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I N T H E S U P R E M E C O U R T O F T H E U N I T E D S T A T E S

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L I F E T E C H N O L O G I E S :

C O R P O R A T I O N , E T A L . , :

P e t i t i o n e r s : N o . 1 4 - 1 5 3 8

v. :

P R O M E G A C O R P O R A T I O N , :

R e s p o n d e n t . :

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W a s h i n g t o n , D . C .

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The above-entitled matter came on for oral  
 argument before the Supreme Court of the United States  
 at 10:15 a.m.

A P P E A R A N C E S :

C A R T E R G . P H I L L I P S , E S Q . , W a s h i n g t o n , D . C . ; o n b e h a l f o f  
 t h e P e t i t i o n e r s .

Z A C H A R Y D . T R I P P , E S Q . , A s s i s t a n t t o t h e S o l i c i t o r  
 G e n e r a l , D e p a r t m e n t o f J u s t i c e , W a s h i n g t o n , D . C . ; f o r  
 U n i t e d S t a t e s , a s a m i c u s c u r i a e , s u p p o r t i n g t h e  
 P e t i t i o n e r s .

S E T H P . W A X M A N , E S Q . , W a s h i n g t o n , D . C . ; o n b e h a l f o f t h e  
 R e s p o n d e n t .

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P R O C E E D I N G S

( 10:15 a.m )

CHIEF JUSTICE ROBERTS: We'll hear argument  
this morning in Case 14-1538, Life Technologies  
Corporation v. Promega Corporation.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONERS

MR. PHILLIPS: Mr. Chief Justice, and may it  
please the Court:

I think because this is largely an  
international trade case, it's probably useful to put  
this case in context and to compare it to the facts that  
gave rise to the passage of Section 271(f) that's at  
issue in this case. You'll recall that in the Deepsouth  
case, that was a case involving a shrimp deveiner in  
which all of the activities took place within the United  
States, except for the final act that took less than an  
hour to assemble in a foreign country. In that case,  
this Court held even that was not within the meaning of  
the -- of the patent statute as it existed then, and  
Congress then acted to fill that particular loophole.

The facts of this case seem to me to be the  
polar opposite of that. With -- Life Tech has -- Life  
Technologies operates an -- an enormous plant in

1 England, in the United Kingdom It spends tens of  
2 million dollars on that plant. Four out of the five  
3 components that go into the creation of the kits that  
4 are at issue in this case are sourced outside of the  
5 United States; one inside. I'll come back to that in a  
6 minute. And as relevant to this litigation, all of the  
7 kit -- kits are sold outside of the United States.

8 So the only contact that any of this has  
9 with the United States is the fact that a single,  
10 commodity product is shipped to England as part of the  
11 process for the fabrication of these particular kits.

12 Now, that commodity product is called a Taq  
13 polymerase, which I will readily concede that when I  
14 think about what you buy off-the-shelf, I don't go to  
15 Costco to buy Taq polymerase, but I'm told, and I think  
16 it's absolutely undisputed in the record, that this is a  
17 commodity. This is at the essence of what the Congress  
18 enacted in (f)(2), which is a staple article or  
19 commodity of commerce suitable for many non-infringing  
20 uses. And, indeed, if you get online and put in "Taq  
21 polymerase," you can find literally dozens and dozens of  
22 ways to purchase it online at this time. And that was  
23 true as much in 2006. It may have been a significant  
24 product in 1989, but clearly by 2006, it was a  
25 commodity.

1                   And so the question is, is whether or not,  
2 simply by using a single, staple article, Congress  
3 intended through 271 to -- to declare that this is --

4                   JUSTICE SOTOMAYOR: Could you tell us --

5                   MR. PHILLIPS: -- a violation.

6                   JUSTICE SOTOMAYOR: -- is this product  
7 available outside the U.S.?

8                   MR. PHILLIPS: Taq polymerase?

9                   JUSTICE SOTOMAYOR: Yes.

10                  MR. PHILLIPS: Absolutely. Yes. It's --  
11 it's readily available throughout the world through --  
12 there are a variety of manufacturers who wish to make --

13                  JUSTICE SOTOMAYOR: There's no patent on  
14 that particular component?

15                  MR. PHILLIPS: No, none that -- none that  
16 exists any longer, no. As I said, it's a commodity  
17 product. The --

18                  JUSTICE GINSBURG: Do we know why that  
19 particular component was exported from the United  
20 States? You -- you said all the others --

21                  MR. PHILLIPS: Right.

22                  JUSTICE GINSBURG: -- were made in England.

23                  MR. PHILLIPS: Yeah, and the key to this is  
24 you want -- you want to get the best quality product  
25 at -- presumably, at the lowest possible price. And --

1 and most of these were purchased -- most of the Taq was  
2 purchased from the Roche company, and I -- and I suspect  
3 they just had a better supply arrangement.

4 I mean, that's -- that's the key to this  
5 case in a lot of ways, is what you're looking for is,  
6 what are the best supply arrangements that you can make  
7 on a global basis? Can you get them in the United  
8 States? Can you get them outside the United States?  
9 And what it seems to me clear that Congress could never  
10 have intended was to in some way disadvantage U.S.  
11 manufacturers who are providing a particular staple.

12 Indeed, I would read 271(f)(2) as saying  
13 categorically that the one thing Congress did not want  
14 to do is to interfere with the ability to -- of a  
15 manufacturer to provide a staple article as part of  
16 the -- as part of an activity outside of the United  
17 States.

18 JUSTICE KENNEDY: If all of this had  
19 happened in the United States, would there have been a  
20 patent infringement suit that would be -- have merit?

21 MR. PHILLIPS: Yes, if everything had  
22 take -- taken place inside the United States, there  
23 would have been.

24 JUSTICE KENNEDY: Under the U.K. laws, are  
25 patents generally enforced for items that are patentable

1 in the U.K.?

2 MR. PHILLIPS: Yes. Yes, absolutely.

3 And -- and -- and, indeed, in this case, Promega had --  
4 I think Promega -- at least somebody had a patent in the  
5 U.K., but that patent had expired, which is, candidly,  
6 not surprisingly, why the activity was taken.

7 And that -- and that is ultimately, Justice  
8 Kennedy, the answer to these issues. If a patentholder  
9 in the United States is upset by the use of a particular  
10 invention outside the United States, the solution is to  
11 go outside of the United States and seek patent -- patent  
12 -- patent protection in that particular country.

13 JUSTICE KENNEDY: I assume, though, that  
14 there might be other countries that are not so vigorous  
15 in their enforcements as the U.K.

16 MR. PHILLIPS: Well, I suspect that there  
17 may be, although there -- you know, this isn't broadly  
18 regulated by -- by treaties. And the -- and to me, the  
19 key is, you know, right -- you know, the United States  
20 has agreed that each country should regulate its own  
21 patent rights. I mean, we're bought into that deal  
22 in -- in the Paris Convention in the 19th century,  
23 and -- and consistently have accepted that. And  
24 that's -- and the whole theory of this, is to ensure the  
25 free flow of commerce across borders on a regular basis,

1 at least when we're talking about staple articles of  
2 commerce.

