do with bilateral association, the only reasonable  
18 starting point is where Motorola started. The 2.25 percent  
19 of end products that it has offered everybody for 15 years,  
20 in which everybody prior to this has come in and engaged.  
21 There have been a couple of litigations. One of them got  
22 settled, because they engaged. There is another one going on  
23 with Apple. We'll see what happens with that one. Everybody  
24 over 15 years have engaged. They've negotiated. And it has  
25 resulted in the RAND license, that's required, not the RAND

1 offer.

2 If Your Honor were to find that a RAND offer is required,  
3 I therefore submit to Your Honor that Motorola's offer was  
4 consistent with RAND. It was as consistent as it could be,  
5 without Motorola knowing what all the impacts are on  
6 Microsoft, that it can only learn in negotiation.

7 The thing that is being eliminated from this process by  
8 Microsoft that I urge Your Honor to put back into this, is  
9 commercial reality in the commercial real world. People  
10 negotiate, whether you're buying a car, whether you're buying  
11 a house, whether you want an 802.11 patent portfolio. People  
12 negotiate. They have to engage. They've got to talk to each  
13 other. The standards organizations know it. They tell you  
14 that. They don't have anything to do with it. They don't  
15 tell you how to go about it. The parties have to engage to  
16 do it, and Microsoft simply refused to go there.

17 So if there's an opportunity for that to happen, that  
18 would be great. But we submit there's been repudiation. If  
19 there hasn't been, Motorola sure hasn't breached any  
20 contract. It has acted in good faith and it stood ready to  
21 engage with a company that would not engage back.

22 THE COURT: All right. We will be in recess for ten  
23 minutes. I'll be back out at 10:25 and we'll hear from  
24 Microsoft.

25 (Court recessed.)

1 THE COURT: Mr. Harrigan, who is carrying the flag on  
2 your side?

3 MR. HARRIGAN: That will be me, Your Honor.

4 THE COURT: All right.

5 MR. HARRIGAN: Your Honor, I'd like to pick up on  
6 some of the questions the court was asking a few minutes ago  
7 initially, even though it's out of sequence. But I think  
8 Mr. Jenner was out of sequence, too. So I think that seems  
9 to be the order of the day, which is good.

10 One point the court made was that under the RAND system  
11 Microsoft has a license that is essentially subject to  
12 arriving at the terms, or alternatively the court said at  
13 least Microsoft has a right to a license under that contract  
14 subject to arriving at the terms. We concur with that and we  
15 believe that that is why here, in order to avoid having that  
16 contract be illusory, if necessary the court has to figure  
17 out what the terms are.

18 And I would refer the court to the authority that's  
19 probably getting a little worn in this case, but there is a  
20 case at least that says that the court can do that. In fact,  
21 Motorola argued that the court could do that in the *RIM* case.  
22 That's *RIM v. Motorola*, 644 F.Sup., Texas 2008.

23 "Motorola's second argument in support of dismissing the  
24 contract claim is that RIM has not suffered any damages,  
25 contending that even if it has breached eventually RIM will

1 receive a FRAND license. Either this court will determine  
2 FRAND terms, or the parties will settle on FRAND terms.  
3 Either way Motorola contends RIM will incur no injuries."

4 So that's pretty good authority, from Motorola, that the  
5 court can, in fact, determine what the RAND terms are. And  
6 we agree with the court's characterization of the general  
7 contract principle that once it's determined that the parties  
8 have a binding agreement, if the agreement doesn't provide  
9 specifically, with respect to certain terms, and especially  
10 where the agreement provides a standard, which in this case  
11 is commercially reasonableness, it's quite common for the  
12 courts to supply the terms in order to carry out the parties'  
13 intent of having a binding agreement. The court has already  
14 ruled there's a binding agreement here and that Microsoft is  
15 a third-party beneficiary of it. And so those cases seem to  
16 apply here, as they were apparently thought to apply by  
17 Motorola in the *RIM* case.

18 THE COURT: Let me stop you there. My friend,  
19 Mr. Jenner, was struggling with the fact that it's not a  
20 license that Microsoft holds, it's the right to a license.  
21 And that that right to a license becomes a license when the  
22 terms are agreed to -- putting words in his mouth. What  
23 difference does that make in my analysis of this case?

24 MR. HARRIGAN: Your Honor, I'm not sure that it makes  
25 any difference under the facts of this case, because under

1 the facts of this case Microsoft has unequivocally stated  
2 that it will take the license on RAND terms. And if the  
3 court has to determine them, it will take them on those  
4 terms. So the offer has been accepted, regardless of whether  
5 you characterize it as Microsoft already having a license, or  
6 Microsoft having a right to a license. Once Microsoft says,  
7 "and we'll take it," there's no longer an issue with regard  
8 to the obligation or the, frankly, existence of the license.  
9 The license exists, it's just a matter of having the court,  
10 if necessary, decide what the terms are.

11 THE COURT: Both sides, in their briefing, make that  
12 statement that Microsoft has unambiguously stated that it  
13 will take a license. Where is that in the record?

14 MR. HARRIGAN: Your Honor, we've handed up a notebook  
15 to you, and I'm going to be referring to it periodically.  
16 And in tab 3 we have a list of the many statements by  
17 Microsoft to this effect, starting with the complaint, which  
18 is less than crystal clear. But as of September 30, 2011,  
19 "Microsoft is seeking and remains ready and willing to take a  
20 license."

21 And then more recently -- there are numerous statements  
22 along those lines -- but in the preliminary injunction motion  
23 March 28, 2012, this is over on the second page at the top,  
24 "A license that Microsoft is eager to obtain. A ruling that  
25 Motorola is contractually bound to grant a RAND license,

1 coupled with Microsoft's express commitment to accept the  
2 RAND license, necessarily means that Motorola cannot seek to  
3 enjoin," et cetera. And there are a number of other  
4 statements in the intervening period. So that statement is  
5 unequivocal, and if it needs to be any more unequivocal I'll  
6 make it more unequivocal.

7 THE COURT: Well, I guess what I'm finding  
8 interesting is -- I mean, your evolving litigation position  
9 seems to be now that you're unequivocally going to take the  
10 license. You also have a motion that they breached the  
11 contract, and that would be the contract between Motorola and  
12 the IEEE, for one of the two licensing bodies. If they  
13 breached that contract, then that contract doesn't exist. So  
14 how can you take a license under a contract that doesn't  
15 exist?

16 MR. HARRIGAN: Well, Your Honor, I don't think their  
17 breach destroys the contract, it just creates a claim for  
18 whatever damages flow from the breach.

19 That isn't something that we've spent a lot of time  
20 figuring out, because as far as we're concerned what this  
21 case is now primarily about is getting the RAND license  
22 defined, because that's how it's going to end. And whether  
23 Microsoft has any current or past damages arising from the  
24 breach is not the main issue. But I'm not saying there  
25 aren't any. It could be that all the legal fees expended in

1 Germany and the ITC would be part of that. But that's a  
2 separate issue. And obviously a party can sue for damages  
3 and still get the benefit of the contract, because otherwise  
4 then their damages are even worse.

5 THE COURT: All right.

6 MR. HARRIGAN: So a second point, Your Honor, relates  
7 to the language of the standards which, you know, I think  
8 it's clear that it would be an enormously complex task to  
9 figure out what the standards said on different subjects at  
10 different times.

11 But at tab 2, here's what we have done, hoping that it  
12 might be of some use. We have taken the excerpts from the  
13 two standards that each party has quoted. The ones with  
14 yellow highlighting, the yellow highlighting is where  
15 Motorola likes it, and the underlining is where Microsoft  
16 likes it. So the parts that were quoted in the briefs by the  
17 two parties are distinguished in that way. And the court  
18 noted a few minutes ago the mandatory language from the ITU  
19 standard, "will grant a license," and contrasted it with the  
20 IEEE language that the court referred to is, "Prepared to  
21 grant."

22 The first section of this is the IEEE. And I would just  
23 like to call the court's attention to a few items that help  
24 to clarify what the IEEE thinks the rule -- the requirement  
25 is, and it's really very parallel to the ITU language.

1           The court noted the statement in the middle of the page,  
2 "Is prepared to grant." That was in 2005. In 2006 it was  
3 changed to, "The Patent Holder will grant a license under  
4 reasonable terms." In 1994 when Motorola submitted an early  
5 LOA it said that it, "Agrees to license these patents on a  
6 non-discriminatory basis offering fair and commercially  
7 reasonable terms," which I think sheds some light on whether  
8 the offer is supposed to be RAND, or if it's something that  
9 is not RAND, then you bargain toward RAND, because that would  
10 not be offering fair and commercially reasonable terms.

11           By the way, in answer to the court's question about the  
12 bylaws, we concur with Mr. Jenner's characterization of the  
13 situation regarding the bylaws.

14           On the next page, in 2005 the IEEE bylaws said that there  
15 has to be a statement that a license will be made available  
16 without compensation, or under reasonable rates. And another  
17 point worth noting, Your Honor, is that the commitment as  
18 we've highlighted here is irrevocable. And that runs through  
19 these standards, which I believe relates to the question of,  
20 you know, can you accept this? It's an irrevocable  
21 commitment. Do you call it a license or an offer? The  
22 obligation to provide a RAND rate is irrevocable. And I'm  
23 not going to read the rest of it. But whatever use it is,  
24 Your Honor, we've got a collection there of the various  
25 phrases used throughout the period, which we think the gist

1 of all of them is that the Patent Holder is committing to  
2 offer and make a license available on RAND terms. And there  
3 is no exception for the first offer.

