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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

HBCU MESSAGING US LP \*  
\* January 23, 2026  
VS. \*  
\* CIVIL ACTION NO. 1:24-CV-1199  
APPLE, INC., ET AL. \*

BEFORE THE HONORABLE ALAN D ALBRIGHT  
MARKMAN HEARING (via Zoom)

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Proceedings recorded by mechanical stenography,  
transcript produced by computer-aided transcription.

01:38

*KRISTIE M. DAVIS, OFFICIAL COURT REPORTER*  
*U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS (WACO)*

01:38 1 (Hearing begins.)

01:38 2 DEPUTY CLERK: A civil action in Case  
01:38 3 AU:24-CV-1199, HBCU Messaging US LP versus Apple,  
01:38 4 Incorporated, et al. Case called for a Markman  
01:39 5 hearing.

01:39 6 THE COURT: Announcements from counsel,  
01:39 7 please.

01:39 8 MR. DEVLIN: For plaintiff HBCU  
01:39 9 Messaging, Tim Devlin of Devlin Law Firm.

01:39 10 THE COURT: Mr. Devlin, it's been forever  
01:39 11 since I've seen you. How are you doing?

01:39 12 MR. DEVLIN: Doing well, Judge. Thank  
01:39 13 you.

01:39 14 THE COURT: How are things up in  
01:39 15 Delaware?

01:39 16 MR. DEVLIN: They're good. They're  
01:39 17 chilly but not as bad as it is for some folks on this  
01:39 18 line. We've been chatting about it. Get through all  
01:39 19 this fine as well. But thank you for asking, Judge.

01:39 20 THE COURT: It's a pleasure to see you.  
01:39 21 It's been too long.

01:39 22 MR. DEVLIN: You as well.

01:39 23 With me I have Neil Benchell of Devlin  
01:39 24 Law Firm. And I believe on the phone we may have Tracy  
01:39 25 Stark and Anabel Manaloor, also from Devlin Law Firm.

01:39 1 And we also have Mr. Michael Shore of The Shore Firm  
01:39 2 with us today.

01:39 3 THE COURT: Mr. Shore of The Shore law  
01:39 4 firm? I haven't seen you either, Mr. Shore. How are  
01:39 5 you doing?

01:39 6 MR. SHORE: Just fine. Your hearing has  
01:39 7 gotten me out of rounding up cows. So thank you very  
01:39 8 much.

01:39 9 THE COURT: I would rather be rounding up  
01:39 10 cows, for gosh sakes. I think you made the wrong  
01:40 11 decision.

01:40 12 (Laughter.)

01:40 13 THE COURT: Occasionally, at a discovery  
01:40 14 hearing, that's kind of -- I feel like that's kind of  
01:40 15 what I'm doing. So it's probably a good analogy. So.

01:40 16 MR. SHORE: It's warmer here.

01:40 17 THE COURT: Where are you at?

01:40 18 MR. SHORE: I'm about 65 miles southeast  
01:40 19 of Dallas.

01:40 20 THE COURT: Oh, okay.

01:40 21 Mr. Nash?

01:40 22 MR. NASH: Good afternoon, Your Honor.  
01:40 23 Brian Nash of Morrison Foerster. Joined today with  
01:40 24 client representatives Chris Han and Jenny Liu and  
01:40 25 colleagues Ryan Malloy, Nima Kiaei, and Nomin

1 Jagdagdorj, Your Honor.

01:40 2 And I'll note, in the interest of  
01:40 3 reducing the number of cattle you have to round up  
01:40 4 today, Apple has withdrawn its position on third-party  
01:40 5 provider, and we are willing to rest on the briefing on  
01:40 6 cellular core network. But of course happy to answer  
01:40 7 any questions Your Honor might have as to that  
01:40 8 construction. So that just leaves two terms for today.

01:40 9 THE COURT: I can't wait to get to  
01:41 10 "bearer." That sounds like it'll be very exciting.  
01:41 11 But I'm going to hold off on the -- on that excitement  
01:41 12 and start with "wherein, ellipses, when."

01:41 13 And let's see. Give me one second. I'm  
01:41 14 just trying to figure out who should start.

01:41 15 MR. NASH: Your Honor's preliminary  
01:41 16 construction on that one aligns with Apple's position,  
01:41 17 and so I would understand that to typically be the  
01:41 18 Court's practice to start with plaintiff on that one.

01:41 19 THE COURT: I think we're all just  
01:41 20 stunned by the fact my construction aligns with Apple's  
01:41 21 position. So if for no other reason, we'll start with  
01:41 22 Mr. Devlin.

01:41 23 MR. NASH: Understood, Your Honor.

01:41 24 MR. DEVLIN: Thank you, Your Honor. I'm  
01:41 25 going to try to share a set of slides that we've

01:41 1 provided to the Court. Is that on the screen?

01:41 2 THE COURT: Yes, sir.

01:41 3 MR. DEVLIN: Okay. Thank you.

01:41 4 I'll note at the outset, Your Honor, on  
01:42 5 this wherein/when clause, the issue is not so much the  
01:42 6 verbiage of the construction, it's the legal effect of  
01:42 7 the construction. And I'll of course explain what I  
01:42 8 mean by that.

01:42 9 But the words "when" or "whenever" could  
01:42 10 kind of each go a different direction. Our  
01:42 11 understanding is that Apple's intent with its proposal  
01:42 12 and what the Court has adopted as a tentative results  
01:42 13 in some -- has a legal effect that we think is  
01:42 14 problematic. And that's really what I'm going to be  
01:42 15 talking about.

01:42 16 As long as we're on the same page that  
01:42 17 the legal effect is not so problematic, then the words  
01:42 18 of the construction are fine. But it's the import that  
01:42 19 we'll be talking about here.

01:42 20 I'll note first, just very briefly, Your  
01:42 21 Honor, see if I can go through these slides. I'll skip  
01:42 22 all this.

01:42 23 I will note Apple submitted a series of  
01:42 24 IPRs. And each of the IPRs, Apple submitted to the  
01:43 25 PTAB that no formal constructions were necessary.

01:43 1 Now, there's, you know, I think a variety  
01:43 2 of reasons that they might suggest that that was  
01:43 3 appropriate for the IPRs, but it is inconsistent with  
01:43 4 the positions that they've taken here. They did it in  
01:43 5 each IPR.

01:43 6 I'm on Slide 5 right now, which just  
01:43 7 collects a bunch of those statements.

01:43 8 And I'll just briefly run through this  
01:43 9 Slide 6, which is a timeline showing that all of this  
01:43 10 claim construction disclosure was done before they  
01:43 11 submitted their IPRs. So everyone knew their own  
01:43 12 positions before those petitions were submitted.

01:43 13 So we think it's a little incongruous for  
01:43 14 them to be arguing things here that they did not argue  
01:43 15 or apply in the IPR petitions.

01:43 16 Unless the Court has questions on that,  
01:43 17 I'll just set that aside and move into the substance.

01:43 18 THE COURT: All good.

01:43 19 MR. DEVLIN: All right. So let me go  
01:43 20 to -- let me just back up to the constructions here and  
01:43 21 talk a little bit about what I mean by this legal  
01:43 22 issue, Your Honor.

01:43 23 So first, let's get our terminology right  
01:44 24 because there's a little bit of back and forth in the  
01:44 25 briefs about condition X and result Y or condition Y,

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result X.

A number of claims have this phrasing, wherein/when something -- when the some condition is true, which I'm going to call X, then there is, you know, an event or action or a result Y. Okay. So when X the condition is satisfied, then the claim says Y the event or action takes place. Okay?

And the concern that we have legally is that Apple's construction would negate or cancel or obviate, erase from existence actual instances of infringement if there are certain instances where there's not infringement.

So to be more specific, if there's a single instance or a set of circumstances in which the condition -- sorry, the action Y does not follow X, which we all agree that particular instance is not infringing. There's no debate about that.

But if there's also instances or circumstances or conditions where of course all the other elements of the claim are met and Y does result from the condition X, are those instances of infringement canceled out? If that's what Apple is getting at, it's utterly wrong factually and utterly wrong legally. And that's what I'm going to be speaking about.