3           You know, if -- if -- you know, where the  
4 Federal Circuit clearly got this wrong is in saying that  
5 you could interpret (f)(1), which talks about a -- a  
6 substantial portion of the commodities, and say that a  
7 single commodity can be a substantial portion, when  
8 (f)(2) says that in order for a single commodity to  
9 constitute a -- to give rise to a potential claim of a  
10 violation, what it has to be is especially made or  
11 especially adapted for use in the particular invention.

12           JUSTICE ALITO: Does "substantial portion"  
13 mean a majority?

14           MR. PHILLIPS: Oh, I think it means  
15 substantially more than a majority. I -- I would -- I  
16 would say that it has to be approximating or very close  
17 or tantamount to all.

18           JUSTICE ALITO: So here, there were five  
19 components?

20           MR. PHILLIPS: Yes, Your Honor.

21           JUSTICE ALITO: And -- and they would have  
22 to be -- all -- all five would have to be made in the  
23 United States? Or --

24           MR. PHILLIPS: Well, I -- I would -- at  
25 minimum --



1 JUSTICE ALITO: -- four would be enough?

2 MR. PHILLIPS: I would have thought at least  
3 four would have to be. But I -- I -- you know, in many  
4 instances, my guess is the right answer may well be  
5 five.

6 JUSTICE KAGAN: Where -- where do you get  
7 that from? What's the principle there?

8 MR. PHILLIPS: Because all Congress wanted  
9 to do was to close a loophole where you're essentially  
10 doing nothing but violating U.S. patent law and avoiding  
11 it by simply offloading it at the last second. In a lot  
12 of instances, I don't think that's true when you're only  
13 talking about a majority of -- of the -- the items.

14 JUSTICE KAGAN: Well, how do we know that  
15 that's all Congress wanted to do? I mean, that might  
16 have been the -- the -- the scenario in *Deepsouth*, but  
17 Congress used language that could refer to much more  
18 than that, that could refer to a majority, that even  
19 could refer to a substantial minority.

20 MR. PHILLIPS: Yeah. I -- I -- I think  
21 there is no way to -- to -- first of all, the -- the  
22 rule against extra -- the rule -- the presumption  
23 against extraterritoriality would drive you in the  
24 opposite direction. Even if you could reasonably read  
25 the language either way, you would -- you would drive it

1 toward recognizing that the company that the substantial  
2 portion keeps is the word "all," and it's talking about  
3 components.

4 And so those are, to my mind, very much  
5 quantitative and driven in the direction of all. I --

6 JUSTICE GINSBURG: And so you agree that  
7 "substantial portion" is an ambiguous term?

8 MR. PHILLIPS: Yes, Justice Ginsburg. I --  
9 I agree. It could be interpreted in either of two ways,  
10 which is why I think the principle against  
11 extraterritoriality drives you in the direction of  
12 saying Congress meant only to allow U.S. patents to  
13 operate outside the United States in very narrow  
14 circumstances. And if Congress chooses to -- to create  
15 the kinds of international problems that will  
16 undoubtedly arise by an overbroad interpretation of  
17 271(f), which is what the Federal Circuit has adopted,  
18 leave it to Congress to go back and fix that, because  
19 those are -- those are issues of international relations  
20 that, it seems to me, Congress is in a much better  
21 position than the courts --

22 JUSTICE KENNEDY: But those are --

23 MR. PHILLIPS: -- to sort out.

24 JUSTICE KENNEDY: -- just two -- two  
25 components, the polymerase and then a -- a patent --

1 the -- a second part of a patent that we'll envision.

2 MR. PHILLIPS: Right. Clearly in that  
3 situation, there's -- there's no liability, because  
4 it -- you know, because only one of those components --  
5 you know, either one of two things happen. Either both  
6 of them are being put together or -- or only one of them  
7 is, and 271(f)(1) --

8 JUSTICE KENNEDY: It seems -- it seems to me  
9 that even if we -- we agree with you that quantitative  
10 is -- is the proper measure, you still have qualitative  
11 coming in to balance your judgment, as in the case of  
12 one out of two --

13 MR. PHILLIPS: Well, I -- not in one out of  
14 two. One out of two, seems to me, is dictated by  
15 271(f)(2) that says that if it's only one, and then it  
16 has to be either especially --

17 JUSTICE KENNEDY: No, no, no --

18 MR. PHILLIPS: -- adapted or especially --

19 JUSTICE KENNEDY: Well, I'm just talking  
20 about (f)(1).

21 MR. PHILLIPS: Oh, I'm sorry. I thought you  
22 were talking about one out of two components. I  
23 apologize.

24 No, when you get to one -- you know, there's  
25 no question at some point, as you're approaching all,

1 but not all, that you're going to have to make some  
2 kinds of judgments, but it seems to me it's absolutely  
3 critical that the Court maintain a very significant  
4 numerical component to it. Otherwise, what you do is  
5 allow the -- the extraterritorial principle not to have  
6 the full sway that it should be entitled to.

7 CHIEF JUSTICE ROBERTS: I'm not sure I agree  
8 with your understanding of the extraterritorial  
9 principle. I don't -- I mean, do you really take that  
10 down into the minutiae of every little clause? It seems  
11 to me it's once the law applies, then you apply normal  
12 principles of statutory interpretation. I think we have  
13 cases about that in other -- in other areas, which is  
14 sort of what is the reach, I think, may be the  
15 presumption against infringements in sovereign immunity,  
16 is -- a case I can't recall right away that said, well,  
17 once you get over it, you know, it's over, and then you  
18 apply normal principles.

19 And it -- I'm not sure at every turn --  
20 okay, and we know that this is a statute that obviously  
21 applies overseas.

22 MR. PHILLIPS: Yeah, Mr. Chief Justice,  
23 that -- that's exactly the opposite of what the Court  
24 said in Microsoft. In Microsoft, the Court said that  
25 the issue is not simply, is this extraterritorial,

1 because there's no question that 271(f) operates  
2 extraterritorially. The question is the sweep of  
3 271(f). And -- and this Court said that it was going to  
4 interpret the word "component" very narrowly in that  
5 context, candidly, in the same way that the -- that this  
6 Court also interpreted it in the Deepsouth case, meaning  
7 --

8 CHIEF JUSTICE ROBERTS: Well --

9 MR. PHILLIPS: -- very narrowly. And we're  
10 asking you to do the same thing, which is to say, adopt  
11 a narrow construction of the "substantial component"  
12 language so that it drives much closer to the word "all"  
13 and recognizes that this is meant as a --

14 JUSTICE BREYER: Your real argument is just  
15 that -- isn't it -- that you interpret it differently  
16 than you do, and we cause a lot of problems in other  
17 countries.