4 THE COURT: Is Microsoft in agreement with the  
5 position taken in this matter that all of the patents that  
6 are before the court are standard essential patents, and  
7 therefore the fact that I do not have any definitive chart  
8 listing those patents should not be a concern to me?

9 MR. HARRIGAN: Your Honor, if I understand what  
10 you're asking, I think the answer is, yes. All of the  
11 patents that are before the court on this breach claim are  
12 the ones that are attached to the two letters. And whether  
13 they're standard essential patents or not -- and I take it  
14 from Mr. Jenner's comment that he thinks there was one where  
15 Motorola didn't submit an LOA, but it was still a standard  
16 essential patent, the letters state that they are providing a  
17 RAND rate for all of them. So we believe that they are --  
18 even if there are some in there that are not standards  
19 essential, and I can't tell you for sure whether that's the  
20 case, Motorola was representing in the letter that it was  
21 providing a RAND rate for every patent that's attached to  
22 either of those two letters. And, therefore, for purposes of  
23 this case we believe that they are all included within the  
24 RAND obligation.

25 Now, I'd like to address the comment by Mr. Jenner, a

1 number of times, that the offers or the letters, or demands  
2 for offers, were just a starting point. And the royalty  
3 might very well have gone much below 2.25 percent. This is  
4 contradicted by Motorola's own briefing and by statements in  
5 its declarations that it always gets 2.25 percent at the end  
6 of the day. The only question is how do they get there? If  
7 they get some technology coming back the other way, then they  
8 value it in a certain way, then perhaps the royalty rate goes  
9 down, but they're still getting 2.25 percent.

10 In other words, this was a "take it or leave it." Maybe  
11 you get to talk about how you're going to pay the  
12 2.25 percent. But Motorola's response to our summary  
13 judgment motion at page 6 says, "Because each licensing  
14 situation is unique, negotiated license terms often reflect  
15 the 2.25 percent overall value in different ways." For  
16 example, three, a grant-back of license rates. So the  
17 grant-back -- and this is according to Motorola's revisionist  
18 version of its own letter, because in fact the letter says,  
19 you pay us 2.25 percent, and you grant us back your  
20 technology. And there's no indication that the 2.25 percent  
21 is coming down for that reason. That was the demand in the  
22 letter, which I'll get to in a minute.

23 But the fact is in their own brief Motorola says, we're  
24 sticking to 2.25 percent, no matter what, the only question  
25 is how are we going to get there.

1           So the suggestion the court made that, tell us whether you  
2 accept within 20 days, sounds like an ultimatum, is  
3 consistent with the fact that Motorola wasn't going to back  
4 off its 2.25 percent, no matter what counteroffers Microsoft  
5 made.

6           THE COURT: How do you know that?

7           MR. HARRIGAN: Because they say so, in their brief.  
8 They say they always get 2.25 percent.

9           THE COURT: You didn't know that at the time.

10          MR. HARRIGAN: Well, what Microsoft knew at the time,  
11 Your Honor, was the demand was 2.25 percent for the standard  
12 essential patents on the price of a laptop, among other  
13 things -- which is kind of important, which I'll also get to  
14 in a second -- and you give us your standard essential  
15 patents also. That was what Microsoft knew.

16          And what Microsoft didn't know, I presume they didn't know  
17 this, was that Motorola was never backing off the  
18 2.25 percent. But what matters for this case is, was the  
19 letter a breach? Because the breach has to be measured based  
20 upon what Motorola was saying when it said it, not what it  
21 says now about what it really meant.

22          THE COURT: Well, this takes me to one of my favorite  
23 aspects of this case, which is how am I going to determine if  
24 it was unreasonable until I know what RAND terms are? And  
25 I'm not going to know what RAND terms are until November 26th

1 when the jury comes back.

2 MR. HARRIGAN: Well, Your Honor, I think that -- if  
3 we take the example of the laptop, I believe that as a matter  
4 of law it's unreasonable. And that's apart from some of the  
5 other evidence with regard to the total amount of royalties  
6 and how they relate to essentially being 20 percent of  
7 Microsoft's annual profits for a tiny little piece of the  
8 operating system.

9 The fact is that Motorola's technology that contributes to  
10 the operating system is a tiny little part of Microsoft's  
11 operating system. And as a matter of law, the only way that  
12 Motorola could get a percentage of the price of the operating  
13 system, would be to demonstrate that its little contribution  
14 to that operating system is the basis for customer demand for  
15 the operating system. But it's not asking for a percentage  
16 of the operating system, it's asking for a percentage of the  
17 laptop price.

18 There is no way that Motorola's standards essential  
19 patents on this, for the operating system, are on the basis  
20 of customer demand for it, much less the customer demand for  
21 the laptop, which is the requirement under the entire Market  
22 Value Rule, if you are going to get a royalty based on a  
23 percent of the product price. And under those cases the  
24 burden is on the Patent Holder to demonstrate that its  
25 technology is the basis of customer demand.

1           And failure to do that, there are a lot of *Daubert* motions  
2 granted on the basis of excluding evidence using that royalty  
3 approach, because as a matter of law first the Patent Holder  
4 has to sustain the burden of showing that its technology is  
5 the basis for customer demand. There has been absolutely no  
6 effort made by Motorola to even try to do that here. And it  
7 obviously can't, as to the laptop.

8           And so, Your Honor, on that basis we believe as a matter  
9 of law, it is clear that at least with respect to the laptop,  
10 which is kind of an important piece of this case, the demand  
11 was unreasonable as a matter of law. And the other thing is,  
12 Your Honor, these letters don't invite anybody to negotiate  
13 about individual products. It lists the products that the  
14 demand relates to very specifically. And there's no  
15 suggestion that you could have different rates for different  
16 ones, or, oh, we'll talk about this, or whatever. They're  
17 listed there in each of the two letters.

18           So the court raised the question about valuing the  
19 patents. And, Your Honor, you cited to an article which we  
20 believe, based on what you said about it, states the law  
21 correctly, which is that you value the contribution of the  
22 patented technology to the accused product. And that's  
23 really what I was just talking about. That is a general  
24 proposition for how you determine patent damages and how you  
25 measure them.

1           In the case of asking for a percentage of the product, you  
2           have to show that your technology is the basis of customer  
3           demand, which is a version of this general proposition,  
4           because that is how you measure the contribution of the  
5           technology to the product. And there is no way that that is  
6           -- I won't repeat myself -- but that burden has not been met  
7           here. But the court's statement is correct with regard to  
8           what the overall rule is.

9           And here, not only is Motorola using the laptop product of  
10          which Microsoft's product is a piece, to charge the royalty,  
11          which violates the general principle because it's not even  
12          applying it to the right product, but in addition we have  
13          cited -- and I'll get to it if I ever arrive at my outline --  
14          we have cited statements by Motorola folks who came up with  
15          these letters and determined what was going to be sought.

16          To the effect that in the case of the Xbox, what they were  
17          valuing was the contribution of the standard to the Xbox.  
18          They thought that the standard had high value to the Xbox,  
19          which is exactly what you do not get to do in a RAND context.  
20          That is the holdup value. You don't get the value of the  
21          standard. You get the value -- you get the proportionate  
22          contribution of your technology to the standard. And that  
23          has to then relate to its contribution to the product. And,  
24          in fact, Motorola's deposition testimony admits that what  
25          they considered was the value of the standard.

1           Would you take a look, please, at tab 4 in the notebook.  
2           I just want to call the court's attention to, in a little bit  
3           more context, what Judge Shaw said, which is at tab 4. The  
4           first quote is the one that Mr. Jenner read that the royalty  
5           rate of 2.25 percent could not possibly have been accepted by  
6           Microsoft. He then said, "Indeed there is no evidence that  
7           any company would agree to the offer that Motorola sent to  
8           Microsoft." Then he said, and this is significant in that it  
9           shows how he was reading the RAND obligation, "The offers  
10          made to Microsoft show that although Motorola assured the  
11          SSOs and the public that it would provide reasonable and  
12          non-discriminatory licenses for the patents essential to  
13          certain standards, those communications were misleading."  
14          ie: These letters show that the commitments had been  
15          misleading.

16           And then finally, "The evidence supports Microsoft's  
17          conclusion that Motorola was not interested in good-faith  
18          negotiations and in extending a RAND license to it."

19           We concur that the court is not bound in any way by those  
20          observations. They're worth whatever the comments of an  
21          independent third party about this situation are worth.

22           The court asked what happened in Germany. And at tab 10  
23          there is a quote from the -- one of the translations. This  
24          is Motorola's translation of the May 2nd order. And I am  
25          merely calling the court's attention to the fact that the

1 German court does not recognize third-party beneficiary  
2 rights. And there was a communication glitch here. And  
3 there is one other statement we wanted to call to the court's  
4 attention from the German case, and that is, "In the opinion  
5 of the court, this consideration may be restricted to the  
6 question whether the offer constitutes a blatant violation of  
7 antitrust law."

8 And what the court is talking about there is that  
9 Microsoft had made its Orange Book offer, Motorola did not  
10 accept it, and the question was, what is the significance of  
11 that in terms of the failure to accept a reasonable proposed  
12 royalty? And the court's answer was that the criteria for  
13 determining that is whether the failure to accept that Orange  
14 Book offer was a blatant violation of antitrust law, not just  
15 a violation of antitrust law.

16 So the court's determination that this case is going to go  
17 forward with an injunction, in spite of Microsoft's Orange  
18 Book offer, was predicated on the fact that by turning it  
19 down Motorola was not committing a blatant violation of  
20 antitrust law. And that's the only determination of  
21 reasonable royalties the court made or will make. So that  
22 case is clearly inconsistent with RAND. And the fact that it  
23 doesn't even recognize that Microsoft has contract right as a  
24 third-party beneficiary, would suggest that the probability  
25 of inconsistent outcomes and the motivation to do the end-run

1 are clear.