01:45 1 So factually, I'll just note quickly.  
01:45 2 The word "whenever" doesn't appear in the claims. Any  
01:45 3 of the claims at issue. The word "whenever" does not  
01:45 4 appear in the specification. Apple's pointed to  
01:46 5 nothing in the prosecution history at all, disclaimer  
01:46 6 or otherwise, related to this term.

01:46 7 The same with the word "always." Because  
01:46 8 in a sense, what we're worried about, the thing, the  
01:46 9 legal impact that I'm worried about is in effect that  
01:46 10 says something always has to happen. If it doesn't  
01:46 11 always happen, then when it does doesn't count. That's  
01:46 12 also legally wrong. And factually wrong because the  
01:46 13 word "always" doesn't appear in the claims. The word  
01:46 14 "always" never appears in the patent spec. It's not  
01:46 15 there. Nothing like that.

01:46 16 So there's nothing factually that draws  
01:46 17 in this concept that something always needs to happen.

01:46 18 Legally it would be wrong for a couple of  
01:46 19 reasons. One is here on the screen now. These are --  
01:46 20 I skipped a slide, Your Honor.

01:46 21 And it won't go back. Let me -- thank  
01:46 22 you.

01:46 23 Sorry. I'm on Slide 10 now. And it just  
01:46 24 notes that fact that we all understand --

01:47 25 THE COURT: Can you hold on one second?

01:47 1 I want to check something with my clerk. I'll be back  
01:47 2 in just a second. Give me a minute or two.

01:47 3 MR. DEVLIN: Thank you, Your Honor.

01:47 4 (Pause in proceedings.)

01:47 5 THE COURT: Okay. I'm back.

01:47 6 MR. DEVLIN: Thank you, Your Honor. And  
01:47 7 are we seeing Slide 10 on the screen?

01:48 8 THE COURT: We are.

01:48 9 MR. DEVLIN: Thank you.

01:48 10 So the claims at issue are all comprising  
01:48 11 claims, which we all know allow for noninfringing  
01:48 12 features, elements, steps, whole systems outside the  
01:48 13 scope of the claims. And they don't negate  
01:48 14 infringement. That's just a basic fundamental  
01:48 15 principle of patent law that is applicable here.  
01:48 16 Because of what we -- I'm worried that Apple's trying  
01:48 17 to do.

01:48 18 There's more specific case law on this.  
01:48 19 I'm moving to Slide 11. A product that sometimes, but  
01:48 20 not always, embodies a claimed method infringes.

01:48 21 The Fed Circuit has said this over and  
01:48 22 over and over again. If you've got a system performing  
01:48 23 a method -- and I'll get to system claims in a minute,  
01:48 24 but this is specifically about method claims and it's  
01:48 25 very clear for method claims.

01:48 1 If you sometimes perform the method and  
01:48 2 you sometimes don't, then you're sometimes infringing  
01:48 3 and sometimes not. Of course when you're not, you're  
01:48 4 not. Those don't count for liability, for damages, for  
01:49 5 whatever. But the instances where you do practice the  
01:49 6 claimed method, those are infringing. And so if  
01:49 7 Apple's construction negates those instances of  
01:49 8 infringement, that's the problem.

01:49 9 Slide 12 says the same thing but even  
01:49 10 more strongly. A single instance of a claimed method  
01:49 11 being performed is infringement. Just a single  
01:49 12 instance. And obviously here, we have -- we would  
01:49 13 submit and we'll demonstrate eventually -- billions and  
01:49 14 billions and billions of instances of infringement.

01:49 15 And there's other cases that say the same  
01:49 16 thing. Direct infringement of a method claim can be  
01:49 17 based on even one instance of the method being  
01:49 18 performed.

01:49 19 And so the fact that there might be  
01:49 20 instances where the method is not performed, where the  
01:49 21 claimed condition and event or condition and result is  
01:49 22 not met, those instances should not erase the times  
01:49 23 when it is met.

01:50 24 And I'll note, I mentioned this method  
01:50 25 and system claim issue a minute ago. One of the

01:50 1 citations here on the screen, the UltimatePointer case,  
01:50 2 816 F.3d 816, involved a system claim. It touched upon  
01:50 3 this issue, but the Fed Circuit sort of states the same  
01:50 4 principle with respect to a system claim.

01:50 5 And here, just by the way, there's two  
01:50 6 patents for which this is relevant. One of the  
01:50 7 patents, the '127 patent is all method claims. The  
01:50 8 other's about 50/50 method and system claims. But to  
01:50 9 the extent there's any differentiation, and the method  
01:50 10 claim law seems somehow different than the system claim  
01:50 11 law to the Court, many of the claims here are method  
01:50 12 claims. In fact, the majority of the claims at issue  
01:50 13 for this issue -- for this particular claim term are  
01:50 14 method claims.

01:50 15 And so we think -- I'll get to Apple's  
01:51 16 adjustment a minute ago, but we put together an  
01:51 17 example. And this is not to insult anyone's  
01:51 18 intelligence, this simple claim I'm going to go  
01:51 19 through, to explore this legal issue and to just make  
01:51 20 sure we understand -- stripping away all the  
01:51 21 technology, the jargon, the whatever of the claims  
01:51 22 we're dealing with and just isolate this issue.

01:51 23 There's a simple claim on the screen.  
01:51 24 It's in the box at the top. A method of eating three  
01:51 25 meals a day, eating breakfast, eating lunch, eating

01:51 1 dinner. And now we have our "wherein/when" clause.  
01:51 2 Wherein orange juice is consumed when breakfast is  
01:51 3 eaten. So there's -- when is our condition, when  
01:51 4 breakfast is eaten. And the result is the Y, you  
01:51 5 consume orange juice.

01:51 6 Well, there's lots of instances under Fed  
01:51 7 Circuit law where this claim is not going to be  
01:51 8 infringed. Not going to be infringed if you don't eat  
01:51 9 lunch or don't eat dinner. Not going to be infringed  
01:51 10 when you don't eat breakfast on a given day. It's not  
01:51 11 going to be infringed if you eat breakfast, lunch, and  
01:51 12 dinner but not orange juice.

01:51 13 But on those days where you have  
01:52 14 breakfast, lunch, and dinner and you have orange juice  
01:52 15 with breakfast, those days are instances of  
01:52 16 infringement. That's that simple application of the  
01:52 17 Federal Circuit law that we just looked at.

01:52 18 The concern is that Apple's proposal  
01:52 19 would be interpreted legally to have the opposite  
01:52 20 result. If there's a single day, so same claim is on  
01:52 21 the screen and in this first black text bullet is about  
01:52 22 a single day of noninfringement.

01:52 23 You eat breakfast, you eat lunch, you  
01:52 24 have dinner, but you don't have orange juice with your  
01:52 25 breakfast. Every other day of the year you have all

01:52 1 three meals and you have orange juice with breakfast.

01:52 2 And what should not happen is that single  
01:52 3 instance of noninfringement on the one day cancels or  
01:52 4 negates or erases all the other infringement that takes  
01:52 5 place every other day. That's the legal concern that  
01:52 6 we have. And that's totally contrary to law and  
01:53 7 there's really no support for it here factually, as I  
01:53 8 mentioned a minute ago.

01:53 9 And here, Your Honor, there's been a  
01:53 10 proposal by Apple -- I'll go through there's some other  
01:53 11 things in our brief I'll just rest on. There's some  
01:53 12 claim differentiation arguments that to us aren't  
01:53 13 applicable because they just hit different issues.  
01:53 14 They're sort of orthogonal to the question here.  
01:53 15 They're just different sets of things that don't  
01:53 16 isolate the question of sometimes infringing, sometimes  
01:53 17 not versus if you ever don't, then you never can  
01:53 18 infringe at all even when you meet the claim.

01:53 19 They just -- the claim differentiation  
01:53 20 issues that Apple has raised don't address that. I'm  
01:53 21 happy to talk about those in more detail. We've got  
01:53 22 them collected on a couple of slides here. But I'll  
01:53 23 skip those and get to something else. Which is Apple's  
01:53 24 reply brief.