18 I mean, they -- they can't tell whether,  
19 when they get one component, their lawyer is going to  
20 have to know not only British law, it's going to have to  
21 know American law.

22 MR. PHILLIPS: That's exactly --

23 JUSTICE BREYER: And -- and that's a very  
24 practical argument.

25 MR. PHILLIPS: Right.

1 JUSTICE BREYER: And it -- really, we don't  
2 need -- well, you, it's up to you what you want to use.  
3 But I don't -- you -- the problem is, if that's the  
4 point, why do you need this sort of grand thing about --  
5 about a -- a presumption against extraterritoriality?

6 MR. PHILLIPS: Yeah --

7 JUSTICE BREYER: It's up to you what you  
8 want to use, but --

9 MR. PHILLIPS: Yeah, yeah, yeah -- well,  
10 look, I'm -- I'm perfectly comfortable with, really,  
11 any -- any policy argument you feel comfortable with.  
12 That one --

13 (Laughter.)

14 JUSTICE BREYER: Well, I --

15 MR. PHILLIPS: -- is certainly one that  
16 we -- we embraced.

17 I mean, the other -- the other policy  
18 argument that seems to me equally strong in this context  
19 is the -- is the mischief that the Federal Circuit's  
20 Rule provides for trolls, because now, not only do you  
21 have all of the trolls in the world looking for all of  
22 the products in the world, but now they're going to go  
23 through the entire supply chain of every punitive  
24 infringer and go after each provider of a single staple  
25 article of commerce as part of this exercise --

1 JUSTICE ALITO: Do you think --

2 MR. PHILLIPS: -- and it seems to me that  
3 cannot be possibly what Congress intended.

4 JUSTICE ALITO: Do you think it's clear that  
5 the -- that the -- the qualitative interpretation has a  
6 greater extraterritorial effect than the quantitative  
7 interpretation?

8 What if you have a situation where -- let's  
9 say there are ten components, and nine of them are --  
10 are made overseas, but those are very routine things;  
11 those are like the product that was made in the United  
12 States here. You can buy them off the shelf.

13 But there's one that's very unique. Now,  
14 it's not made specifically for this device, but it's  
15 very -- it's -- it's very unique, and that's -- and  
16 that's made in the United States.

17 MR. PHILLIPS: Yeah. Well, you know -- from  
18 my -- it -- the only device coming from the United  
19 States is a single device --

20 JUSTICE ALITO: Right.

21 MR. PHILLIPS: -- and it's not -- and it  
22 doesn't satisfy "especially made or especially adapted."  
23 It seems to me that (f)(2) tells you specifically,  
24 that's not within the meaning of the statute.

25 JUSTICE KAGAN: Well, I'm not sure if that's

1 --

2 MR. PHILLIPS: And if Congress wants to fix  
3 it, it can fix that.

4 JUSTICE KAGAN: I'm not sure if that's true,  
5 Mr. Phillips. I mean, you're reading (f)(2) as having a  
6 negative implication, that this is the only time when  
7 one component can create liability, is when it's  
8 especially made or especially adapted. But these might  
9 be just independent clauses.

10 In other words, (f)(2) talks about a  
11 component that's especially made, whether or not it's a  
12 substantial portion of the product. And then (f)(1)  
13 comes in and says -- independently creates a rule for a  
14 component or components that are a substantial portion  
15 of the product.

16 So I'm not sure why we have to read (f)(2)  
17 as creating this negative implication as to any product,  
18 any single product, as opposed to just saying (f)(2) is  
19 about specially made stuff, and it has nothing to do  
20 with (f)(1), which is not about specially made stuff,  
21 and provides a different test about substantial --  
22 substantiality.

23 MR. PHILLIPS: Right. I mean, in -- in the  
24 first instance, I don't -- I mean, I don't think that's  
25 the more natural way to read the two together. But then



1 I would go back, and -- and without trying to offend  
2 Justice Breyer, go to the principle against  
3 extraterritoriality, and say -- say to you that if there  
4 were two different ways that are equally plausible to  
5 interpret this language, you should interpret the  
6 language to be more narrowly applicable, and therefore  
7 less likely to interfere with extra -- with  
8 extraterritorial -- extraterritorial application of  
9 patent law.

10 And so that's the reason. It -- I'm not  
11 saying that you would have, in the abstract, been  
12 compelled to a particular conclusion, but in a situation  
13 where Congress has used the language talking about all  
14 or a major -- or a -- or a substantial portion where all  
15 is all but -- you know, it's very close to that, talks  
16 about components of the invention, not of the invention  
17 itself, the Federal Circuit twice in its opinion just  
18 dropped out "of the components of the invention," where  
19 it's clear that that's designed to be a --

20 JUSTICE GINSBURG: And what are --

21 MR. PHILLIPS: -- quantitative analysis.

22 JUSTICE GINSBURG: What are the -- what are  
23 the components of the invention? How do we know what  
24 the -- the components of the invention?

25 MR. PHILLIPS: This Court in Microsoft said

1 that the components of the invention are the elements in  
2 the claim, and so you look at the claim and you  
3 interpret the claim and you -- and you devise from that.

4 Now, that -- that -- that's claim -- that's  
5 claim construction. And that's, you know, not always  
6 the easiest thing in the world to do, and it requires  
7 review of the claims, review of the specification and  
8 the -- and the history. But in this particular case,  
9 it's really easy.

10 The claims say very categorically what each  
11 of the five components are, is, and -- and so that one  
12 is easy.

13 If there are no further questions, Your  
14 Honors, I'd like to reserve the balance of my time.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Tripp.

17 ORAL ARGUMENT OF ZACHARY D. TRIPP

18 FOR UNITED STATES, AS AMICUS CURIAE,

19 SUPPORTING THE PETITIONERS

20 MR. TRIPP: Mr. Chief Justice, and may it  
21 please the Court:

22 We are asking the Court to do two things  
23 here today.

24 First, we are asking the Court to hold that  
25 the supply of a single commodity component is never

1 enough. We think that's clearly right when you look at  
2 (f)(1) and (f)(2) together, especially in light of  
3 extraterritoriality concerns.

4 Second, we are asking the Court to hold that  
5 (f)(1) reaches the supply of all or a large portion of  
6 the components of the invention, not any important  
7 portion of the invention. And the way we had put it is  
8 that it reaches the supply of all or something  
9 tantamount to all of the components.

10 And our principal practical concerns here  
11 stem from the breadth of the Federal Circuit's ruling,  
12 and it's broad because they are asking a loaded question  
13 that's looking only at part of the picture.

14 If you look only at the supplied portion of  
15 the components and you ask whether they are important or  
16 essential to the operation or novelty of the invention,  
17 the answer is always going to be yes. In most  
18 inventions, if you take away any component, it isn't  
19 going to work and it's not going to be patentable. So  
20 we think you just can't come at it that way.