2 THE COURT: Well, let's stop on that question. It is  
3 a standard feature of judicial training that we are taught to  
4 avoid conflicting judicial declarations, for the reasons that  
5 they leave the parties in precisely the predicament that  
6 we're in right now. How do I harmonize these two positions?  
7 I mean, I was very careful not to enjoin the German legal  
8 system and the German court. On the other hand, Motorola at  
9 this point has a lawful opinion in Germany. How is it that  
10 the court here can pretend like that doesn't exist without  
11 depriving Motorola of its rights?

12 MR. HARRIGAN: Well, Your Honor, the anti-suit case  
13 law provides the answer. And that is that this was an  
14 end-run, it was an effort to create a situation where there  
15 is a high likelihood of inconsistent outcomes, one in which  
16 Motorola can get the leverage of an injunction that it would  
17 not get under the jurisprudence in this country or in this  
18 court.

19 And so it is a classic end-run around a court that was  
20 first seized with jurisdiction of this matter, and is in the  
21 process of determining whether Microsoft has a license --  
22 actually determining simply what the terms are of the license  
23 that Microsoft will get. Because the stage is set, Microsoft  
24 has committed to take a license, it has already been ruled by  
25 the court that it has a right to such a license, and the

1 court can determine the terms. So there is no basis for  
2 getting an injunction in this case, which I guess we'll be  
3 talking about in a few minutes.

4 But this is a classic anti-suit situation, and the  
5 decisions -- the decision of the German court simply  
6 underscores the fact that in addition to the reasons that we  
7 advanced earlier, now the injunction is imminent, which is  
8 the basis for -- which was the motivation for the motion.  
9 And it's clearly demonstrated that the legal system in  
10 Germany is more antithetical to the RAND scheme of things  
11 than we even suggested in the motion. We were hesitant to  
12 say German law doesn't recognize third-party beneficiary  
13 rights, but there seemed to be some confusion about it, but  
14 there isn't any in the mind of the judge who made the  
15 decision.

16 Your Honor, in the interests of time, I'm going to address  
17 the -- let me make sure I don't have anything left here. Oh,  
18 I'm going to address the repudiation issue as briefly as I  
19 can. The original argument by Motorola was that when  
20 Microsoft filed the lawsuit, it repudiated the contract. And  
21 the court seemed to look askance at that proposition. And in  
22 the current motion the ground has shifted and Motorola is now  
23 arguing that there are -- arguing for two conditions  
24 precedent that added together seem to amount to repudiation.  
25 And so I will just address first the issue of conditions.

1           The first condition is that Microsoft must negotiate. In  
2 other words, Motorola's duty to make a RAND offer is subject  
3 to a condition precedent that Microsoft has to negotiate when  
4 it gets the offer. And that just doesn't make any sense. In  
5 terms of sequence, you can't have a condition precedent that  
6 doesn't even -- where the occasion for the condition doesn't  
7 even arise until after the other party has taken its action.

8           The duty that Motorola has under the contract that it says  
9 Microsoft repudiated, obviously exists at the time that it  
10 makes the offer. And it can't be subject to a condition that  
11 -- a precondition that can't happen until after the demand  
12 was delivered. And there is no --

13           THE COURT: Let me stop you, because I'm not sure I  
14 understand the legal underpinnings for this argument. Do you  
15 disagree with the statement of one of the witnesses here that  
16 you need to look at the conduct of both the patent owner as  
17 well as the implementer, they both need to be willing to  
18 negotiate in good faith, and there is an obligation on both  
19 parties' parts to negotiate in good faith? Is that in  
20 disagreement to Microsoft's position?

21           MR. HARRIGAN: I think, Your Honor, that the RAND  
22 contract does not contain any such duty.

23           THE COURT: Well, that's your senior director of  
24 intellectual property talking in this context.

25           MR. HARRIGAN: Well, I think that the witness was

1 stating a belief with regard to how this should work. I  
2 don't believe the witness was attempting to render a legal  
3 opinion on what the RAND contract requires.

4 THE COURT: Well, his words speak for themselves. It  
5 seems to me you're ignoring the second half of that sentence.

6 MR. HARRIGAN: No, Your Honor.

7 THE COURT: You know, what good faith is there in  
8 saying: You know what? We don't want to play in your  
9 sandbox, we're going to go sue you.

10 MR. HARRIGAN: Your Honor, first of all, that is  
11 subject to the proposition that the first party has acted in  
12 good faith to begin with.

13 But the court, if I can quote a higher authority on what  
14 the contract means as opposed to how people should behave  
15 themselves, has said, "Motorola has failed to provide any  
16 legal authority that requires negotiation as a precondition  
17 to a breach of contract claim based on RAND licensing  
18 commitments." Or, and another statement, "Motorola attempts  
19 to insert a requirement that Microsoft negotiated the license  
20 terms prior to filing suit for breach of contract. The IEEE  
21 and ITU guidelines provide no such requirement." And if you  
22 look through the tab where we put all of this in there, and  
23 you look at all the ones with yellow on them, you will not  
24 find a word that says that the recipient of a RAND demand has  
25 a duty to negotiate.

1           The fact is that if the recipient of the RAND demand, as  
2 Microsoft did, looks at this offer and says, no one in its  
3 right mind can ever accept this, this is not RAND, they've  
4 breached their agreement. You have a right to file a lawsuit  
5 to enforce the contract, that is exactly what we did. It  
6 wasn't a repudiation.

7           THE COURT: Well, counsel, you know, I have two  
8 questions about that. First, you apparently had been, you  
9 Microsoft, had been disregarding Motorola's patent rights for  
10 18 months. And then you accuse them of somehow improper  
11 conduct when they write you an offer saying you have been  
12 using our patents for 18 months, here are the terms for  
13 licensing them. Isn't that inequitable?

14           MR. HARRIGAN: I think not, Your Honor. And, in  
15 fact, I'll quote Motorola on that point, from one of their  
16 motions for summary judgment on this issue at page 5,  
17 "Companies sometimes choose not to engage each other in  
18 licensing discussions, despite the fact that each is getting  
19 value from the other side's patented technology. For years  
20 that was the case with Motorola and Microsoft."

21           So companies, for whatever reason, think it might be  
22 better to not bother with this, and we'll just proceed. And  
23 the whole point of the RAND scheme is that if someone does  
24 decide that they want to collect something for the standards  
25 essential technology, you can be comfortable that it's not

1 going to cost you any more than a reasonable amount to take  
2 care of that problem.

3 And presumably if you're a company like Microsoft you're  
4 going to get something in return for your own standards  
5 essential patents. And so it's all going to kind of come out  
6 in the wash. And therefore maybe it's not worth bothering  
7 with.

8 What happened here, we believe, is that Motorola decided  
9 to point a gun at Microsoft for various reasons, and it sent  
10 them a letter that it had no intention of ever having  
11 accepted, or didn't regard as being -- didn't actually regard  
12 as being reasonable.

13 So it's completely outside the normal behavior of the  
14 parties in this situation.

15 THE COURT: You know, counsel, you both have filed so  
16 much stuff under seal, I'm hesitant to try and sort through  
17 it, because your knowledge of that is better than mine. But  
18 Motorola offered a compelling case that there had been prior  
19 discussions, and negotiations, and business arrangements,  
20 that had postponed this resolution. Pointing a gun at your  
21 head seems to me to be the worst of hyperbole.

22 MR. HARRIGAN: The gun didn't get pointed until the  
23 letters were delivered. The letters were completely outside  
24 the context of any of those discussions. And, Your Honor, I  
25 confess, I am not an expert in the content of those

1 discussions either. But I don't think anybody has suggested  
2 that they were about the list of patents that were attached  
3 to those two letters. They were about a variety of things.

4 THE COURT: Well, let me take your argument to a  
5 slightly more extreme position. What I hear you saying is  
6 that arrangements like the IEEE or the ITU, one side has a  
7 good faith -- Patent Holder, has a good faith obligation to  
8 propose a term. And every one of those is going to imply the  
9 question of, is it RAND, because we don't know until it's  
10 ultimately resolved.

11 And then the implementer, as the language is used, is free  
12 to immediately run to court and say, we don't like the terms,  
13 court, you resolve them. That doesn't seem to me to give  
14 rise to a commercially reasonable context for these essential  
15 patents use.

16 MR. HARRIGAN: Well, Your Honor, if the predicate is  
17 that a RAND offer was made, then running to court would not  
18 be appropriate. But you can run to court, as long as you  
19 satisfy Rule 11, if you have a reasonable basis for believing  
20 that you have a cause of action for breach of contract. And  
21 the RAND scheme does not denigrate that right, nor does a  
22 lawsuit to enforce the contract constitute repudiation.

23 And I'll just mention one other thing about that lawsuit,  
24 which is that Microsoft did not merely sue for breach of  
25 contract. Microsoft also asked for a decree that Microsoft

1 is entitled to license from Motorola any and all patents, et  
2 cetera. In other words, the declaratory judgment action.

3 THE COURT: Well, you were doing better when you were  
4 attempting to persuade the court that that wasn't the most  
5 precise use of language. You need to take a long walk off a  
6 very short pier to get to the position that you're arguing  
7 here. That complaint does not ask for a license, only by  
8 implication.