01:53 25 So I think they sensed that the

01:53 1 construction that they proposed originally was  
01:54 2 overreaching. Because even in cases of fault or error  
01:54 3 in the system, a bug in the system where something  
01:54 4 didn't happen would, again, if the claim is legally  
01:54 5 interpreted -- or the claim construction is legally  
01:54 6 interpreted in a way I'm worried about, then, you know,  
01:54 7 a simple single instance of a message being directed  
01:54 8 the wrong way would negate infringement for an entire  
01:54 9 system or for the billions and billions of times when  
01:54 10 the method claims are met.

01:54 11 And so --

01:54 12 THE COURT: Mr. Devlin, I don't  
01:54 13 understand. I'm just too simple.

01:54 14 MR. DEVLIN: Sure.

01:54 15 THE COURT: I'm too simple minded. How a  
01:54 16 construction could excuse -- or if instances infringe  
01:55 17 the claim term on Monday through Saturday, to use your  
01:55 18 vernacular, regardless of what the claim term is, the  
01:55 19 fact that they don't -- if Apple were to take the  
01:55 20 position under the construction they don't infringe on  
01:55 21 Sunday, I don't see any scenario where Apple wouldn't  
01:55 22 be liable for the infringement Monday through Saturday.

01:55 23 MR. DEVLIN: Thank you, Your Honor.

01:55 24 That's what we're worried about. It kind  
01:55 25 of flows from -- I otherwise don't understand what this

01:55 1 construction's getting at and so maybe it's a -- maybe  
01:55 2 I'll just stop there and Apple's counsel can speak and  
01:55 3 we can see, you know, if this is really an issue. It  
01:55 4 felt like an issue based on the communications we had  
01:55 5 with them over time and how they developed and what we  
01:55 6 ended up seeing in the briefing.

01:55 7 But, Your Honor, I can stop here if the  
01:55 8 Court has enough. Because I'm in total agreement with  
01:55 9 what Your Honor just said, the Saturday through -- I'm  
01:56 10 sorry. Yeah.

01:56 11 THE COURT: And for example, and I don't  
01:56 12 know if it's Mr. Nash or someone else that's going to  
01:56 13 argue this, but, you know, for example, here, you know,  
01:56 14 if the wireless device or PSMS is acting in a certain  
01:56 15 way, configured in a certain way and it functions in a  
01:56 16 certain way with regard -- I think here it says to the  
01:56 17 transmission mode, et cetera, every time -- for  
01:56 18 example, here, it says sends an outgoing message as IP  
01:56 19 packets in a way that is infringing, the fact that it  
01:56 20 might at other times send or deliver in transmission  
01:56 21 mode packages or whatever, its packets, whatever it's  
01:56 22 sending, I don't understand how if they're not using --  
01:56 23 if it's not infringing when it does that, it's not  
01:56 24 infringing when it does that, but I don't understand an  
01:57 25 argument how it would excuse infringement when it does

01:57 1 do what the patent claim says.

01:57 2 MR. DEVLIN: Then I think we're on the  
01:57 3 same page. I'll just tease out this bullet on the  
01:57 4 screen as an example, though, to be sure.

01:57 5 So there may be situations -- so for  
01:57 6 example, if the recipient phone is a -- with this --  
01:57 7 looking at the first bullet here, it's claim language  
01:57 8 from the '127 patent. And it talks about sending the  
01:57 9 transmission of first mode, a first transmission mode.  
01:57 10 When the recipient is a subscriber to this messaging  
01:57 11 service.

01:57 12 And there could be instances -- the  
01:57 13 system could be configured so that it does not go  
01:57 14 through that first transmission mode even if that  
01:57 15 recipient is a subscriber. If the subscriber's phone  
01:57 16 is offline, in airplane mode, not on WiFi, you know,  
01:57 17 whatever. There could be configuration circumstances  
01:58 18 under normal use where the claim is not met and, yet,  
01:58 19 circumstances in normal use where the claim is met.

01:58 20 So again, as long as Your Honor is --  
01:58 21 we're on the same page that when it's not met, there's  
01:58 22 no infringement. When it is met, there's infringement.  
01:58 23 As long as we're on the same page, I'm happy and the  
01:58 24 word "whenever" doesn't bother me. I was worried that  
01:58 25 the word "whenever" would be interpreted as always,

01:58 1 effectively. And so if something -- if there were an  
01:58 2 exception to the always, then that would negate  
01:58 3 infringement entirely, for the entire universe.

01:58 4 But if we're on the same page that that's  
01:58 5 not the legal impact, we are fine. We're fine with the  
01:58 6 Court's tentative construction and -- which is Apple's  
01:58 7 construction.

01:58 8 THE COURT: Mr. Nash?

01:58 9 MR. NASH: Your Honor, I believe  
01:58 10 Mr. Malloy in our LA office will be responding on this  
01:58 11 position. Of course, I'm always happy to chat with  
01:59 12 Your Honor.

01:59 13 MR. DEVLIN: I should have stopped  
01:59 14 sharing my screen just in case.

01:59 15 MR. NASH: Thanks. I believe it's down,  
01:59 16 Tim. Appreciate it.

01:59 17 MR. DEVLIN: Got it. Thank you.

01:59 18 MR. NASH: And if you'll wait one moment,  
01:59 19 Your Honor, I believe we're going to pull up some  
01:59 20 slides as well.

01:59 21 THE COURT: Sure.

01:59 22 MR. NASH: Go ahead, Mr. Malloy.

01:59 23 MR. MALLOY: Good afternoon, Your Honor.  
01:59 24 My name's Brian Malloy. I'm from Morrison & Foerster  
01:59 25 representing Apple.

01:59 1 Mr. Devlin talked a lot about  
01:59 2 infringement issues, but I think that puts the cart  
01:59 3 before the horse. He's assuming infringement and then  
01:59 4 saying that we are trying to get out of infringement.  
01:59 5 We're just trying to interpret these claims and figure  
01:59 6 out what the claim scope is.

01:59 7 THE COURT: Well, let me just say, after  
01:59 8 400 Markmans, just know I would be shocked to think  
01:59 9 that any -- any patent lawyer representing a defendant  
02:00 10 would ever be proposing a construction for the purpose  
02:00 11 of getting out of infringement. That would never cross  
02:00 12 my mind ever. I know that both sides are seeking only  
02:00 13 the truth and justice and the American way.

02:00 14 So don't think for even a moment I  
02:00 15 would -- it would cross my mind that Apple was trying  
02:00 16 to get out of infringement by suggesting a  
02:00 17 construction.

02:00 18 MR. MALLOY: I appreciate that, Your  
02:00 19 Honor, and that's exactly right. We are applying the  
02:00 20 plain and ordinary meaning of these terms. And we  
02:00 21 think it's clear from the specification and the claim  
02:00 22 language.

02:00 23 I think that the easiest way to address  
02:00 24 much of what Mr. Devlin discussed is to go to Slide 16  
02:00 25 of the power slides. And we have Nomin Jagdagdorj

02:00 1 who's helping with this.

02:01 2 And this slide is about claim  
02:01 3 differentiation. But right now, I don't want to focus  
02:01 4 on the claim differentiation issue. I want to talk  
02:01 5 about what these wherein/when clauses are.

02:01 6 And, yes. They are part of the method  
02:01 7 claims. And these method claims have steps that  
02:01 8 read -- they have -- may read -ing, a lot of verbs.  
02:01 9 Like Claim 1 of the '127 patent says receiving,  
02:01 10 determining, selecting. And those are all steps of the  
02:01 11 method.

02:01 12 But then we get to these wherein clauses.  
02:01 13 And it doesn't make sense to read them as method steps.  
02:01 14 It's really clear, this particular wherein clause that  
02:01 15 we're looking at says that the wireless device is  
02:01 16 capable of selecting the second transmission mode when  
02:01 17 an indication does not correspond to a subscriber.

02:01 18 The expressing capability of a wireless  
02:02 19 device is clearly not a method step. What Apple  
02:02 20 contends is that these wherein/when limitations,  
02:02 21 specifically this one before us, '127 patent, Claim 1,  
02:02 22 is it's expressing how this -- how this wireless device  
02:02 23 is programmed or how it's configured.