21 And then the second piece is that the  
22 Federal Circuit isn't looking at all the components that  
23 were not supplied, and so they are not asking the  
24 comparative question of whether the person has done  
25 anything similar to supplying all of the components.

1 And we think that's just a critical piece here. This is  
2 an anti-circumvention provision. It was enacted to  
3 shore up the basic territorial restriction against  
4 actually making a patented invention in the United  
5 States and then shipping it abroad, and we think it  
6 needs to be interpreted with that purpose in mind.

7 JUSTICE SOTOMAYOR: You keep saying  
8 "substantially all." Mr. Phillips argued that  
9 "substantially all" has to mean just that: Almost all.

10 You, instead, in your brief, want us to keep  
11 that vaguer, but I'm assuming that there is a minimum  
12 that wouldn't constitute an infringement.

13 MR. TRIPP: Well, I think --

14 JUSTICE SOTOMAYOR: 20 percent? 30 percent?  
15 40? How -- how --

16 MR. TRIPP: Well, so I think the -- the --  
17 the one bright line that we -- that we are drawing here  
18 is -- on the face of the statute is that one is never  
19 enough. We think that's clear when you look at (f)(1)  
20 and (f)(2) together the way this Court read them in  
21 Microsoft the first time.

22 Beyond that, the numbers are very important  
23 under our test, but they are not the whole ball game.  
24 We're -- we say this on page 26 of our brief. You could  
25 also -- you would look not only at the numbers of the

1 components that were supplied and not supplied, but you  
2 would also look at the relative time, money, and effort  
3 that you would need to obtain the remaining components.

4 So if I could give --

5 CHIEF JUSTICE ROBERTS: Time -- time, money,  
6 and effort, but not significance of the component?

7 MR. TRIPP: I think --

8 CHIEF JUSTICE ROBERTS: It seems to me that  
9 the significance of the component would be the most  
10 important consideration. If --

11 MR. TRIPP: I think -- and so the --

12 CHIEF JUSTICE ROBERTS: If it's the -- if  
13 it's whatever you think is not quite enough, 70 percent,  
14 but 70 percent of the components -- I mean, that's  
15 really the core of what makes it work. I don't know why  
16 you wouldn't look at that differently than if it's 70  
17 percent, but the 70 percent are, you know, fairly  
18 insignificant.

19 MR. TRIPP: Well, I -- I -- our principal  
20 concern or -- as I was saying, is that if you just ask  
21 the question of whether it's significant in the sense of  
22 is it essential or important to the novelty of the  
23 invention, I think that's just a black hole that's not  
24 going to get you anywhere. And we think our approach  
25 works better.

1                   And if I could just give you two examples of  
2 how this would work using this particular invention?  
3 So, if some -- if -- if the record here showed that  
4 manufacturing the first component, the primer mix was,  
5 you know, an incredibly difficult, time-consuming, hard,  
6 challenging process, the bulk of the work here, but that  
7 you could get the -- the reaction buffer very quickly in  
8 a heartbeat, you know, it's like a dime a dozen, you  
9 drop it into the kits and it works.

10                   In that circumstance, if somebody supplied  
11 all the components except the reaction buffer, we think  
12 they would clearly be liable because they would have  
13 done something that is really tantamount to supplying  
14 all of the components. You could get that last one so  
15 easily, but if supply -- if somebody supplied all the  
16 components --

17                   JUSTICE SOTOMAYOR: To the expert testimony  
18 here that out of the five, three were significant, so  
19 let's assume they supplied the three significant  
20 components and not the two less insignificant. What --  
21 what would your answer be then?

22                   MR. TRIPP: I think that would be a much  
23 closer case to supplying something that is tantamount to  
24 supplying all of them under our test. I think the --  
25 the record here isn't -- isn't fully set out in terms of

1 what it is that -- that -- that makes them main or  
2 major.

3 What we are trying to get at -- and -- and  
4 the key point to us, whether exactly how you articulate  
5 this test I think doesn't matter all that much to us,  
6 but what we really do care about is the idea that this  
7 needs to be a comparative inquiry looking at how much  
8 work there is left to be done to obtain the rest of the  
9 components so that --

10 CHIEF JUSTICE ROBERTS: I think once you --  
11 once you're into your fairly complicated test, I mean, I  
12 think it's -- you're off to the races. I mean, what  
13 factors do you look at, all of that, when it -- it seems  
14 to me the -- the clear argument is whether you want to  
15 call it the plain text or not, but it's just focusing on  
16 a numerical. It's -- it's -- it's a substantial portion  
17 of the components, and now you're saying, well, it kind  
18 of depends on what components we are talking about. You  
19 know, how much time it takes to make them Effort, I  
20 don't quite understand what effort means in that area.

21 In -- in other words, you're -- you're --  
22 you're compromising the principle in a way that really  
23 undermines the force of the principle.

24 MR. TRIPP: No, I -- I -- I think that what  
25 we are saying is that the -- the statute carries the

1 quantitative meeting in the sense that it needs to be a  
2 large portion, but this is an anti-circumvention  
3 provision and then trying to figure out what it needs  
4 for it to be a large portion, the numbers are a whole  
5 lot of the picture.

6 I -- I don't want to -- I don't want to  
7 diminish that, but as we said on page 26, we think they  
8 are not the entire ball game, and a court look at --  
9 could look at some qualitative factors, but that it  
10 would not look at the question of whether what's left on  
11 the table is essential or in -- or to the novelty,  
12 because the answer to that is always going to be yes.

13 JUSTICE SOTOMAYOR: I don't know enough  
14 patent law to have the answer to this. When a -- a  
15 claim is made, what -- how is the determination made of  
16 what the elements are? Do the elements' determinations  
17 sort out the common from the uncommon in a patent claim?

18 MR. TRIPP: Not as I understand it, no. It  
19 would just be -- it would just be sorting out what the  
20 elements are, and -- and the way we approach the  
21 components of the invention, this is on page 27 of our  
22 brief, is we think, as in Microsoft, that they --  
23 they -- they are -- they need to be capable of  
24 combination, and they are derived from the elements of  
25 the claim



1                   So we think in -- in most cases it actually  
2 won't be that difficult. And also, as it -- you know,  
3 as I was saying, I -- I think under our approach, it  
4 also, frankly, wouldn't matter that way.

5                   JUSTICE BREYER: But why do we have to go  
6 into the details here? I mean, it did strike me as an  
7 instance where maybe the less said by us the better. I  
8 mean, would you be happy if we say it means what it  
9 says?

10                   "All or substantially all" means a whole  
11 lot. Or what you said, tantamount to all. So if you  
12 get into that circumstance or you get into the "to"  
13 circumstance, which is there is a special ingredient  
14 here that has the special qualities, Mr. Manufacturer,  
15 don't get close to that.