9 MR. HARRIGAN: Well, it asks for the court to rule  
10 that Microsoft is entitled to a license. And it asks for the  
11 court to determine that there are binding and enforceable  
12 contractual obligations. Now, the court dismissed that  
13 declaratory judgment action based on procedural grounds that  
14 I'm not here to argue about. The question is what did  
15 Microsoft say in its pleading that would be a repudiation?  
16 And what I'm saying is that Microsoft didn't just say, you  
17 breached. It also said, enforce this agreement. Declare  
18 that Microsoft is entitled to a license, and that there is a  
19 binding and enforceable agreement, which is the opposite of  
20 repudiation. And under the repudiation standard, repudiation  
21 will be found only where there is an unequivocal indication  
22 that the repudiating party will not perform. Asking to  
23 enforce a contract can not possibly meet that standard.

24 THE COURT: Well, wouldn't a less arrogant position  
25 have been to say, Microsoft wishes to take a license under

1 this. Court, set the terms.

2 MR. HARRIGAN: Could have done that. Did do that  
3 later.

4 THE COURT: The evolving litigation position.

5 MR. HARRIGAN: The evolving litigation position. I  
6 think it's fair to say the position of Microsoft specifically  
7 asking the court to grant -- to see to it that it was granted  
8 a license and that it would take one, arose in September of  
9 2011.

10 THE COURT: All right. Please continue.

11 MR. HARRIGAN: So, Your Honor, I think it might help  
12 at this point to turn to the actual letters for a second,  
13 which are --

14 MR. WION: Tab 6.

15 MR. HARRIGAN: These have the attachments and some  
16 yellow highlighting on them. I'd like to turn to the second  
17 one in that tab, which is Exhibit 13, and just run down what  
18 these letters actually say. And, Your Honor, the breach  
19 claim that we are making should be measured by the actual  
20 terms of the letters, because that's when we believe the  
21 breach took place, and should not be read in light of  
22 subsequent revisionist history about what we really meant and  
23 what we normally do.

24 The October 29th, Exhibit 14 letter, is for a worldwide  
25 non-exclusive license for H.264. Motorola represents in the

1 letter that this offer is RAND. And that's highlighted. It  
2 includes a royalty, a reasonable royalty of 2.25 percent,  
3 subject to a grant-back license under the H.264 patents of  
4 Microsoft. And that means you pay 2.25 percent, and we get a  
5 grant-back license. It does not mean you get 2.25 percent  
6 and we'll talk about reducing this if you give us a  
7 grant-back license. The offer is made subject to the receipt  
8 of a grant-back license.

9 The next sentence says that, "As per Motorola's standard  
10 terms, the royalty is based on the price of the end product,  
11 e.g., among other things, each PC/laptop, and not on  
12 component software, e.g., Windows 7 software." I've already  
13 covered why we believe that is a breach. It's very clear  
14 that that is what's going on here. And those are stated to  
15 be Motorola's standard terms. And their brief, which I  
16 quoted from earlier, confirms that their standard term is  
17 that they get 2.25 percent somehow.

18 So you can either -- what the letter actually says is we  
19 get 2.25 percent, and we get the grant-back. But even if you  
20 buy the revisionist history, Motorola says, we always get  
21 2.25 percent somehow, taking into account what we might get  
22 back.

23 And finally, as the court already noted, "This offer is  
24 open for 20 days. Confirm whether Microsoft accepts it." So  
25 it is an ultimatum. It contains terms that we believe are

1 clearly not reasonable. And, therefore, it is a breach, if  
2 the court determines that there is an obligation to make a  
3 RAND offer. And I'm not going to go back through the  
4 highlighted standards. The court has already read about them  
5 numerous times. They're in the notebook.

6 We have underlined a number of statements by each of the  
7 two organizations stating you either make it available, or  
8 you offer -- you either make RAND terms available or you  
9 offer RAND terms. And those provisions cannot logically be  
10 that, well, at some point down the road you will finally get  
11 to making a RAND offer. They state what the obligation is of  
12 the Patent Holder with respect to an offer. And they say you  
13 will make a RAND offer, or you will make your technology  
14 available on RAND terms. It's not available on RAND terms if  
15 your offer isn't RAND. You're making it unavailable RAND  
16 terms.

17 THE COURT: Go back to diagraming the sentence in the  
18 October 29th letter. It says, "Including a reasonable  
19 royalty of 2.25 percent per unit, subject to a grant-back  
20 license." It seems to me -- I don't know what that sentence  
21 means. Does that mean 2.25, less the value of the grant-back  
22 license? It doesn't say 2.25 and a grant-back license, which  
23 is how you choose to read it.

24 MR. HARRIGAN: Well, Your Honor, the way I would read  
25 it is this: We're starting out with the second word of the

1 sentence. "Motorola offers" -- offers to license. So here's  
2 the offer: "Offers to license on a non-discriminatory basis  
3 on reasonable terms and conditions, RAND, including a  
4 reasonable royalty of 2.25 percent, subject to a grant-back  
5 license." So what's subject to the grant-back license is the  
6 offer. This offer is subject to a grant-back license. In  
7 other words, we are offering you 2.25 percent. But the offer  
8 of 2.25 percent is subject to a grant-back license. It  
9 doesn't say the 2.25 percent is modified by a grant-back  
10 license.

11 THE COURT: You know, there was a wonderful Latin  
12 phrase that attaches to construction of these terms, which I  
13 think in more dignified language than I would use says that  
14 the subject relates to the clause before it, not modifying  
15 the entire sentence. Do you want to reconsider that, or are  
16 you sticking to that position?

17 MR. HARRIGAN: Well, Your Honor, I hate to be  
18 stubborn, and it's been awhile since I diagrammed a sentence.  
19 However, I think -- and I'll be short here -- I already am  
20 short. "Motorola offers to license." Then we go to the  
21 comma, and it says, "Including a reasonable royalty,"  
22 et cetera, comma, "subject to a grant-back license." I  
23 believe with those two commas around that phrase, the  
24 "subject to" is modifying the fact that Motorola offers, for  
25 what it's worth.

1           So, why is this offer -- it is inherently unreasonable for  
2 two main reasons: One, I've already stated and I don't have  
3 time to repeat it, and that is that there's -- but very  
4 briefly -- there's been no demonstration particularly in the  
5 case of the laptop, Motorola can sustain the burden under the  
6 rule requiring that it show that it was the basis of customer  
7 demand.

8           Secondly, and more intuitively obvious than the legal  
9 analysis of patent courts, is what is the -- how is it  
10 possible for a royalty based upon Motorola's contribution of  
11 a small part of a standard, that is a small part of an  
12 operating system, how is it consistent with the general  
13 requirement of proportionality for the royalty on -- for that  
14 to depend upon the price of a device, the laptop that the  
15 operating system is a small part of, when the price of the  
16 laptop varies depending on how big its screen is, whether  
17 it's got a titanium case, what kind of a keyboard it has, how  
18 fast it is, how much memory it has. None of those things  
19 have anything remotely to do with the contribution of  
20 Motorola's technology.

21           So, apart from the intricacies of patent law, just as a  
22 matter of common sense, it doesn't make any sense for the  
23 royalty that Motorola gets to be increased by ten times  
24 because somebody buys a \$4,000 laptop, instead of a \$400  
25 laptop. Maybe there isn't a \$4,000 laptop. But maybe a

1 \$3,000 instead of a \$300. Because there's been no  
2 demonstration of proportionality between those numbers and  
3 Motorola's contribution.

4 THE COURT: Mr. Harrigan, shouldn't you be addressing  
5 the jury? I mean, this is your opening statement.

6 MR. HARRIGAN: Well, Your Honor, the facts that I  
7 just stated I don't believe are disputable. The fact is that  
8 we know why people pay more for certain laptops. And there's  
9 been -- Motorola would have to come forward with some  
10 evidence that those variations are connected to its  
11 technology somehow, or else it's simply inherently  
12 unreasonable. So that's how we believe that that should be  
13 viewed.

14 And if the concern is that it's a factual issue, I will  
15 revert to the entire Market Value Rule, which says you can't  
16 do it this way unless you sustain the burden of proving that  
17 your technology is the basis for customer demand. And we  
18 submit that Motorola hasn't even started to or attempted to  
19 sustain that burden. So, on that basis as a matter of law it  
20 is unreasonable. And that would be outside the RAND context.  
21 Even if you didn't have the constraints of RAND, that rule  
22 would apply.

23 I've already covered the ITC comments. With regard to the  
24 various license agreements that Motorola has cited, they have  
25 not come forward with any licensing agreement, where they did

1 what they're doing here in the case of the laptop. Whatever  
2 else is wrong with their comparisons, and we've provided some  
3 detailed comments on that in the briefs, they have produced  
4 no comparable situation where the product of which they're  
5 seeking a percentage royalty is not the product of the person  
6 from whom they're getting the royalty. And for the reasons  
7 I've already said, that is a grotesque situation which is  
8 part and parcel of the letter, because you can't accept it  
9 piecemeal. And that is, that the product of which they would  
10 have -- the product that Microsoft is producing, the  
11 operating system, is not the product that is the subject of  
12 the royalty.

13 I'm a little confused about where I am on time.

14 THE COURT: You have about eight minutes left.

15 MR. HARRIGAN: Does that include the injunction  
16 issue?

17 THE COURT: No.

18 MR. HARRIGAN: Okay. Thank you.

19 THE COURT: It doesn't mean you have to use all of  
20 it.

21 MR. HARRIGAN: I understand.

22 Another aspect of these letters that needs to be measured,  
23 Your Honor, is the fact that Motorola is now claiming that it  
24 was only seeking a total of 2.25 percent. And if we're -- I  
25 believe that it is a valid basis for summary judgment on

1 breach that, in fact, there is no way to get there by reading  
2 those two letters. They asked for 2.2 -- there were two  
3 standards. They sent two letters. They asked for  
4 2.25 percent in each letter. They listed the products they  
5 wanted it on. If you read those two letters you would  
6 immediately conclude that you're paying four and a half  
7 percent total; or at least that they were separate royalties  
8 for 2.25 percent, for each standard.