02:02 24 And so there's no difference between our  
02:02 25 original constructions and the constructions that

02:02 1 Mr. Devlin said were admitting something, admitting  
02:02 2 that -- that these constructions are too narrow or --  
02:02 3 we don't -- we don't think that at all because we think  
02:02 4 our -- it's the same construction. That these claim  
02:02 5 terms, the wherein/when limitations, should be read to  
02:02 6 describe how this wireless device is configured.

02:02 7 And these method claims say that you  
02:02 8 perform these steps of the method using this wireless  
02:02 9 device that's programmed in a certain way.

02:02 10 This slide also makes a point that  
02:03 11 Mr. Devlin didn't want to address. Because there's no,  
02:03 12 in my mind, good rebuttal to our argument. And it's  
02:03 13 that the applicants, when they wanted to express mere  
02:03 14 capability of the wireless device, they wrote that  
02:03 15 explicitly.

02:03 16 So we see here that they said that the  
02:03 17 wireless device is capable of selecting the second  
02:03 18 transmission mode when an indication doesn't correspond  
02:03 19 to a subscriber.

02:03 20 And so we agree. Certainly the wireless  
02:03 21 device doesn't have to be programmed to always select  
02:03 22 the second transmission mode when the indication  
02:03 23 doesn't correspond to a subscriber. When you have  
02:03 24 language just requiring "is capable of."

02:03 25 But the applicants decided to use this

02:03 1 word "when" for the first transmission mode. And they  
02:03 2 say: When the indication corresponds to a subscriber  
02:04 3 of the service, then the wireless device is configured,  
02:04 4 programmed to use the first transmission mode.

02:04 5 And you read the rest of this claim, it  
02:04 6 makes clear that that first transmission mode is packet  
02:04 7 switching versus the older SMS technology.

02:04 8 And it's clear here. It's if/then logic  
02:04 9 that this device is programmed with. And so with that  
02:04 10 in mind, I'd like to go to plaintiff's Slide 14. This  
02:04 11 analogy that they made.

02:04 12 Mr. Devlin raised this hypothetical  
02:04 13 claimed method of eating breakfast, eating lunch,  
02:04 14 eating dinner wherein orange juice is consumed when  
02:04 15 breakfast is eaten. And he said, well, gosh. That  
02:04 16 would be really, really limiting because nobody would  
02:04 17 always drink orange juice with breakfast like every  
02:05 18 single day.

02:05 19 And that's not a really fair analogy to  
02:05 20 the claims of the patents. Because the claims of the  
02:05 21 patents are about a wireless device that has a chip and  
02:05 22 a memory. It's programmed in a certain way. It's much  
02:05 23 more reasonable that that wireless device is going to  
02:05 24 be configured to do the same thing every time.

02:05 25 That's how computers are programmed. To

02:05 1 do the same thing every time and be reliable. As  
02:05 2 opposed to a person who of course is -- can't be  
02:05 3 expected to drink orange juice at every time he or she  
02:05 4 eats breakfast.

02:05 5 And of course we don't have the spec  
02:05 6 here, we don't have the prosecution history here, so we  
02:05 7 don't know what the applicants intended. It could have  
02:05 8 been that they intentionally wanted this narrow because  
02:05 9 how else would they overcome validity challenges? We  
02:05 10 don't know. There's not enough context here.

02:05 11 But in the context of the specification,  
02:06 12 our construction is very well supported. It's actually  
02:06 13 the construction that's set forth in the abstract of  
02:06 14 the patent.

02:06 15 Nomin, could you actually pull up Slide  
02:06 16 13 of our slides?

02:06 17 And here, we're reading the abstract's  
02:06 18 description of this invention, and it says that the  
02:06 19 sender's wireless device sends, if the destination  
02:06 20 address corresponds to a subscriber of the service, the  
02:06 21 outgoing message to the recipient's wireless device via  
02:06 22 the packet switched base station in the first mode.

02:06 23 And this first mode is packet switching.

02:06 24 So again, we see if/then logic being  
02:06 25 clearly expressed in the abstract. And that's what our

02:06 1 wherein/when limitations are meant to convey. That the  
02:07 2 mobile device is programmed with this if/then logic  
02:07 3 that, yeah. It will always be satisfied because that's  
02:07 4 how it's programmed. And it's just like any kind of  
02:07 5 computer's programmed to do the same things repeatedly.

02:07 6 If you have a mobile device that has some  
02:07 7 different programming and that were used in conjunction  
02:07 8 with these method claims, then that would be outside  
02:07 9 the scope of the claims.

02:07 10 THE COURT: Were you done?

02:07 11 MR. MALLOY: I think it's a good point to  
02:07 12 stop and see if you have any questions.

02:07 13 THE COURT: I don't.

02:07 14 MR. MALLOY: Okay. I'll briefly discuss  
02:07 15 the IPR issue. It's not correct that we've taken any  
02:07 16 inconsistent positions. We simply didn't articulate to  
02:07 17 the PTAB that any particular terms required  
02:08 18 construction, and that's because we're applying plain  
02:08 19 and ordinary meanings there.

02:08 20 But there's no inconsistency between the  
02:08 21 arguments that we've made in the PTAB and the  
02:08 22 constructions that we're presenting to Your Honor. And  
02:08 23 Mr. Devlin didn't point to any particular  
02:08 24 inconsistency. There is none.

02:08 25 I also want to make one final point that

02:08 1 in these slides that plaintiff has submitted and the  
02:08 2 argument, there is discussion of certain claims that  
02:08 3 haven't been asserted. And so we just want to state  
02:08 4 for the record that if there appear to be a number of  
02:08 5 claims being referenced in these proceedings that  
02:08 6 aren't part of the infringement contentions aren't part  
02:08 7 of the asserted claims.

02:08 8 THE COURT: Did I -- I may have  
02:08 9 misunderstood you. So you -- Apple has challenged this  
02:09 10 patent at the PTAB?

02:09 11 MR. MALLOY: Yes, Your Honor. We filed  
02:09 12 IPR petitions on all seven --

02:09 13 THE COURT: I got it. I got it. And  
02:09 14 so -- and with regard to this claim term, what  
02:09 15 construction did you proffer at the PTAB?

02:09 16 MR. MALLOY: We didn't proffer any  
02:09 17 construction. We were applying the plain and ordinary  
02:09 18 meanings.

02:09 19 THE COURT: And what's the difference  
02:09 20 between the PTAB and my Court?

02:09 21 MR. MALLOY: It's the same claim  
02:09 22 construction standard is my understanding. And what  
02:09 23 I'm trying to express is that we haven't taken any --

02:09 24 THE COURT: No. I -- maybe my question  
02:09 25 wasn't clear. Why are you proffering a construction in

02:09 1 this case when you did not proffer one at the PTAB?

02:09 2 MR. MALLOY: Oh, I understand, Your  
02:09 3 Honor.

02:09 4 During meet-and-confer conversations with  
02:09 5 plaintiff's counsel, we determined that we weren't  
02:09 6 seeing these terms eye-to-eye in terms of what they  
02:10 7 meant because it appears that plaintiff's counsel  
02:10 8 doesn't think that the wireless device needs to be  
02:10 9 programmed the same way that we think it needs to be  
02:10 10 programmed.

02:10 11 And we think that they would argue that  
02:10 12 some kind of coincidental -- coincidental co-occurrence  
02:10 13 would be enough to satisfy these claims. And so we  
02:10 14 disagreed about that and thought it needed to be raised  
02:10 15 as a claim construction.

02:10 16 THE COURT: Well -- I'm sorry to  
02:10 17 interrupt you. So let me tell you the problem I have  
02:10 18 now. From my perspective.

02:10 19 So what I hear Mr. Devlin saying is  
02:10 20 essentially, I think, and he can correct me when we get  
02:10 21 back, is that there is plenty of infringing going on,  
02:10 22 tons of infringing going on by Apple. Under -- under  
02:10 23 his orange juice theory.