16                   MR. TRIPP: I -- I think --

17                   JUSTICE BREYER: All these lawyers that will  
18 be there telling them, don't get close to that, and the  
19 thing will work over time. If we set a detailed test  
20 down, then all those lawyers will be trying to figure  
21 out how, in fact, they actually do the thing without  
22 quite infringing the detail test.

23                   MR. TRIPP: Yeah, I -- I -- I think that --

24                   JUSTICE BREYER: That's what worries me.

25                   MR. TRIPP: I -- I think if you said that

1 one was never enough and it needs to be a whole lot, we  
2 would be quite happy. All that we're --

3 JUSTICE BREYER: End of the case. It says  
4 one means a lot, we need a whole lot, tantamount to the  
5 whole lot, and good-bye.

6 MR. TRIPP: Yeah, we -- we -- we would be  
7 perfectly happy with that.

8 (Laughter.)

9 MR. TRIPP: All -- all that I'm trying to do  
10 is try and give you our sort of best gloss on  
11 interpreting --

12 JUSTICE GINSBURG: Then why did you -- why  
13 did you add the qualification to put in qualitative  
14 considerations in addition to quantitative?

15 MR. TRIPP: Well, as I was trying to get at  
16 with the -- the illustrations using this particular  
17 invention, like you could get to a different answer even  
18 when you have the same number of components. So if  
19 somebody supplied everything but the reaction buffer,  
20 this one you would get cheaper and easily, we think you  
21 would be liable.

22 But if they did everything except the primer  
23 mix, and that's really just an enormous amount of --  
24 of -- of what needs to happen here, then we think they  
25 wouldn't have done something that's tantamount to

1 supplying all the components. And they wouldn't be  
2 liable because there would be so much left to be done.

3 But I think, frankly --

4 CHIEF JUSTICE ROBERTS: I think that's your  
5 answer in this invention, but every other invention is  
6 going to have a different mix of the time, the effort,  
7 the, you know, qualitative aspect, and it -- again, it  
8 does seem to be that once you get beyond looking at  
9 purely quantitatively in terms of the components, I  
10 don't think you've made much progress in clearing up  
11 the -- the litigation costs and the confusion.

12 And I'm also not sure how it fits in with  
13 the presumption against extraterritoriality, or at least  
14 the clear application of that.

15 MR. TRIPP: Well, I -- I -- I think the main  
16 thing that we are getting at is that -- and -- and --  
17 and again, as I was saying, I -- I don't think we have a  
18 strong -- strong position on how exactly you -- you  
19 articulate the test. Our concern is that it needs to be  
20 pinned to an anti-circumvention provision, and the  
21 question is, are you doing something that is pretty  
22 close to supplying all the components? How exactly are  
23 you --

24 JUSTICE KAGAN: Because there's a reason why  
25 it's that almost all.

1           I mean, if I said to you, Mr. Tripp, a  
2 substantial portion of my former clerks have gone into  
3 government work, how many would I mean?

4           MR. TRIPP: Well, I -- I think with any of  
5 these things, the interpretation of substantial depends  
6 entirely on its context and its purpose, and -- and --  
7 and so this term is used in just, like, a countless  
8 array of ways in the law.

9           JUSTICE KAGAN: So you're not pinning this  
10 on the -- on the language here, the substantial portion  
11 means almost all?

12          MR. TRIPP: Well, no --

13          JUSTICE KAGAN: You are finding it from  
14 someplace else? And where are you finding it from?

15          MR. TRIPP: So we're trying to give a gloss  
16 on substantiality in light of the context and purpose of  
17 this statute as -- as we understand all of 271(f) is  
18 designed to shore up the basic restrictioning and is  
19 actually making a patented invention in the United  
20 States and then shipping it abroad. Both of the  
21 provisions get at that. We think (f)(1) is situations  
22 that resemble the Deepsouth paradigm you're --

23          JUSTICE KAGAN: But then you take Justice  
24 Alito's hypothetical, which is a product where there's a  
25 single product that is accounting for 90 percent of the

1 time and effort, and whatever the third thing you  
2 mentioned was.

3 MR. TRIPP: I think in -- in -- in the one  
4 is never enough, (f)(2) was just a complete answer to  
5 that. And if Congress was going to draft a special rule  
6 about the supply of an individual super important  
7 component, you would have expected to see it in (f)(2),  
8 and it's just not there.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Waxman.

11 ORAL ARGUMENT OF SETH P. WAXMAN

12 ON BEHALF OF THE RESPONDENT

13 MR. WAXMAN: Mr. Chief Justice, and may it  
14 please the Court:

15 I think it's extremely important to  
16 understand how fundamentally the Petitioners and the  
17 government misapprehend the nature of the harm that  
18 Congress addressed in 271 as enacted. When the  
19 DeepSouth solution was proposed by Senator Mathias, it  
20 precluded the supply with no active inducement  
21 requirement, the supply of the material components of a  
22 combination that if combined in the United States would  
23 infringe.

24 In the 1984 hearing that's discussed at page  
25 29 of our brief, the United States -- the commissioner

1 of patents came in and testified that the United States  
2 objected to that interpretation. They objected to the  
3 topdown -- you know, not -- not totally all, and  
4 proposed instead that Senator Mathias amend his  
5 legislation to preclude what in essence is prohibited  
6 domestically in 271(c); that is, contributory  
7 infringement. That is the supply of a single, specially  
8 designed part where there are no substantial  
9 non-infringing uses.

10 That in and of itself shows you how far --  
11 and that is, in fact, 271(f)(2). And that shows you how  
12 far from this "all or substantially all" paradigm  
13 Congress was aiming.

14 Now, Senator Mathias's response right  
15 there -- and again, we discuss it at page 29 -- was,  
16 okay, I understand that. But what about, he said, the  
17 situation of the, quote, exporter who sends specific  
18 instructions on how to manufacture a product which would  
19 infringe a U.S. patent notwithstanding the use of a  
20 staple product or products?

21 And Commissioner Mssinghoff's response was,  
22 gee, I hadn't thought of that. That would be the analog  
23 to 271(b). That is the induced infringement requirement  
24 which makes one liable as an infringer if you actively  
25 induce infringement by another and --

1                   CHIEF JUSTICE ROBERTS: You're -- but  
2 you're -- you're beginning with a dialogue at a Senate  
3 hearing on the bill that's pretty weak even in the  
4 legislative history hierarchy, but I don't think you've  
5 mentioned the actual language of the statute yet.

6                   MR. WAXMAN: Well, that -- thank you,  
7 Mr. Chief Justice. And I'm not relying on the  
8 legislative history alone. This is just one example  
9 in --

10                  JUSTICE BREYER: Well, how does it help you?  
11 Because I -- it's very hard for me to believe that  
12 Senator Mathias really wanted to interpret American  
13 patent law so that it runs the world when we've entered  
14 into a treaty which says British patent law runs  
15 Britain, French France, and so forth. I mean, is there  
16 something in this history which says no, no, Senator  
17 Mathias had a different view; he -- he wanted whenever  
18 you send any component abroad that's in a patent,  
19 suddenly American law governs it?