9 And Motorola has come forward with no evidence to suggest  
10 that that level of royalty would be reasonable. And so if  
11 we're going to measure their conduct in those letters it  
12 should be measured in the way that -- it should be measured  
13 according to the way that the letters were written. And you  
14 just can't get to the position that they now say is their  
15 normal approach.

16 Let me just see if I have left off anything terribly  
17 important. Oh, one other thought I did want to express, Your  
18 Honor, you alluded to the jury setting the RAND rate, or  
19 determining the terms. And we believe the court can decide  
20 that without a jury. We're not here to debate that today.  
21 But I just want to let you know that that's something that  
22 would probably be debated when the appropriate time comes.  
23 Thank you.

24 MR. JENNER: Your Honor, at the risk of wearing out  
25 my welcome, will you take four points in reply?

1 THE COURT: I think you had your time, Mr. Jenner.

2 MR. JENNER: Okay. Thank you.

3 THE COURT: Mr. Harrigan, I think it is -- we're  
4 going to do injunctive relief. And do you want to do your  
5 injunctive relief speech now, or are you delegating that to  
6 someone else?

7 MR. HARRIGAN: I'm doing it.

8 THE COURT: All right. Then I'll hear from you.

9 MR. HARRIGAN: All right.

10 THE COURT: Mr. Palumbo, you will get the last word  
11 today.

12 MR. PALUMBO: Thank you, Your Honor.

13 MR. HARRIGAN: As usual I have too much paper, so  
14 I've got to find it.

15 So, Your Honor, we believe there are three reasons that  
16 the court should dismiss the claim for injunctive relief.  
17 The first I've just talked about, which is that if, in fact,  
18 the letters were a breach, it remains for Motorola to even  
19 make a RAND offer.

20 Second, we believe it's clear that Microsoft is going to  
21 get a license in this case. It is entitled to one. It's  
22 committed to take one. And it's asking the court to  
23 determine the terms. And therefore at the end of the day  
24 there will be -- not only at the end of the day, but at this  
25 point in time, in light of those commitments and that

1 program, there will be no basis for injunctive relief.

2 And third, the lack of irreparable harm. And since I've  
3 already talked about the first two, I will focus on the last.

4 THE COURT: Well, please do so in the context of the  
5 *eBay* case, because it seems to me that's the controlling  
6 authority that I'm to follow.

7 MR. HARRIGAN: I agree. Let me turn to the *eBay* case  
8 then, right off the bat.

9 THE COURT: And also as part of that, I thought  
10 Motorola made a strong argument in regards to, how do I know  
11 what is irreparable harm in this context? Both of you have  
12 cited things that the court would not normally think of as  
13 irreparable harm, because it's not in this business. So I'd  
14 like you to cover that also.

15 MR. HARRIGAN: So first of all, Your Honor, under  
16 *eBay*, basic equitable principles of it relating to the  
17 availability of injunctive relief are viable in patent cases.  
18 And the factors that the court has identified that have to be  
19 shown are not -- they're not balancing factors, they are four  
20 independent factors, each of which has to be demonstrated.  
21 The first one is that the party has suffered an irreparable  
22 injury. The second is that remedies available at law, such  
23 as monetary damages, are inadequate to compensate for that  
24 injury. Then the court balances hardships and looks at the  
25 public interest.

1           The first two items, as well as the other two, are  
2 requirements for getting injunctive relief. The court  
3 doesn't balance the probability of irreparable injury against  
4 some other thing in order to make a decision, it determines  
5 if there has been irreparable injury, and if monetary damages  
6 are inadequate.

7           So we believe that the best evidence that monetary damages  
8 are not inadequate is that Motorola has written two letters  
9 stating that it will take what we think is an astronomical  
10 amount of money, but nonetheless money, in exchange for a  
11 worldwide license to these patents. And therefore it must  
12 believe that it can be adequately compensated in money. It  
13 is essentially an admission.

14           In fact, we had a similar statement recently which is at  
15 tab 9 of your notebook, in describing the German -- outcome  
16 of the German litigation Motorola said -- after stating it  
17 was pleased -- it said, "Fair compensation is all that we  
18 have been seeking for our intellectual property."

19           It has not been suggested -- Motorola has not come forward  
20 with anything indicating that they have irreparable harm.  
21 And, in fact, the two letters and their statement in Germany  
22 strongly indicate that they do not.

23           Now, the question of whether there's been a breach by  
24 Microsoft, or repudiation by Microsoft, doesn't bear on this  
25 issue, because the whole notion of when do you get injunctive

1 relief, and do you have to show irreparable harm, presumes  
2 that there's been in this case an infringement or there's  
3 been some breach. The issue is, what's the remedy? And here  
4 the remedy is money, and it will be decided in this case in a  
5 RAND context pursuant to Microsoft's commitment to take a  
6 license. And so, the end game here in this case will  
7 inevitably result in Motorola receiving reasonable  
8 compensation, and that removes any basis for injunctive  
9 relief.

10 THE COURT: Well let me take you back to your  
11 anti-suit briefing, in which you argued that Microsoft would  
12 suffer irreparable injury if there was not an injunction  
13 entered against Motorola, among other reasons that potential  
14 customers wouldn't buy the product because of uncertainty,  
15 that it was a damage to Microsoft's reputation for  
16 reliability, all of those arguments which you were forcefully  
17 making at the time.

18 If Mr. Jenner or Mr. Palumbo were to stand up, they would  
19 say the same thing. So why were you right then, and they're  
20 wrong now?

21 MR. HARRIGAN: Well, Your Honor, in fact Motorola  
22 does not say the same thing. It has done nothing to identify  
23 irreparable harm. Microsoft's irreparable harm actually  
24 began before we even came into the court. And that is that  
25 it had to move its distribution center to the Netherlands

1 because it wouldn't have time to make the change after an  
2 injunction was entered. There were hundreds of people  
3 dismantling its German operations. There was concern about  
4 all kinds of partner relationships being dismembered, because  
5 the German operation is huge and complicated, and there was  
6 no way to comply with an injunction without making the  
7 preparations.

8 And that irreparable harm was already happening. Motorola  
9 has come forward with nothing comparable to that at all.

10 THE COURT: That just seems to me that Microsoft made  
11 a bad legal decision. German law was the same when it set  
12 this up as it is now. And they chose to go into a large and  
13 very lucrative market in the face of law which was known to  
14 them. So, that argument doesn't have much traction with me.

15 MR. HARRIGAN: Well, Your Honor, I'm not trying to  
16 debate the wisdom or the merits of the German legal system.  
17 But the question was, wasn't Microsoft arguing it would  
18 suffer irreparable harm from a German injunction? And the  
19 answer is yes. And it really was irreparable harm. I'm  
20 saying, if you look at Motorola's evidence, they just talk  
21 about, well, there are these cases that say that this might  
22 happen or that might happen. But there is no evidence that  
23 it is happening or it actually would happen.

24 THE COURT: All right.

25 MR. HARRIGAN: For example, some of the cases say you

1 might lose market share, and that might be irreparable harm;  
2 or, your litigation expenses are robbing you of the money to  
3 do research. And Motorola cites those cases and mentions  
4 those potential irreparable harm factors. But there is not a  
5 declaration that says that Motorola is running out of  
6 research money because of the lack of this licensing revenue,  
7 or that it's lost market share as a result of this problem.

8 Motorola and Microsoft are not competitors. So the fact  
9 is that it's up to Motorola, under the *eBay* case, to come  
10 forward with something that at least creates an issue of fact  
11 as to whether it has suffered irreparable harm.

12 THE COURT: Mr. Harrigan, I think the court could  
13 take judicial notice of the fact that the legal fees in this  
14 matter would finance a small country. Why don't you go ahead  
15 and wrap up.

16 MR. HARRIGAN: All right. I will just briefly  
17 address two things: One is, Motorola also argues that this  
18 motion is coming too soon because, "The factual record has  
19 not yet been developed to allow for adequate consideration of  
20 these issues." And we suggest, Your Honor, that that is no  
21 longer -- if that were ever the case, that is no longer the  
22 case since there's been ample opportunity for discovery, and  
23 that that work has not produced any evidence of irreparable  
24 harm that would justify denying this motion.

25 Finally, Your Honor, I just want to mention the fact that

1 I believe the court's temporary restraining order, by its  
2 terms, will expire upon the court's rendering a decision with  
3 regard to the issues that we've been debating this morning.  
4 And Microsoft is here requesting that there not be a hiatus,  
5 and that when the court does rule, and thus potentially  
6 satisfies that termination condition of the temporary  
7 restraining order, that the court determine and act on  
8 whether that order should be extended.

9 Thank you, Your Honor.

10 MR. JENNER: And, Your Honor, just for the record, if  
11 Your Honor decides to entertain it, we would of course like  
12 to be heard in opposition to that. No surprise, I'm sure.

13 THE COURT: No surprise. Mr. Jenner, given the  
14 timing, you may get your four points here. Looks like we're  
15 going to have some time. But have Mr. Palumbo go first.

16 MR. JENNER: I just would like -- four points I would  
17 make in response to counsel's argument. Could you bring up  
18 Dave's slide 46?

19 This goes to what I take to be the overriding, "they ask  
20 too much" argument, \$4 billion. And I would emphasize we  
21 didn't ask \$4 billion, we asked the standard rate of  
22 2.25 percent applied to products. And nobody came back and  
23 said, if you do that, it's going to be too big. Any time  
24 anyone has ever come in negotiations, and we always have  
25 negotiations, there have been caps, there have been

1 discounts, there have been royalty-free cross licenses.  
2 Negotiations allow customization and remove this magnitudinal  
3 problem that Microsoft brings up.