02:11 24 But that he's afraid that for other  
02:11 25 instances, Apple will say, no. Apple will say because

02:11 1 you didn't add the orange juice, because you didn't  
02:11 2 have what you have here, it will eliminate all of  
02:11 3 the -- all of the infringement being done by Apple and  
02:11 4 that's a reason for me to reject the proffered claim  
02:11 5 term.

02:11 6           What I hear you saying, if I understand  
02:11 7 it, and again, I may not, but if I hear you saying is  
02:11 8 your fear is that Apple could be on the hook for almost  
02:11 9 no infringement other than random occasions when you  
02:11 10 accidentally swerve into -- a tiny amount where you  
02:11 11 swerve into what might be covered under the orange  
02:11 12 juice rule here, as it were, and you're worried that  
02:12 13 plaintiff is going to argue for infringement of  
02:12 14 everything under this.

02:12 15           So help me out there. Again, I'm a  
02:12 16 pretty simple person. When Mr. Devlin was speaking, I  
02:12 17 said to the extent the expert can show that the Apple  
02:12 18 product is complying really with the plain and ordinary  
02:12 19 meaning of the claim term, then there is infringement.  
02:12 20 And if there are times when the technology is acting in  
02:12 21 a way that doesn't infringe, then there's not  
02:12 22 infringement. And that the fact that sometimes the way  
02:12 23 the product works is not infringing does not absolve  
02:12 24 Apple of the times when it is.

02:12 25           You seem to be coming at it from a

02:12 1 completely opposite perspective, which tempts me to  
02:13 2 want to give a plain and ordinary meaning construction,  
02:13 3 which I do often, and tell Apple -- I'm not picking on  
02:13 4 Apple -- this is not unique to this case and I'm not  
02:13 5 picking on Apple, you just happen to be the defendant  
02:13 6 here -- that I'm going to say plain and ordinary  
02:13 7 meaning because I almost -- I'm sure Mr. Nash advised  
02:13 8 you, I almost never, if ever, give prophylactic  
02:13 9 constructions because the defendant is worried about  
02:13 10 what the plaintiff might say about infringement.

02:13 11 And at some point, Mr. Devlin sends you  
02:13 12 their expert infringement report and you look at it and  
02:13 13 you either say, okay. We believe Mr. Devlin and team  
02:13 14 stayed within the bounds of what plain and ordinary  
02:13 15 means for this claim term, or we think he went beyond  
02:14 16 it, which causes a problem for the Court then.

02:14 17 At which point you come back to the Court  
02:14 18 and say, Judge, before we do our expert report, we want  
02:14 19 to challenge whether or not the plaintiff's  
02:14 20 technical -- the opinion proffered by the technical  
02:14 21 expert falls within what the Court believes is the  
02:14 22 ambit of the claim -- the plain and ordinary meaning of  
02:14 23 the claim term and we go from there.

02:14 24 That's typically what I do -- I know I've  
02:14 25 spoken for about ten minutes now -- but that is

02:14 1 typically what I do in a situation like the one I have  
02:14 2 here. Tell me why that isn't the better course of  
02:14 3 conduct here.

02:14 4 MR. MALLOY: Yes, Your Honor.

02:14 5 It's because we know right now that there  
02:14 6 is a dispute about the plain and ordinary meaning of  
02:14 7 what these terms mean and what "when" means. And we  
02:14 8 know what that dispute is. It is --

02:14 9 THE COURT: But you don't know what --  
02:14 10 you don't know whether or not the plaintiff -- you  
02:15 11 don't know how they're going to take the plain and  
02:15 12 ordinary meaning and what -- how they're going to apply  
02:15 13 it to the Apple products.

02:15 14 And I would -- you know, I'm -- as  
02:15 15 Mr. Nash will tell you, I would require them to be very  
02:15 16 specific about why -- how and why the Apple product  
02:15 17 meets the bounds of this claim term in this specific  
02:15 18 claim language.

02:15 19 And again, if once you get the expert  
02:15 20 report you believe that that can't -- as a matter of  
02:15 21 law cannot be plain and ordinary meaning of the -- of  
02:15 22 what that claim term is, then you come and tell me  
02:15 23 that. And at that point, I'd rule with you or against  
02:15 24 you.

02:15 25 MR. MALLOY: Your Honor, plaintiff's

02:15 1 counsel has already told us that they disagree with our  
02:15 2 view of the plain and ordinary meaning. They do not  
02:16 3 agree that this -- that what we're looking at on the  
02:16 4 right of this slide, the wherein/when is a  
02:16 5 cause-and-effect relationship.

02:16 6 Just like in *American Calcar*, where the  
02:16 7 plaintiff didn't agree that this was -- that "when" was  
02:16 8 connoting a cause-and-effect relationship, and the  
02:16 9 Federal Circuit said, yes. It is a cause-and-effect  
02:16 10 relationship. That's the plain and ordinary meaning.

02:16 11 And Apple's position is that the plain  
02:16 12 and ordinary meaning of these wherein/when limitations  
02:16 13 is a cause-and-effect relationship, and plaintiff's  
02:16 14 counsel doesn't agree. They want to point to any time  
02:16 15 where it just so happens that an indication comes back  
02:16 16 that a recipient was a subscriber to packet switching.

02:16 17 Any time that happens -- that happens and  
02:16 18 co-occurs with selection of packet switching, they want  
02:16 19 to say that's infringement because it's not a  
02:16 20 cause-and-effect relationship. That this condition  
02:16 21 doesn't have to lead to this result in the plaintiff's  
02:16 22 world.

02:17 23 We already know that. They've told us  
02:17 24 that. They wouldn't agree to our configured to  
02:17 25 constructions where we said, well, we can get rid of

02:17 1 these edge case concerns because all we're saying is  
02:17 2 that the wireless device that's recited here, it has to  
02:17 3 be configured to do this. It has to be configured to  
02:17 4 select this first transmission mode packet switching  
02:17 5 when a response comes back from a server that says the  
02:17 6 subscriber has the ability to do packet switching.

02:17 7 THE COURT: But everything you're saying  
02:17 8 there, what you just said is -- says a lot more than  
02:17 9 what the claim construction is that I'm giving you.  
02:17 10 And if -- and I'm concerned that -- that you are  
02:17 11 taking -- that what you are arguing is just the  
02:17 12 appropriate construction of a claim term and  
02:17 13 essentially wanting me to do that so that you can make  
02:18 14 the argument you just made about technically how it  
02:18 15 works and whether or not there would be infringement.

02:18 16 And that's usually not the way I handle  
02:18 17 claim constructions. I usually -- at this point. I  
02:18 18 mean, I don't know -- I know you've probably spoken to  
02:18 19 Mr. Devlin. Maybe even you have infringement  
02:18 20 contentions. But I don't -- but I don't know, as we  
02:18 21 sit here today in January, that what you are worried  
02:18 22 about is going to come to pass with respect to what  
02:18 23 Mr. Devlin and team say in their expert report.

02:18 24 Which is -- and I'm -- again, I'm -- I'll  
02:18 25 give you one more shot, but I'm very reluctant usually

02:18 1 to provide a prophylactic claim construction. So one  
02:18 2 more chance, please.

02:18 3 MR. MALLOY: Okay. Thank you, Your  
02:18 4 Honor.

02:18 5 We don't consider it a prophylactic claim  
02:19 6 construction. We just think it's a fundamental  
02:19 7 question about what these wherein/when causes mean.

02:19 8 So I want -- I just want to go -- let's  
02:19 9 go to Slide 12 again. I know we already looked at this  
02:19 10 slide.

02:19 11 Excuse me one second. Let me make sure I  
02:19 12 get the right slide.

02:19 13 I can step through this more  
02:19 14 systematically too. Because I know we went briefly  
02:19 15 into response to plaintiff's counsel. But I want to  
02:19 16 make sure that the issue's fully keyed up and that you  
02:19 17 understand what our position is and I think what the  
02:19 18 dispute is.

02:19 19 I think Slide 16, let's start with that.

02:19 20 Okay. The fundamental question that's  
02:19 21 before us, and which we know right now that there's a  
02:19 22 dispute about, is whether this word "when" is the same  
02:20 23 thing as "is capable of." And Mr. Devlin wants to read  
02:20 24 "when" to mean "is capable of." Even though the next  
02:20 25 limitation uses is capable of.