20                  MR. WAXMAN: So, Justice Breyer, before I go  
21 back to the history, I'll take the Chief Justice's  
22 admonition and -- and -- and focus on the language.

23                  I mentioned the history, Mr. Chief Justice,  
24 only because it's rare that an exchange in the  
25 legislative history translates so directly to the

1 language of the statute as a result of that exchange  
2 which we're not relying on as interpretive authority.  
3 Senator Mathias did exactly what the United States  
4 suggested. He -- he scrapped the original -- the  
5 material components and came back with what is now  
6 271(f)(1) and (f)(2).

7 (f)(1), modeled on 271(b), precludes active  
8 inducement in the United States, and 271(f)(2) precludes  
9 following on 271(c).

10 CHIEF JUSTICE ROBERTS: Well, I know. But I  
11 mean, you know, you know the objection. I don't -- I  
12 don't know how many of the people voting on the bill  
13 went back and read the Senate hearing.

14 I understand the argument when you're  
15 talking about something in the Senate Report or the  
16 House Report at a fairly high level of connection to the  
17 statute. But when you're wading into the particular --  
18 the dialogues at a particular hearing in one House --  
19 one committee of one House of the Congress, that's a  
20 real stretch.

21 MR. WAXMAN: Okay. Let me -- let me -- let  
22 me put aside that exchange. The -- the -- in fact, the  
23 report does acknowledge what is obvious from the face of  
24 the statute and which I believe -- and this Court  
25 recognized in Microsoft v. AT&T, which is the 271



1 provisions were modeled after induced infringement under  
2 271(b) and contributory infringement under 271(c). And  
3 -- and --

4 JUSTICE ALITO: What about the -- what about  
5 the text of the -- of the statute? It doesn't say "a  
6 substantial portion of the patented invention." It says  
7 "a substantial portion of the components" of -- of the  
8 patented invention.

9 So if I were to -- you know, if I were to  
10 ask, what is a substantial portion of the pages of your  
11 brief, I think someone would think that's a quantitative  
12 determination and -- and would not think that, well, you  
13 know, I think pages 12 to 16 of your brief are  
14 particularly important, so that would be a substantial  
15 portion of the -- of the pages of your brief.

16 MR. WAXMAN: So I -- let me go first to  
17 the -- to the question about the use of the word  
18 "components" rather than "invention" and then address  
19 your -- your question on the substantial number of  
20 pages.

21 As this Court explained in Microsoft  
22 v. AT&T, the use of the word "components" is the -- is  
23 Congress's indication that the combinations that are  
24 precluded are tangible or physical combinations, not  
25 method patents or unembodied software. That's how you

1 know what the scope of the combination is.

2           And if Congress had said, you know, to  
3 export one or more rather than a substantial portion,  
4 you would still use the plural because the plural is  
5 necessary to accommodate the instance in which it will,  
6 in fact, commonly be more than one.

7           Now, in your hypothetical, if you're talking  
8 about a substantial portion of units that are  
9 indistinguishable from each other, like pages of the  
10 brief, then I concede that the more natural reading is a  
11 quantitative one. But if you look at how "substantial"  
12 is used in the relevant provisions, the provisions of  
13 the patent code that my friend on the other side is  
14 averting to, that is (f)(2), where substantial  
15 non-infringing uses is plainly at least partly  
16 qualitative, or, as they say, the Warner-Jenkinson, the  
17 doctrine of equivalence case where equivalency turns on  
18 substantiality of functions and methods and uses, it is  
19 also qualitative, our argument is that, again, we agree  
20 with the United States whether the extent to which  
21 substantial is qualitative or quantitative depends on  
22 the context.

23           And so my only point, Mr. Chief Justice,  
24 just so that I'm not misunderstood here, is Congress --  
25 when Congress, rather than what it started to do, which

1 was to count down -- enact something that counted down  
2 from all the components, it instead scrapped it at the  
3 United States' suggestion and started from the ground up  
4 from contributory infringement, which is just one  
5 component specially designed, and active inducement,  
6 which doesn't require the supply of any components.

7 Now, in this instance, and this goes, I  
8 think, to Justice Breyer's question about  
9 extraterritoriality, Congress was very careful -- of  
10 course, as this Court recognized in Microsoft, there are  
11 extraterritorial implications because it concerns  
12 exporting things for something to be done in commerce  
13 overseas. But Congress was very, very careful to make  
14 the conduct that the provision looks at domestic only.  
15 It is -- you have to actively induce from the United  
16 States an active inducement, this Court explained in the  
17 Grokster case means active steps to encourage like  
18 advertising or providing instructions. You have to  
19 support --

20 JUSTICE GINSBURG: What do you do -- what do  
21 you do with the word "all"? I take it your argument  
22 would be easier if that word were not in the statute.

23 MR. WAXMAN: I don't -- I don't -- I'm  
24 not -- I don't -- I don't agree that our argument would  
25 be easier. All, you know, has the same implications one

1 way or the other, whether you call substantial  
2 quantitative or qualitative. Clearly Congress was  
3 aiming at less than all.

4 But it's a commonplace for -- for  
5 legislatures for completeness' sake to say all or fewer  
6 than all, or all or some. And, Justice Breyer, I do  
7 want to correct one thing. You -- you inadvertently  
8 kept saying this is all or substantially all. It's not  
9 all or substantially all. It's all or a substantial  
10 portion. And as we point out in, I believe, page 35 of  
11 our brief, there are -- it is a commonplace locution in  
12 State statutes and probably Federal statutes to use all  
13 or substantially all, which is more clearly  
14 quantitative. And the State statutes, these are often  
15 corporate law statutes that talk about the sale or  
16 alienation of all or substantially all of the assets.

17 In that instance, the stake -- the cases we  
18 cited and many others give "substantially all" a  
19 quantitative as well as a qualitative interpretation.

20 JUSTICE BREYER: Is it against the law?  
21 Which I don't know. Is it against the law for a  
22 patentholder on patent X, which has 19 ingredients, to  
23 send one commonplace ingredient over to England and say,  
24 you know, I -- I don't mind. Here -- here is what my  
25 patent's on here, but there is no British patent. And I

1 would love you to make this and sell it in Britain. Is  
2 that against American law?

3 MR. WAXMAN: It is not for two reasons.  
4 One, what -- what you have to show under 271(f) is the  
5 act of active inducement that is --

6 JUSTICE BREYER: What -- what he does is  
7 just as I said. You know, I have a great invention in  
8 America. It's patented.

9 MR. WAXMAN: Okay. I got it.

10 JUSTICE BREYER: In England, it's not  
11 patented. And what I really -- I see no reason why you  
12 cannot make my thing over there and sell it over there.  
13 And here, by the way -- it's not mine, you know. It's  
14 Mr. Smith's, my competitor's. And -- and here, by the  
15 way, is the patent. You see what it is, and go ahead.  
16 Sell it in England. It's not patented there. Can you  
17 not do that? Is that illegal?