4 So I do not want to leave this notion that total money is  
5 a demonstration of reasonability. And at the bottom of the  
6 slide, as Judge Posner said, "If you think it's too much,  
7 negotiate, just tell them they're charging too much."

8 Could you pull up slide 40. Slide 40 goes to the issue of  
9 no way that you should be charging for the end product in the  
10 first place. And we just want to call to Your Honor's  
11 attention that the law, in particular the *Lucent v. Gateway*  
12 case, in the middle of the page, recognizes that  
13 sophisticated parties -- I don't want to say always,  
14 routinely enter into license agreements that are based on the  
15 end value of commercial products. Because that's the  
16 convenient way, the foolproof check way, where you're not  
17 speculating about somebody's profits or anything else. The  
18 end product has a price, and you can work with it. Of course  
19 you can negotiate that away. But it's recognized as a common  
20 point.

21 And at the bottom of the slide Your Honor will even see  
22 the IEEE's Letter of Assurance even provides using the end  
23 price of the product as a permissible option. So to say  
24 using the end product price is improper is wrong.

25 THE COURT: Did you check that box?

1 MR. JENNER: I'm sorry?

2 THE COURT: Did you check that box on the IEEE?

3 MR. JENNER: Didn't have to.

4 THE COURT: You selected another option on the RAND  
5 terms.

6 MR. JENNER: It's in the context of saying that the  
7 price won't exceed a certain price. And we didn't agree the  
8 price wouldn't exceed a certain price.

9 THE COURT: Counsel, the argument that you just made  
10 to me was we selected a different basis for RAND terms, and  
11 now we're proposing RAND terms that include the rejected  
12 basis. That doesn't strike me as a particular powerful  
13 argument.

14 MR. JENNER: All I'm trying to say the IEEE  
15 understands that parties will, on occasion, use the end price  
16 as a basis for pricing. It recognizes that that's possible.

17 The third point that I would like to make goes to this  
18 question about "subject to." It's tab 6 of Microsoft's  
19 binder where they showed you Exhibit 14, the ITU RAND letter.  
20 And they take the position that it was appropriate to  
21 interpret "subject to" as something that would come along for  
22 free.

23 What I would ask Your Honor to consider is a line further  
24 down. At the end of line 3 of the second paragraph there's  
25 another clause where it also says, "And subject to any

1 Motorola commitments made to JVT in connection with an  
2 approved H.264 recommendation." That shows that there was  
3 going to have to be a reduction in recognition of JVT.  
4 Nobody could possibly suggest that Motorola used "subject to"  
5 in that context to mean that Microsoft was supposed to pay  
6 Motorola for obligations Motorola had to JVT. So clearly the  
7 second "subject to" shows that it was going to be a decrease  
8 in what was owed.

9 The last thing I would point out, Your Honor, is on slide  
10 18. If you could bring up slide 18. The notion of Microsoft  
11 saying that Motorola only had a duty to negotiate in good  
12 faith. And that is not a duty that should be imposed upon  
13 Microsoft. The middle box shows that Washington State law  
14 imposes on both parties a good-faith negotiation obligation.  
15 I just wanted to call that to the court's attention.

16 THE COURT: All right. Thank you.

17 Mr. Palumbo, other than me, you get the last word of the  
18 day.

19 MR. PALUMBO: I also have a bench book, Your Honor.  
20 And I guess since you and I are going to have a conversation,  
21 that makes it impossible for me to get through my bench book,  
22 so I want to set this into context.

23 First, if you grant our repudiation motion, we're done,  
24 since Microsoft's motion to dismiss our injunctive relief  
25 claim is based on their right to a RAND license. So I'm

1 going to explain why you should not dismiss the injunctive  
2 relief claim at this time, even if you deny our repudiation  
3 motion. And as I'm sure you understand, the injunction  
4 motion and the other motions you heard this morning, are  
5 inner-related.

6 So I don't want to be flippant, but let me start with a  
7 very simple and perhaps silly example. You fall in love with  
8 a house. More importantly, your wife falls in love with a  
9 house, and she tells you to go buy it. Your real estate  
10 broker tells you that the seller wants \$1 million, won't take  
11 a dollar less, you've got 20 days to accept. What do you do?  
12 You tell the broker, yeah, yeah, go offer them \$800,000.  
13 That's exactly what happened in this. And we can't tell you  
14 the substance of those negotiations, but there have been  
15 negotiations, and they have been significant.

16 So let me first explain to you what I think Mr. Jenner was  
17 saying, and make it crystal clear about how we think this  
18 case should proceed. If you determine that Microsoft has not  
19 repudiated its right to a RAND license, we submit that you  
20 should find the contract imposes a duty of good faith  
21 negotiations on both parties, a mutual duty, and that that  
22 duty is continuing.

23 We submit that that holding is consistent with the terms  
24 of the contract where the parties clearly anticipate the RAND  
25 terms will be set by negotiations and that that is a good

1 policy for the federal court.

2 In other words, federal courts should permit and even  
3 encourage the parties to continue negotiations in good faith  
4 until it's clear that both have negotiated in good faith, and  
5 they have a genuine good-faith disagreement on the RAND  
6 terms, and the dispute will not be resolved without the  
7 court's intervention to resolve the dispute. Proceeding in  
8 that manner does not require any change in the case schedule  
9 in this case. Motorola and Microsoft have something less  
10 than seven months between now and November 19th to reach an  
11 agreement on all the RAND terms.

12 So what are the possibilities? First possibility, you  
13 could determine on November 19th that one or the other party  
14 had not negotiated in good faith, and you could think about  
15 remedies for that. Second possibility, the parties could  
16 reach an agreement on some but not all RAND license terms.  
17 And if the court then determined that it was going to submit  
18 those terms to the court's determination, you'd have less to  
19 deal with. Or, the parties could agree upon all terms. And  
20 proceeding in that manner is, we think, consistent with the  
21 law, we think it's good policy for the federal court, and we  
22 think it makes a great deal of sense.

23 THE COURT: Does that mean you're joining Microsoft  
24 in taking this issue away from the jury?

25 MR. PALUMBO: We have to think about that, Your

1 Honor. We certainly considered whether this is simply a  
2 matter of equity that would be for your determination only.  
3 But I'd like to talk with the clients and talk with the other  
4 lawyers before we weigh in. But if there is a disagreement  
5 between us and Microsoft on that point, I'm sure you're going  
6 to hear about it and the basis for it.

7 So the issues before the court are the two issues that I  
8 have on the screen. Do the RAND Letters of Assurance and our  
9 offer to Microsoft categorically bar Motorola for seeking  
10 injunctive relief for the three H.264 patents? It's only the  
11 H.264 patents that are at issue in this motion. And the  
12 second issue is whether you should refrain from determining  
13 whether Motorola could meet its burden of proving the  
14 four-part test.

15 This motion comes to you in a manner that is somewhat  
16 unprecedented. In all the cases cited in both the parties'  
17 briefs, the Patent Holder makes a motion for injunctive  
18 relief, supported by evidence that the Patent Holder has  
19 offered to satisfy the four-part test for granting injunctive  
20 relief. Some of those cases are preliminary injunction  
21 cases, some are permanent injunction cases where there had  
22 been a finding at trial of patent validity and infringement.  
23 Motorola has not made and does not intend to make a  
24 preliminary injunction motion.

25 If Motorola's patents are judged valid and Microsoft's

1 products are judged to infringe, whether Motorola makes a  
2 motion for permanent injunction will depend on facts which  
3 are yet to be determined, including future developments in  
4 the markets in which Motorola and Microsoft's products  
5 compete. The competing products right now are Windows 7,  
6 which is offered on PCs, and on the Nokia phone. Microsoft  
7 will release Windows 8, that will be a cross-platform license  
8 that operates on PCs and all mobile devices, in direct  
9 competition for Motorola's project.

10 So it remains to be seen, even to us, whether we would  
11 make a motion for preliminary injunction. If we decided that  
12 there was a basis to do it, we would offer the evidence in  
13 support of the four-part test at trial and make the motion at  
14 the conclusion of trial. And the evidence in that motion  
15 will be undoubtedly different than the evidence we offer  
16 today.

17 Now, Microsoft argues in its reply that it is not arguing  
18 that the RAND commitment is a categorical bar to injunctive  
19 relief. But if you look at the third slide, Your Honor, if  
20 you look at what they say consistently in their opening  
21 motion, they are arguing precisely that the RAND commitment  
22 is a per se or categorical bar. And I have shown you several  
23 quotes out of Microsoft's briefs. And if you can look at  
24 just the last one on slide 4. It's clear what they're  
25 saying, they're saying that because we have made a RAND

1 commitment, that's an adequate remedy of law for use of the  
2 patented technology and we have no right to injunctive  
3 relief.

4 So what Microsoft's contending is that the RAND commitment  
5 is an admission that a compulsory license is an adequate  
6 remedy. And if that contention were true, if the RAND  
7 commitment was a per se bar to injunctive relief, then there  
8 would be a basis to grant this motion. But Microsoft's  
9 contention is contrary to law.

10 Federal cases uniformly hold that a Patent Holder's  
11 willingness to license its patent, including by making a RAND  
12 commitment, does not bar injunctive relief. Rather, the  
13 availability of injunctive relief is decided in each case  
14 based upon the traditional four-factor test, and the specific  
15 facts in that case. And we have *eBay*, the language which I'm  
16 sure you're familiar with, Your Honor, where the district  
17 court found that the willingness to license would be  
18 sufficient to show that the Patent Holder would not suffer  
19 irreparable harm. And Justice Thomas said, "But traditional  
20 equitable principles do not permit such broad  
21 classifications." And this is the language in *eBay*, that the  
22 lower courts cite every time they're confronted with this  
23 question.