02:20 1 And Mr. Devlin doesn't agree with us that  
02:20 2 this wherein/when limitation is reciting a  
02:20 3 cause-and-effect relationship. He wants when to be --  
02:20 4 to co-occur. So -- if the wireless device is even  
02:20 5 capable of selecting packet switching when a indication  
02:20 6 corresponds to a subscriber, he wants to say that's  
02:20 7 within the scope of the claims.

02:20 8 We are -- we know that's the dispute  
02:20 9 already. We don't have to get to expert reports to get  
02:20 10 there.

02:20 11 And our position is this is a pure claim  
02:20 12 construction issue. It's a Markman issue. It's  
02:20 13 pure -- it's clear claim differentiation when we have  
02:20 14 this "is capable" of language versus "when" as recited  
02:21 15 in the wherein/when terms.

02:21 16 And if you go through these patents,  
02:21 17 you'll see that the applicants routinely in many claims  
02:21 18 recite "is capable of" when that's what they mean. But  
02:21 19 here, they didn't say that they used very different  
02:21 20 language expressing a cause/effect relationship which  
02:21 21 is the plain and ordinary meaning according to Apple  
02:21 22 and not according to plaintiffs.

02:21 23 In fact, they refuse to say what the  
02:21 24 plain and ordinary meaning is. But they're -- as I  
02:21 25 understand it, they will not agree to a

02:21 1 cause-and-effect relationship like the Federal Circuit  
02:21 2 held when to require in *America Calcar*.

02:21 3 THE COURT: I wasn't sure if you were  
02:21 4 finished. Anything else?

02:21 5 MR. MALLOY: Unless Your Honor has more  
02:21 6 questions, then nothing else.

02:21 7 THE COURT: Okay. I'll be back in just a  
02:21 8 second.

02:21 9 (Pause in proceedings.)

02:26 10 THE COURT: The Court is going to change  
02:26 11 its preliminary construction and go with plain and  
02:26 12 ordinary meaning.

02:26 13 The next claim term up is "bearer."

02:26 14 MR. DEVLIN: Thank you, Your Honor.

02:26 15 THE COURT: Yes, sir.

02:26 16 MR. DEVLIN: Yes. This is Tim Devlin.  
02:26 17 This one will be very short. I'm not even going to go  
02:26 18 to the slides.

02:26 19 So the issue with the tentative  
02:27 20 construction in our view and Apple's proposal is that  
02:27 21 it's too broad in one very simple sense. There's  
02:27 22 always a channel. This is -- we're talking about  
02:27 23 communications. There has to be --

02:27 24 THE COURT: Mr. Devlin, I apologize.

02:27 25 MR. DEVLIN: Yeah.

02:27 1 THE COURT: You would have been well  
02:27 2 served to be at the CLE I did this week where I  
02:27 3 complained, not about you, but just as a general  
02:27 4 statement that a lot of times, you know, my clerks give  
02:27 5 me a very good bench memo. When all I have is the word  
02:27 6 for -- like for example here, bearer, it would help me  
02:27 7 a lot if someone could show me the entire claim and let  
02:27 8 me see the context "bearer" is used in.

02:27 9 MR. DEVLIN: One moment, Your Honor.  
02:27 10 We have a sample claim here. And if I  
02:27 11 need to, I can pull up a full claim.

02:27 12 So here's an example. In the '127  
02:27 13 patent, Claim 1. And there are different types of  
02:27 14 bearers that are discussed in the patent and in the  
02:28 15 claims. There's packet switch bearers. And --

02:28 16 THE COURT: I'm not -- you know, I've  
02:28 17 done this for a while and I'm certainly not an  
02:28 18 engineer. I don't remember confronting the term  
02:28 19 "bearer" before. Is it something that's used often? I  
02:28 20 mean, why -- do you have any idea why the -- either the  
02:28 21 inventor or the lawyer prosecuting this chose -- does  
02:28 22 "bearer" have some meaning I'm unaware of because I'm  
02:28 23 not an engineer?

02:28 24 MR. DEVLIN: Your Honor, we perhaps  
02:28 25 should have put in some extrinsic evidence here. It is

02:28 1 a term of art. And it really just means the protocol  
02:28 2 that's being used. Those protocols have to run on  
02:28 3 channels.

02:28 4 So bearer could sound like -- this is why  
02:28 5 we actually suggested this term, because bearer could  
02:28 6 sound like it means the medium. Is it a wire? Is it  
02:28 7 the air? You know, if it's wireless, what does the  
02:28 8 "bearer" mean? You know, is it the -- for lack of a  
02:28 9 better way to say it, the physical thing that's going  
02:28 10 on? Or is it something more logical?

02:29 11 It turns out it's the logical side. If  
02:29 12 you look up "bearer," you know, if you just kind of  
02:29 13 Google it and look at various technical sources,  
02:29 14 they'll indicate that it really relates to the standard  
02:29 15 or protocol, the language by which the information is  
02:29 16 being transmitted across anything, you know, within a  
02:29 17 computer system.

02:29 18 And so for us, protocol or channel, the  
02:29 19 or there is overly broad because it could just mean a  
02:29 20 channel. It could mean a wire. Literally a wire on  
02:29 21 the floor is a bearer. Or anything that's carrying  
02:29 22 bits as a bearer. Regardless of whether they're  
02:29 23 formatted at all in any communication sense.

02:29 24 And so to -- for us really the focus is  
02:29 25 on protocol. And if "bearer" just meant protocol, we'd

02:29 1 be fine with that. We don't need protocol running on a  
02:29 2 channel because -- I mean, in the same way that "or  
02:29 3 channel" is too broad because channel's always there,  
02:29 4 protocol running on a channel is sort of, you know,  
02:30 5 it's unnecessary at some level to say the second part  
02:30 6 because a channel is always there. There's always  
02:30 7 going to be some communication channel.

02:30 8 So really the focus for us is on the fact  
02:30 9 that it relates to the language, the protocol that's  
02:30 10 being spoken. And there are various examples, some of  
02:30 11 which the jury will be familiar with and some, you  
02:30 12 know, not. And I don't think we really need all those,  
02:30 13 by the way. I don't think we need that list in there.  
02:30 14 We want it to be helpful. But if that's considered  
02:30 15 unhelpful, then we could exclude that list.

02:30 16 THE COURT: Okay. Anything else,  
02:30 17 Mr. Devlin?

02:30 18 MR. DEVLIN: That's all, Your Honor.  
02:30 19 Thank you.

02:30 20 THE COURT: Okay. And for Apple?

02:30 21 MR. KIAEI: Good afternoon, Your Honor.  
02:30 22 Nima Kiaei, counsel of Morrison & Foerster on behalf of  
02:30 23 Apple. I believe we might have just one slide here  
02:30 24 that might help the Court.

02:30 25 Of course we agree with Your Honor's

02:30 1 preliminary construction, and so I don't want to  
02:30 2 belabor. We did just want to respond to a few --

02:31 3 THE COURT: Well -- I'm sorry. Could  
02:31 4 you -- what would help me is if you would start by --  
02:31 5 Mr. Devlin, if you would repeat what you'd be  
02:31 6 willing -- what you would like to see removed and ask  
02:31 7 Apple if they -- if they would be okay with that.

02:31 8 MR. DEVLIN: Sure. If we just used the  
02:31 9 word "protocol" or if we wanted to be a little more  
02:31 10 jury friendly, you know, a communication protocol,  
02:31 11 something like that, we'd be fine.

02:31 12 THE COURT: And what does Apple say to  
02:31 13 that?

02:31 14 MR. KIAEI: We're almost in agreement,  
02:31 15 Your Honor. Our concern is that we're going to be  
02:31 16 excluding some of the embodiments that are explicitly  
02:31 17 disclosed in the specification. Namely, there are  
02:31 18 channel-only embodiments, if we go to the next slide.