18 MR. WAXMAN: So there you would ask the  
19 question whether the component or two components --

20 JUSTICE BREYER: If we leave the component  
21 out of it. There are no components. What he does is he  
22 sends him a list.

23 MR. WAXMAN: Okay. That is --

24 JUSTICE BREYER: Is that illegal?

25 MR. WAXMAN: -- not illegal, because in

1 addition to active inducement, you also have to supply a  
2 substantial portion of the component.

3 JUSTICE BREYER: Exactly.

4 MR. WAXMAN: Now, after that --

5 JUSTICE BREYER: So then the question  
6 becomes one of what limits Congress wanted to put in an  
7 area where it isn't illegal. Now, go ahead with your  
8 argument, because what they're saying --

9 MR. WAXMAN: So if the --

10 JUSTICE BREYER: Yeah. Yeah.

11 MR. WAXMAN: Sorry.

12 If the component is -- let me use two  
13 examples: One, I'll adopt Justice Alito's hypothetical.  
14 Let's assume that you have a patented pharmaceutical, a  
15 tablet that, you know, remediates a disease. It has --  
16 as is commonplace in these combinations, it has one  
17 active ingredient, and it has five inert ingredients  
18 that are as easy to pick up as you can imagine.

19 The thing that is exported -- the -- the --  
20 the factory overseas, which by the way is never liable  
21 under the statute because the statute only applies to  
22 conduct in the United States, they -- they're happy to  
23 go down to their local warehouse and get the -- the five  
24 inert ingredients.

25 But the -- the -- the molecule that does all

1 the work, they import from the United States.

2 Now, my friends on the other side would say,  
3 and I believe Mr. Tripp actually did say, if that  
4 molecule has no non-infringing uses, it's illegal. But  
5 if it's such a great molecule that it actually has  
6 another non-infringing use, say it also powers the  
7 injectable form of the pharmaceutical, which is not  
8 patented, that what Congress intended to do was leave  
9 this giant doughnut hole in the rule between the active  
10 inducement of a commodity, that is, non-bespoke  
11 component.

12 You have to -- you know, there's no  
13 liability at all. You have to supply all or nearly all  
14 of those inert components, or you have to show that, you  
15 know, there, in fact, is a patent on the injectable  
16 form

17 Or take also the example that was at issue  
18 in this Court's decision in *Quanta Computer*. Justice  
19 Thomas explained for the Court that that was a case that  
20 involved the patent exhaustion doctrine where Intel was  
21 supplying a very sophisticated microchip, microprocessor  
22 that was used by *Quanta Computer* in a computer that had,  
23 you know, gazillion other components.

24 And the question was whether Intel's sale of  
25 the microprocessor to LGE, which then sold it to *Quanta*,

1 exhausted the patent. And what this Court said is,  
2 well, it didn't exhaust the patent on the combination,  
3 because, obviously, it's only one or two components.

4 But because that microchip -- that  
5 microprocessor embodied the -- what it said was the  
6 inventive aspect of the computer as a whole, we are  
7 going to take account of that and hold that patent  
8 exhaustion applies. And that would apply not only to my  
9 pharmaceutical example or Justice Alito's, you know, one  
10 super important component, it would apply to a more --  
11 you know, the Quanta example where there may be -- say  
12 there are 20 components, but three of them constitute  
13 the inventive aspect.

14 This -- the language is capacious enough and  
15 can be read in a commonsense way to make clear that that  
16 is what Congress intended to address in (f)(1) by  
17 enacting -- provided there is active encouragement for  
18 the combination, by enacting the analog, the -- the (f)  
19 analog to what is active inducement under (b).

20 JUSTICE GINSBURG: So how do you decide --  
21 here there are five.

22 MR. WAXMAN: Yeah.

23 JUSTICE GINSBURG: And only one is  
24 manufactured in the United States.

25 MR. WAXMAN: So --



1 JUSTICE GINSBURG: Under your test, where  
2 there are five, and let's assume that each one is  
3 necessary to the operation of the patented device, how  
4 do you decide if one is substantial, one out of five?

5 MR. WAXMAN: I -- I'm going to answer your  
6 question, but first of all, let me simply correct a  
7 couple of statements by my friend, I think in response  
8 to your earlier question, Justice Ginsburg.

9 The evidence in this case was that as to  
10 300-plus million of the 700 million in sales, two  
11 components were supplied. There was a -- there was a  
12 concession at trial that both primers and the Taq  
13 polymerase were supplied for almost half of the kits.

14 Second of all, Taq polymerase,  
15 notwithstanding my friend's reference to what he found  
16 on the Internet, the testimony at trial is that the Taq  
17 polymerase that is necessary to make these STR kits  
18 sufficiently reliable to be commercially salable was --  
19 and there was testimony about this at trial -- was a  
20 form of very particular Taq polymerase made by Roche  
21 called AmpliGold Plus, which is a particular form, and  
22 was required, and the testimony at trial was, was  
23 manufactured by Roche, Promega, and Life only in the  
24 United States. This is not your Amazon.com Taq that's  
25 now available.

1                   Now, as to your question, Justice Ginsburg,  
2 the question of whether in this case, whether it was  
3 stipulated -- it was conceded there were five  
4 components, although I must say I'm not sure that's  
5 right, that of the five components, one or two were  
6 exported.

7                   And as -- and the question is how do you  
8 know whether that one or two is sufficient? That was  
9 addressed as a factual question by the jury, and --

10                   JUSTICE GINSBURG: And what were the  
11 instructions?

12                   MR. WAXMAN: Excuse me?

13                   JUSTICE GINSBURG: How -- how in the world  
14 would a jury go about deciding that?

15                   MR. WAXMAN: Well, it's interesting in this  
16 case because for other reasons, Life Technologies at  
17 other points of the trial wanted to emphasize just how  
18 important and unique this form of Taq was. It didn't  
19 actually argue to the jury that it wasn't a substantial  
20 portion. Our lawyers argued in their -- in their  
21 initial closing and on rebuttal, look, these kits all  
22 had Taq polymerase. That is a substantial component.

23                   There was no request that the jury be  
24 instructed as to how you determine what is or isn't  
25 substantial, and the way the Federal Circuit -- the

1 question for the Federal Circuit was, you know, is one  
2 sufficient or is two sufficient?

3 JUSTICE SOTOMAYOR: Let's assume the --

4 MR. WAXMAN: If I could just finish my  
5 sentence, and then I'll --

6 JUSTICE SOTOMAYOR: Sure.

7 MR. WAXMAN: The Federal Circuit dealt with  
8 this as a substantial evidence question. They weren't  
9 holding that one is sufficient in this case. They asked  
10 whether there was sufficient evidence to go to the jury,  
11 and they concluded that the answer was yes, because all  
12 of the testimony -- and there were days of testimony  
13 about how polymerase works and the polymerase chain  
14 reaction. All of the testimony from our witnesses and  
15 their witnesses emphasized just how important Taq  
16 polymerase was. So I think it's substantial --

17 CHIEF JUSTICE ROBERTS: I think you've  
18 finished -- I think you've finished your sentence.  
19 So --

20 (Laughter.)