24 The *CSIRO* case is a RAND case. And the court found that  
25 *CSIRO*'s only intent was to derive license revenue, and *CSIRO*

1 made a RAND assurance to the IEEE. And in the face of both  
2 of those, the district court granted a permanent injunction,  
3 finding that a compulsory license will not adequately  
4 compensate CSIRO for the infringement.

5 Courts have not distinguished between a willingness to  
6 license evidenced by a RAND commitment, and a willingness to  
7 license evidenced by the fact that the Patent Holder has  
8 licensed to other parties, or even stated its willingness to  
9 license to the infringer at issue.

10 So, we don't have many RAND cases. We do have a large  
11 number of cases where the court considers evidence of a  
12 Patent Holder's willingness to license, rejects that that is  
13 a basis, per se, to deny it. And in each case they follow  
14 the Supreme Court's decision in *eBay*.

15 So I'm going to go through very, very quickly, Your Honor,  
16 a whole series of cases. Here is *Transocean*. And in this  
17 case, *Transocean*, the evidence was that Transocean was  
18 willing to consider licensing its invention to GSF, the  
19 defendant in the case, and even in the face of that the court  
20 granted a permanent injunction.

21 Then you have *ActiveVideo*, same ruling; *Callaway Golf*,  
22 same ruling. Willingness to license does not forego the  
23 ability to get injunctive relief, rather injunctive relief is  
24 judged by the four-part test. And willingness to license is  
25 a factor the court considers, but it is not a dispositive

1 factor.

2 And then here's a whole series of cases, again none of  
3 these are RAND cases, Your Honor, but as I said, the courts  
4 do not distinguish between a willingness to license,  
5 evidenced by other evidence, and a RAND willingness to  
6 license.

7 So let me turn to what ALJ Shaw says, and this is  
8 consistent with our research, and Microsoft cites no cases to  
9 the contrary. What he says in denying Microsoft's RAND  
10 defense is, "Microsoft was not able to cite one case in which  
11 an exclusion order was foreclosed, due to the existence of  
12 RAND obligations." And I submit, Your Honor, there is no  
13 case that holds that a RAND commitment, standing alone, in  
14 and of itself, bars injunctive relief.

15 So then Microsoft takes the position that if the court  
16 establishes the terms of a RAND license, injunctive relief  
17 cannot be granted, since Microsoft will have a license to  
18 Microsoft's H.264 patents. And that proposition is contrary  
19 to the district court's decisions in *CSIRO* and *Transocean*.

20 So here is the language from *CSIRO*, which was a RAND case.  
21 And the court says, "Further, such royalty payment, a royalty  
22 payment under compulsory license, does not necessarily  
23 include the other non-monetary license terms that are as  
24 important as monetary terms to a licensor such as *CSIRO*."  
25 And Mr. Jenner has told you at some length that a RAND

1 license, and I'll show you some specific language, would  
2 include not only a royalty rate, but many other material  
3 terms.

4 So at least the *CSIRO* district court determined that even  
5 though they could grant a compulsory license, that license  
6 would not include all the essential terms that a Patent  
7 Holder was entitled to for the infringement in this case on  
8 the specific facts of the *CSIRO* case, and an injunction  
9 issued, in the face of a RAND obligation.

10 *Transocean*, as I said before, was not a RAND case. But  
11 the court said the same thing. "The court's persuaded that  
12 if it does not enter a permanent injunction, it will force a  
13 compulsory license on *Transocean*, that will not contain any  
14 of the commercial business terms typically used by a Patent  
15 Holder."

16 And I promised that I would show you specific language  
17 about the fact that a RAND license is going to be and have  
18 more like the 80-page license that Mr. Jenner held up. What  
19 the ITU policy says -- this is a policy that applies where  
20 the Patent Holder checks the box that they're not going to  
21 charge a royalty, and what the ITU says is, even in that case  
22 where there's no royalty, the Patent Holder is still entitled  
23 to require that the implementer sign a license agreement that  
24 contains other reasonable terms and conditions such as those,  
25 and it goes on.

1           So if you find yourself in a position where either you or  
2 the jury has to determine the terms of a RAND license, you  
3 will be doing much more, we submit, than simply determining a  
4 royalty rate. You'll be looking at cross licenses, how the  
5 cross licenses for Microsoft products impact the royalty  
6 rate, and many other material terms.

7           So let me turn to now --

8           THE COURT: Before you leave that, in our research on  
9 this, we could not find a RAND case in this context. The  
10 RAND cases, including the ones that you're mentioning, are  
11 all situations where the infringing party refuses to take a  
12 RAND license. That seems to me to just wipe that whole line  
13 of authority out. Because it is a dramatically different  
14 situation. I would concede to you that it's appropriate to  
15 have injunctive relief then, because you need to stop the  
16 inequitable conduct.

17           MR. PALUMBO: No question.

18           THE COURT: So, tell me why you then carry that over  
19 into the RAND context.

20           MR. PALUMBO: I'm not sure I understand your  
21 question. But let me try to answer it, and then you can  
22 correct me. If you were to determine that both parties had  
23 negotiated in good faith, we would still have the opportunity  
24 to offer evidence to meet our burden of proof under the  
25 four-part test that a compulsory license would not be

1 sufficient to protect our patent rights. And the courts go  
2 on and they cite Justice Robert's concurring opinion where he  
3 says, yes, that's the law that's in the majority opinion, but  
4 we have a long history of honoring Patent Holder's rights to  
5 exclude others from practicing their inventions, and that  
6 history has to be honored. It's not dispositive as it was  
7 before *eBay*, but it has to be honored.

8 Now, Your Honor, the burden of proof that we would have to  
9 meet in that circumstance would be very substantial. And as  
10 I said, we can't sit here today, because facts are yet to be  
11 developed, and tell you that we could meet the burden of  
12 proof. I'm prepared to tell you, we're not in a position  
13 where we could even decide that we were going to seek a  
14 permanent injunction. That decision will be made prior to  
15 trial based on the evidence we believe we can offer at trial.  
16 So where there is a RAND commitment, there's no question that  
17 there's a balancing between the Patent Holder's right to  
18 exclude, and the RAND commitment, and the burden for us to  
19 show and meet the burden that CSIRO was able to meet in its  
20 case is very substantial. And if you've read that case,  
21 there are facts in that case which support it. And they are  
22 different than the facts that we would be able to offer you.  
23 So I'm not saying we would be entitled to it in the face of a  
24 RAND commitment, I'm saying that is an issue that has yet to  
25 be determined.

1 But I want to turn to another subject, Your Honor.  
2 Microsoft seems to suggest that there's something wrong and  
3 unfair about requiring it to negotiate a RAND license, unless  
4 the potential for injunctive relief is removed by this court.  
5 But the clear intent of the parties to the contract is that  
6 RAND license terms would be established by negotiations  
7 between the parties. And we submit this court should stay  
8 its hands until those negotiations have failed.

9 Since court intervention at the inception of negotiation  
10 is unprecedented, as far as we can determine, I can find no  
11 case, every infringer seeking a RAND license does so with the  
12 potential that unsuccessful negotiations could result in an  
13 injunction.

14 The potential for an injunction, the potential, Your  
15 Honor, not the injunction, but the potential is an incentive  
16 for the infringer to engage in good faith negotiations, and  
17 the countervailing incentive for Motorola as the Patent  
18 Holder to engage in good faith negotiations, is the potential  
19 such as this seeking to have the court set a compulsory  
20 license. So there are equal and offsetting incentives. And  
21 what we suggest is it would be a mistake for the court at  
22 this point to remove the potential for an injunction.

23 And let me just show you a few slides on that issue.  
24 These basically say what you've just said, Your Honor.  
25 Members of the industry and the ABA standards clearly say if

1 you have a RAND commitment but you can't successfully  
2 negotiate in good faith a RAND license offer, the Patent  
3 Holder isn't precluded from getting an injunction. And if  
4 you note in each of these, the underlying assumption is the  
5 potential for injunction is out there as you negotiate.

6 Let me show you what Microsoft's two executives who are  
7 responsible for standards have said in a June letter to the  
8 ITC, and I'm not going to read you the whole thing, but look  
9 at the bolded language at the bottom, "Any uniform  
10 declaration that such relief" -- preliminary injunction --  
11 "would not be available if the Patent Holder has made a  
12 commitment to offer a RAND license for its essential patent  
13 claims in connection with a standard may reduce any  
14 incentives that implementers might have to engage in good  
15 faith negotiations with the Patent Holder."

16 So that's a letter submission to the Federal Trade  
17 Commission by Microsoft, and it says precisely that. This is  
18 an incentive. It's out there. There's no guarantee that  
19 there will be injunctive relief if there is no RAND license.  
20 But it is an incentive. And I said, there are equal and  
21 offsetting incentives for good-faith negotiations that weigh  
22 upon Motorola, just as the potential for an injunction weighs  
23 upon Microsoft.

24 I'll show you a couple slides. Ericsson is, as you know,  
25 a very large cellular company. And Ericsson basically says

1 the same thing, "The availability of injunctive relief for  
2 standards essential patents indeed has depended on the  
3 behavior of the parties to the proceedings and, in  
4 particular, on their conduct in bilateral negotiations." So  
5 Ericsson is recognizing the fact that courts do grant  
6 injunctions even in the face of a RAND license, and resolving  
7 that that is a good thing for the benefit of those  
8 negotiations.