02:31 19 We see that in Column 7 of the  
02:31 20 specification with the '127 patent, for example, where  
02:31 21 the specification says that an SMS bearer may be a  
02:31 22 channel. A packet switch data bearer may also be a  
02:31 23 different shared transmission channel. And then later  
02:31 24 on in that same passage, it says that it may also be a  
02:32 25 protocol. And it gives some examples of certain types

02:32 1 of protocols.

02:32 2 But ultimately our issue, Your Honor, is  
02:32 3 that we're concerned that we're collapsing channel and  
02:32 4 protocol together with HBCU Messaging's language of a  
02:32 5 protocol running on a channel. That specific language  
02:32 6 does not appear in the patent.

02:32 7 We think that this is a and/or dispute of  
02:32 8 does it mean the two things together or is it a channel  
02:32 9 or a protocol? And we think it's the latter really  
02:32 10 because of these embodiments disclosed in the  
02:32 11 specification in Column 7.

02:32 12 HBCU Messaging did bring up in their  
02:32 13 brief that they think that SMS is just an adjective  
02:32 14 that's describing the protocol type that's used on the  
02:32 15 channel. We think that ignores the rest of the  
02:32 16 sentence where the patent doubles down and says that it  
02:32 17 may also be a shared transmission channel for a packet  
02:32 18 switch data bearer.

02:32 19 And again, in contrast to that later,  
02:32 20 saying it may also be a data transfer protocol and it  
02:33 21 gives some examples with that.

02:33 22 And I think the way that we reconcile  
02:33 23 this, Your Honor, why there's channel-only embodiments  
02:33 24 and protocol-only embodiments is that we're talking  
02:33 25 about a cellular messaging situation here. We have

02:33 1 SMS. We have certain cellular protocols that are being  
02:33 2 used. And when we're talking about that cellular  
02:33 3 context, the patent is using channel. It may be a  
02:33 4 signalling channel.

02:33 5 But then when we get to these packet  
02:33 6 switch communication methods, the patent gives examples  
02:33 7 of packet switch protocols. And it uses the term  
02:33 8 "protocol." So Bluetooth, WiFi, WiMax. So we think  
02:33 9 it's an issue of cellular versus packet switch and the  
02:33 10 patent is using these terms disjunctively.

02:33 11 And that's ultimately how we see this  
02:33 12 issue, Your Honor, that it's more of a functional  
02:33 13 consequence in terms of what bearer does. What does  
02:33 14 bearer functionally do and that's how we're getting the  
02:33 15 message to the recipient. And in this cellular  
02:33 16 example, it says we're using this particular  
02:34 17 communication channel. And then with these packet  
02:34 18 switch examples, like Bluetooth, WiFi, WiMax, the  
02:34 19 protocol is what's been being used to deliver it.

02:34 20 With that, Your Honor, happy to answer  
02:34 21 any questions that you may have.

02:34 22 THE COURT: Mr. Devlin.

02:34 23 MR. DEVLIN: Yeah. Very brief. And keep  
02:34 24 this slide on the screen.

02:34 25 So what's happening here is not just a

02:34 1 channel. In each one of these, there's a protocol  
02:34 2 pointed to. So there's -- here's there's SM -- there's  
02:34 3 two different categories of bearers that are discussed  
02:34 4 in the patent. There's SMS bearers, which go through  
02:34 5 that cellular traditional SMS system but they do so  
02:34 6 using SMS protocol language.

02:34 7 SS7 and SMS themselves are such  
02:34 8 protocols. So SS7 is a protocol running on this  
02:34 9 channel. So it's not just saying channel.

02:34 10 And the second part of the sentence when  
02:34 11 it talks about packet switched data bearer, it's not  
02:34 12 just channel. It's a channel that combines multiple  
02:34 13 time slots in a GSM TDMA frame. TDMA is Time Division  
02:35 14 Multiple Access. That's a protocol.

02:35 15 So it's talking about protocols in each  
02:35 16 of the examples in this very sentence. And then it  
02:35 17 goes on in the next sentence to say it may also be --  
02:35 18 this is the data switched bearer may also be. And the  
02:35 19 "also" there is above and beyond the TDMA frame. The  
02:35 20 GSM TDMA protocol. It could also be, instead,  
02:35 21 Bluetooth, WiFi, et cetera. All those protocols.

02:35 22 So here, it's -- even in this sentence,  
02:35 23 there's never an instance where channel by itself is  
02:35 24 the bearer. The bearer refers to the language that's  
02:35 25 used to exchange information. And in -- you know, in a

02:35 1 more technical sense, that's the word "protocol." So  
02:35 2 that's where we are on this.

02:35 3 THE COURT: Anything else from Apple?

02:35 4 MR. KIAEI: Thanks, Your Honor. I'll  
02:35 5 just briefly touch on this.

02:35 6 I think that ignores the second -- the  
02:36 7 last sentence in Column 7. There's no channels being  
02:36 8 discussed there. It just says the packet switched data  
02:36 9 bearer may also be a protocol, and it gives examples of  
02:36 10 certain protocols that could be used for packet  
02:36 11 switching, Bluetooth, WiFi, WiMax.

02:36 12 And then the column that we have at the  
02:36 13 very top of the slide here from Column 2, HBCU  
02:36 14 Messaging's contention is that this is not just a  
02:36 15 channel. We think what's being discussed here, Your  
02:36 16 Honor, is, again, a cellular network situation where a  
02:36 17 cellular device is sending SMS messages and that's  
02:36 18 being done with a channel, particular channel.

02:36 19 THE COURT: Mr. Devlin.

02:36 20 MR. DEVLIN: It's right there in the  
02:36 21 sentence, it says GSM SS7 channel. There's the  
02:36 22 protocol. So each of these involves a protocol.  
02:36 23 That's where we are. We agree -- there's always a  
02:36 24 protocol, we agree with that.

02:36 25 THE COURT: So the fight's over channel?

02:36 1 The inclusion of channel?

02:36 2 MR. DEVLIN: It's just the or. So you  
02:36 3 need a protocol. You can't exchange --

02:36 4 THE COURT: Right.

02:37 5 MR. DEVLIN: And that's what "bearer"  
02:37 6 means. That's all.

02:37 7 THE COURT: So your -- the Devlin  
02:37 8 position is that where channel is used, it's still part  
02:37 9 of a protocol. Therefore, you don't need a channel --  
02:37 10 a protocol or a channel?

02:37 11 MR. DEVLIN: Right. There's always going  
02:37 12 to be a channel. There is -- I mean, that's just true.  
02:37 13 There's always going to be a mechanism for bits of data  
02:37 14 to move. That's always going to be there.

02:37 15 And to say "or channel," and so that  
02:37 16 bearer could merely mean channel without any protocol  
02:37 17 running on it, that's what's wrong. There needs to be  
02:37 18 a protocol. And if "bearer" just is defined as  
02:37 19 protocol because it's easier for the jury to  
02:37 20 understand, we're totally fine with that. We don't  
02:37 21 need to use our language, protocol running on a  
02:37 22 channel. We don't need the examples that we have  
02:37 23 provided.

02:37 24 But it needs to be a protocol. It can't  
02:38 25 just be a channel. So it's the "or channel" that is

02:38 1 the troublesome part for us. And that I view and we  
02:38 2 view as inconsistent with that -- what's actually on  
02:38 3 the screen right now that Apple is advocating. Because  
02:38 4 every one of these involves a protocol.

02:38 5 THE COURT: Anything else from Apple?

02:38 6 MR. KIAEI: No, Your Honor. I think  
02:38 7 we've already hit on these key points. We just want to  
02:38 8 reiterate that, again, this Column 7, it says while a  
02:38 9 packet switched data bearer may be a shared  
02:38 10 transmission channel, we do think that it discloses  
02:38 11 channel-only embodiments and that excluding that would  
02:38 12 exclude some of the embodiments in the specification.

02:38 13 So we do think that's important. We also  
02:38 14 think that it is consistent with the plain meaning.

02:38 15 THE COURT: Okay. I'll be back in a few  
02:38 16 seconds.

02:38 17 (Pause in proceedings.)

02:49 18 THE COURT: We can go back on the record.

02:49 19 You know, seven and a half years in,  
02:49 20 there's always a first. And why not have it happen  
02:49 21 when I'm surrounded by such good friends and good  
02:49 22 lawyers?

02:49 23 I don't really -- as I understand both  
02:49 24 sides' arguments, I don't like either of your proposed  
02:49 25 constructions. So I understand, Mr. Devlin, the effort

02:49 1 you made to alter yours.

02:49 2 So I'm going to give the parties until  
02:49 3 close of business Tuesday. You can do it sooner  
02:49 4 obviously. Submit a new -- if you want to. Let me  
02:50 5 start over.

02:50 6 I'm not ordering you to submit something.  
02:50 7 I'm going to give you the opportunity to submit  
02:50 8 something by the end of the day Tuesday. And if you  
02:50 9 don't, you don't, and I'll go from there. If you do,  
02:50 10 I'll look at what I get and hopefully it will help me.

02:50 11 Because I don't -- I don't think either  
02:50 12 one of them, as framed, I'm comfortable with as I  
02:50 13 understand the arguments. And if I -- once I get them,  
02:50 14 if I feel like additional arguments would help me with  
02:50 15 that, then we'll get back together as well.

02:50 16 Because I certainly understand why -- if  
02:50 17 I get this wrong, I can -- and I was joking earlier  
02:50 18 about constructions and infringement and all that and I  
02:50 19 really was joking because I did it for a long time.  
02:50 20 But I really do want to get this right and not  
02:50 21 accidental either permit or prohibit claim -- if I get  
02:51 22 this wrong.

02:51 23 So if you all will get -- as soon as you  
02:51 24 can by -- by the end of Tuesday, if not sooner, I  
02:51 25 believe it's Anna's case, if you'll get them to her and

02:51 1 just copy the other side. Y'all are welcome after  
02:51 2 the -- you know, obviously to talk about it and see if  
02:51 3 you can come jointly up with something. I'm not  
02:51 4 ordering you to -- either to talk or to come up with  
02:51 5 something. Just a suggestion. And if you all want to  
02:51 6 exchange what you're proposing in advance to see if it  
02:51 7 moves one side or the other, that's fine as well.

02:51 8 I really do want -- based on what you  
02:51 9 argued, I understand the importance of getting this  
02:51 10 construction right if I can. And so I think that's the  
02:51 11 best solution.

02:51 12 Mr. Devlin, you're in my screen. Is  
02:51 13 there anything else that we need to take up today?

02:51 14 MR. DEVLIN: Nothing further, Your Honor.  
02:51 15 Just a quick clarification.

02:51 16 So before Tuesday, I'm understanding and  
02:52 17 I'm just confirming so no one's, you know -- no  
02:52 18 argument. You just want a proposed construction but  
02:52 19 no -- if you want argument later, you'll tell us. But  
02:52 20 no argument before Tuesday.

02:52 21 THE COURT: Correct.

02:52 22 MR. DEVLIN: Got it. Thank you, Your  
02:52 23 Honor.

02:52 24 THE COURT: And if you -- I mean, you  
02:52 25 know, when someone's as brilliant as Michael Shore, if

02:52 1 you have this done by -- you know, before he has to go  
02:52 2 out and herd cows and you want to send it in today, you  
02:52 3 can send it in today. Or you can send it to Mr. Nash  
02:52 4 today and say, here's our new proposal. What do you  
02:52 5 think?

02:52 6 And again, if it's 4:59 on Tuesday and  
02:52 7 you haven't gotten it done, you'll have till Wednesday.  
02:52 8 I mean, it's really not time critical. I just want to  
02:52 9 get it done -- I just want to have a deadline so that  
02:52 10 we know when -- and when we get it in Tuesday or  
02:52 11 earlier, Anna and I and the other clerks and I'll talk  
02:52 12 about it. If we need more argument, we'll ask you for  
02:52 13 it. If we don't, once we have everyone's -- we may  
02:52 14 come up with our own. And so -- construction, which is  
02:53 15 probably the worst thing that can happen for the  
02:53 16 parties.

02:53 17 And so and -- if that happens. So but I  
02:53 18 can't -- I don't really feel like I can get it right  
02:53 19 with either of these two constructions.

02:53 20 So, Mr. Nash and team?

02:53 21 MR. NASH: Just one clarifying question,  
02:53 22 Your Honor.

02:53 23 I think on this term, Apple did provide a  
02:53 24 proposed construction to the extent it was helpful to  
02:53 25 the Court. But this was not a term that we had thought

02:53 1 needed a construction. I think in Apple's  
02:53 2 perspective -- and not sure that -- that might have  
02:53 3 been lost on the argument today and perhaps even in the  
02:53 4 briefing.

02:53 5 But it's been our position that one of  
02:53 6 skill in the art would understand this, have a plain  
02:53 7 and ordinary meaning to it. It's a bearer. It just  
02:53 8 simply is that if it's one, it's this. If it's that,  
02:53 9 it's just two different ways of looking at it.

02:53 10 But like I didn't want to then come back  
02:53 11 to the Court and propose plain and ordinary meaning  
02:53 12 because --

02:53 13 THE COURT: No, no, no. By the way,  
02:54 14 plain and ordinary meaning might be the right  
02:54 15 construction.

02:54 16 MR. NASH: Understood, Your Honor.

02:54 17 Okay. I didn't want to keep something to  
02:54 18 that effect and then you think that I didn't take the  
02:54 19 Court's instruction.

02:54 20 THE COURT: That was a great question  
02:54 21 because, you know, again, I was taken a little off  
02:54 22 guard by bearer. It's rare at this point after so many  
02:54 23 Markmans I'm taken off guard. But -- and, you know,  
02:54 24 having practiced. I really was taken a little off  
02:54 25 guard by bearer. And so it might do us good for me to

02:54 1 get better educated about how that word is used as  
2 well.

02:54 3 And that might -- that might -- having  
02:54 4 heard Mr. Devlin's arguments about protocols and  
02:54 5 channels and your arguments as well and -- and, you  
02:54 6 know, a lot of this, as you've heard me say, everyone  
02:54 7 on here's heard me say, you know, I don't think when  
02:54 8 whoever was writing this patent, they spent more than  
02:54 9 about two seconds writing the word "bearer" in there,  
02:54 10 not thinking that I would ever spend an hour of trying  
02:55 11 to figure out what they meant by it.

02:55 12 I bet you there are other things in the  
02:55 13 patent when they were drafting it they spent a lot more  
02:55 14 time worrying about. And probably just used the word  
02:55 15 "bearer" because that's what they thought worked in  
02:55 16 that sentence. And so I'm aware of the realities of  
02:55 17 the patent prosecution world too.

02:55 18 So the fact that I'm unfamiliar with the  
02:55 19 word "bearer" doesn't mean that it's that fancy a word  
02:55 20 either.

02:55 21 So basically by the end -- as soon as you  
02:55 22 can, hopefully by the end of the day Tuesday, get me  
02:55 23 your proposals, whatever they are, you know, I'll take  
02:55 24 them up. And for example, in your case, I'm not saying  
02:55 25 it is or isn't, but I might like plain and ordinary

02:55 1 meaning for Apple better because -- and don't take this  
02:55 2 word wrong, I might see that there could be less  
02:55 3 mischief done with it than the phrase you gave, even  
02:55 4 though I don't think the phrase you gave was intended  
02:56 5 for the purposes of mischief.

02:56 6           It's just when I heard how much fight  
02:56 7 there was over protocol and channel, I can see why the  
02:56 8 other side might be concerned if that's what you  
02:56 9 suggested.

02:56 10           So whatever it is Apple wants to suggest,  
02:56 11 whatever the plaintiff wants to suggest, I'm -- it's  
02:56 12 your case. And so I'm totally open to it.

02:56 13           MR. DEVLIN: Thank you, Your Honor.

02:56 14           MR. NASH: Thank you, Your Honor.

02:56 15           THE COURT: Have a good day. And  
02:56 16 everyone out there be safe. Take care.

02:56 17           (Hearing adjourned.)

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1 UNITED STATES DISTRICT COURT )  
2 WESTERN DISTRICT OF TEXAS )

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5 I, Kristie M. Davis, Official Court  
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