9 And then here is *Transocean* where the court says  
10 effectively the same thing, recognizing the benefit of a  
11 potential injunction on the commercial negotiating power in  
12 a licensing negotiation. And because this is not a RAND  
13 license, what the court in *Transocean* says is, "If  
14 GlobalSantaFe can continue to infringe with a court-issued  
15 compulsory license, then others would be encouraged to  
16 infringe, and Transocean loses part of its commercial  
17 negotiating power in license negotiations."

18 So what this is saying is if somebody gets a compulsory  
19 license from Motorola, and then the risk of an injunctive  
20 relief is removed, then that is diminishing the power to  
21 successfully achieve future successful negotiations over a  
22 RAND license.

23 And here is the German court. And the German court says  
24 the same thing in the certified transcript. And I think  
25 Mr. Harrigan has contended there is just no relationship

1 between RAND and this antitrust thing, yet he cited  
2 absolutely no authority to you whatsoever for that  
3 proposition, Your Honor. And you were troubled in the motion  
4 we had the last time we were here about the impact that the  
5 potential for an injunction would have on Microsoft. And you  
6 were concerned about a disparate ruling by the German court.

7 But just in terms of negotiation, in the German court if  
8 Microsoft -- if Microsoft's offer is deemed to be not  
9 reasonable, not meeting the German court standard, we get an  
10 injunction.

11 If Microsoft makes an offer and the German court  
12 determines that our denial or rejection of that offer is  
13 unreasonable, then we can't enforce our patent rights. So we  
14 don't have that here. But we do have a similar situation  
15 where there are equal and offsetting incentives to both  
16 parties to engage in good-faith negotiations, and you should  
17 not grant a motion to dismiss the injunctive relief claim  
18 because it hasn't even been posed properly and would be  
19 contrary to law; but also because it removes one of the  
20 critical incentives that may get the parties to agree upon  
21 the terms of a RAND license without you ever having to do  
22 anything in this case.

23 And then I have a whole series of slides, but I want to  
24 conclude pretty quickly. And these slides just go on to  
25 demonstrate why it is Mr. Harrigan said that -- well, they

1 say that we've got the burden of coming forward with all of  
2 our proof. And yet here is the cite from their own case  
3 which confirms what I've told you, which is this motion is  
4 based solely on the RAND commitment as evidence that there  
5 can't be irreparable harm. Motorola says because --  
6 Microsoft says, "Because Motorola cannot show irreparable  
7 harm and because monetary relief would provide an adequate  
8 remedy, it is not necessary for the court to consider any of  
9 the other *eBay* factors in rejecting Motorola's claim for  
10 injunctive relief."

11 So the other factors and our proof in this motion of the  
12 four-part test, wasn't even put on the table by Microsoft's  
13 motion. Microsoft says, well, we're not direct competitors  
14 and so you can't give an injunction, because we're not direct  
15 competitors.

16 If a motion for permanent injunction is made, you're going  
17 to look at that issue, and you're going to look at it very  
18 closely. The fact is, as I've said, Windows 7 is a platform  
19 for mobile phones, Windows 8 is a platform for smart phones  
20 and tablets, that will compete directly with Motorola's  
21 mobile devices. And the *ActiveVideo* court says, "The court  
22 is not aware of any precedent which requires direct  
23 competition in any form before an injunction is made."

24 Microsoft also argues in its briefs that we could never  
25 get an injunction because H.264 is not a core aspect of our

1 business. In fact, Motorola has been a leader in video  
2 compression for 20 years. H.264 is a core functionality, and  
3 Motorola and Microsoft were co-chairs of the joint video team  
4 responsible for H.264 development. So to say this is a  
5 non-core functionality for Motorola simply is not true  
6 factually.

7 And moreover, here's the *Bosch* court, which says, "The  
8 federal court granted a permanent injunction based on  
9 indirect evidence of lost market share." And it says  
10 further, "Injuries that affect a non-core aspect of a  
11 patentee's business are equally capable of being irreparable  
12 as ones that affect more significant operations." Even if it  
13 were non-core, and it is core, that alone would not be a  
14 basis.

15 Then I'm just swinging through --

16 THE COURT: You should go ahead and wrap up.

17 MR. PALUMBO: So Microsoft argues that the fact of a  
18 RAND commitment standing alone means that a compulsory  
19 license is an adequate remedy of law, and as a matter of law  
20 we can't get injunctive relief. We've demonstrated that the  
21 Supreme Court's decision in *eBay* and every single decision of  
22 the federal courts following *eBay*, is contrary to Microsoft's  
23 position. And we submit that you should refrain from  
24 determining whether Motorola can meet its burden to prove the  
25 four-factor test for permanent injunctive relief, unless and

1 until we seek such relief and offer evidence at trial. Thank  
2 you, Your Honor. That's all I have.

3 THE COURT: Thank you. Mr. Harrigan, do you want to  
4 take two minutes?

5 MR. HARRIGAN: I would. Thank you, Your Honor. I  
6 was going to suggest the same amount of time.

7 Your Honor, this motion is really primarily predicated on  
8 two things: The first one is that Microsoft, for all  
9 practical purposes, has a license at this point. And the  
10 only issue is what are the terms going to be? And they're  
11 going to be set by the court. If that proposition accords  
12 with the court's view of the matter, then there will never be  
13 any need for a basis for injunctive relief because Microsoft  
14 will have a license to the two standards and that will be the  
15 end of it. And that is what was proposed in Motorola's  
16 letters, but on unacceptable terms. That's the first  
17 proposition.

18 The second proposition is that the lack of irreparable  
19 harm is not based on the fact that this is a RAND situation.  
20 At page three of our reply brief, among other places, we  
21 indicate that the key basis for this motion is that Motorola  
22 offered to license its H.264 patent portfolio to Microsoft at  
23 a 2.25 percent royalty rate.

24 In other words, this is not a case where Motorola  
25 expressed a willingness to do this to some other party, or

1 even just expressed a general willingness to Microsoft. It  
2 gave a specific amount of specific royalty that it would take  
3 in return for a worldwide license for these patents with this  
4 party. And that is a unique situation, and it means that,  
5 especially in light of Microsoft's agreement to accept the  
6 license at whatever rates the court sets, there isn't going  
7 to be any basis for injunctive relief. But it's also an  
8 admission by Motorola that at least payment of that much  
9 money is acceptable, an acceptable outcome, and is all of the  
10 relief that they are seeking in the letters.

11 Basically, Your Honor, Motorola is entitled to RAND rates,  
12 and it's going to get them as a result of this lawsuit, if  
13 not in some other way. Thank you.

14 THE COURT: Counsel, as I indicated at the start, I'm  
15 taking these matters under advisement and will file a written  
16 opinion. I'm reserving my ruling, in part, because I need  
17 time to consider the material that you've given us today.  
18 I'm not sure that there is a tree left standing in the  
19 forest, given the volume that's been submitted. And I also  
20 want to think about some of the arguments that you've made  
21 today.

22 However, I will tell you that it is at least my  
23 preliminary -- and I stress "preliminary" -- view that  
24 Microsoft's motion for breach of contract is going to be  
25 denied and that Motorola's motion for repudiation is going to

1 be denied.

2 Regarding Microsoft's motion to dismiss the injunctive  
3 relief claim, Mr. Palumbo acknowledged what's been troubling  
4 the court, which is there is not much legal authority  
5 regarding RAND cases. And the authority which we've been  
6 given by both sides has to do with infringers who decline to  
7 take a license. That complicates that particular motion.

8 Secondly, the parties are well ahead of the court in what  
9 a trial in this matter might look like. I need to go back  
10 and try and determine from your pleadings, as opposed to your  
11 argument, what issues are in and what are out in order to  
12 evaluate the availability of injunctive relief. So that one  
13 is reserved for further consideration.

14 In response to Mr. Jenner, I am acutely aware that I have  
15 outstanding a temporary restraining order, and we may convert  
16 it into a preliminary injunction, if that is in accordance  
17 with our consideration of your motions. And I'm not inclined  
18 to have another argument in doing so. You've had your  
19 opportunity to present what you wanted to the court. And I  
20 think you've done a good job of doing so.

21 I'm going to close with the following observation, which  
22 I've thought about a fair amount, and which hopefully will  
23 offer you some guidance in the court's view of this matter.  
24 The court is well aware that it is being played as a pawn in  
25 a global, industry-wide business negotiation. The conduct of

1 both Motorola and Microsoft has been driven by an attempt to  
2 secure commercial advantage. And to an outsider looking in  
3 at it, the conduct has been arbitrary, it has been arrogant,  
4 and frankly it appears to be based on hubris.

5 When I use the word "hubris" I am reminded of Sophocles'  
6 *Antigone*, when Creon refuses to even bury Polynices; or, for  
7 those of you who want to be more highbrow, Icarus for flying  
8 too close to the sun.

9 These days hubris is usually defined as extreme pride or  
10 arrogance, often associated with the loss of contact with  
11 reality, and an overestimation of one's own competence or  
12 capabilities. In this case, it is an indictment of the  
13 character of the parties.

14 So, returning to the court's self-described role as a pawn  
15 in this chess game, I leave you with one of my favorite  
16 traditional Irish sayings: When the chess game is over, the  
17 pawn and the king go back to the same box.

18 You should think about that. We will be in recess. Thank  
19 you, counsel.

20 (The proceedings recessed.)

21 C E R T I F I C A T E

22 I certify that the foregoing is a correct transcript  
23 from the record of proceedings in the above-entitled matter.

24 /s/ Debbie Zurn

May 8, 2012

25 Debbie Zurn, Court Reporter