21 MR. WAXMAN: Thank you very much.

22 Justice Sotomayor?

23 JUSTICE SOTOMAYOR: It seems to me that what  
24 you -- you appear to be saying is still not answering  
25 your adversary's position.

1           If there are, as I understood the expert  
2 testimony from the briefing -- and I could be wrong, and  
3 you'll correct me on that -- but assume my hypothetical,  
4 that there are three substantial components in this  
5 invention. How is one a substantial number of those  
6 three substantial ones? Because unless you can explain  
7 that, I don't know how to give meaning to "all or  
8 substantially all" the components.

9           And -- and I do find the government's  
10 argument that it's hard to say that "substantial" means  
11 just something that's critical to the invention. Every  
12 step is critical to an invention. You take out the  
13 step, the invention doesn't work.

14           MR. WAXMAN: So it's not part of our  
15 argument, and we don't think it's a fair reading of the  
16 Federal Circuit's decision, that says, look, if the  
17 thing won't work without a component, it's a substantial  
18 portion of the component. That is a caricature of what  
19 the Court decided.

20           The Court, as I said, was engaging in  
21 substantial -- deferential substantial evidence review.  
22 It recounted the fact that both their witnesses and our  
23 witnesses underscored how important Taq was. It didn't  
24 catalogue the pages and pages of testimony explaining  
25 why that's the case.

1           If you're asking me the hypothetical  
2 question, if all the jury heard was -- and heard -- the  
3 jury heard nothing more than, there are five components  
4 and three are important, would that be sufficient for a  
5 jury to include -- to conclude that one was a  
6 substantial component? I wouldn't say so.

7           But that's a caricature of what actually  
8 happened in an eight-day trial that was very much  
9 focused on Taq polymerase and the particular form of Taq  
10 that was supplied here, and so this Court could, if this  
11 Court agrees with us that there may be circumstances --  
12 maybe it's the Quanta example, or maybe it's Justice  
13 Alito's example -- in which one component constitutes  
14 a -- could constitute a substantial portion, and  
15 therefore liability would apply if there were conduct  
16 that amounted to active inducement, this Court could  
17 then say, okay, we are going to roll up our sleeves and  
18 we are going to read the trial transcript and we are  
19 going to look at what the evidence was in order to  
20 determine whether, on the case as it was tried here, a  
21 reasonable juror could find that Taq polymerase was that  
22 important.

23           JUSTICE ALITO: Well, in order to do that,  
24 it would be necessary to know what "a substantial  
25 portion of the components" means.

1                   So what would you tell a jury that means?

2                   MR. WAXMAN: So I would tell a jury, you  
3 know, following the dictionary definitions, that  
4 "substantial" means considerable in importance and/or  
5 amount. And then, you know, the jury will -- and you  
6 may consider, you know, whatever factors are introduced  
7 in the case, just as when -- as this Court has  
8 explained, when juries have to decide things like, just  
9 adverting to your opinion announced today, what is  
10 materiality?

11                   In *Basic v. Levinson*, this Court rejected  
12 the advocacy that you've got to tell the jury a lot of  
13 primary conduct depends on what materiality means, and  
14 what this Court said is, the contours of that will be  
15 explicated based on the facts of the case and case law  
16 as it develops. And in the patent context, this Court  
17 has been -- I wouldn't say single-minded, but very  
18 active in making -- in rejecting formulations that, you  
19 know, help the jury determine what is obvious in light  
20 of prior art. That was *KSR*. What is equivalent --  
21 substantial equivalent under the doctrine of equivalence  
22 in *Warner-Jenkinson*?

23                   These are all instances in which this Court  
24 said the jury is given the standard, and it then applies  
25 the facts and circumstances to determine it's met, just

1 as it does in negligence cases and in criminal law cases  
2 and many other contexts in which primary conduct is  
3 being adjusted.

4 Here, the -- the -- this parade of horrors  
5 that, gee, anybody who supplies a component from the  
6 United States could be liable if they are in the supply  
7 chain is -- is manifestly incorrect.

8 They have to -- they have to, number one,  
9 know that there is a patent. They have to know that the  
10 product is going to be combined with others. They have  
11 to know that the combination, if practiced in the United  
12 States, would infringe.

13 JUSTICE KENNEDY: Do they have to figure --

14 MR. WAXMAN: They have to go beyond that and  
15 actively encourage, send instructions or blueprints or  
16 something, in order to do it, and a jury, properly  
17 instructed, based on the evidence, has to ascertain,  
18 gee, this really is a substantial portion.

19 JUSTICE KENNEDY: Well, that -- that --

20 MR. WAXMAN: This is the molecule.

21 JUSTICE KENNEDY: That -- that -- that  
22 sounds to me much more like (f)(2) than (f)(1), but  
23 I'll -- I'll -- I'll look at that.

24 The -- the -- the brief by Agilent  
25 Technologies was instructive for me as to how modern

1 supply chains work. They say it's very complex. They  
2 ship out hundreds of different things. And that seems  
3 to me to give some help to the Petitioner, because it  
4 shows that a quantitative test is simply a good baseline  
5 to begin with, and the more egregious cases, it seems to  
6 me, are under (f)(2) anyway.

7 If we have -- if we can think of horror  
8 stories, they are mostly covered by (f)(2), aren't they?

9 MR. WAXMAN: I -- I don't think so, Justice  
10 Kennedy. I -- I -- I guess I'd make two points with  
11 respect to the supply chain.

12 The liability in this -- this is -- this is  
13 a provision modeled on 271(b). It also includes the  
14 requirement of the domestic supply of a portion of the  
15 components. But the sauce here, where the rubber meets  
16 the road, is that the -- the -- the tortious conduct is  
17 the active -- active inducement, and somebody who was  
18 simply responding to an order for supplies is in no way  
19 at risk in this case.

20 The reason that (f)(2) doesn't really solve  
21 the problem is, again, I think pointed out by Justice  
22 Alito's question. You can have a molecule that has --  
23 that does all the therapeutic work in the world, and you  
24 get -- and it is protected against circumvention only if  
25 it has no substantial non-infringing uses.



1           Many of the most important, innovative,  
2     inventive components actually are terrific because they  
3     have two uses. In my hypothetical, it has a use for an  
4     injectable form of the drug which is not patented. It  
5     is not reasonable to assume that the Congress that -- I  
6     was going to make a reference to the exchange in the  
7     legislative history, but the Congress --

8           (Laughter.)

9           MR. WAXMAN: -- that responded to the  
10    government's suggestion like, let's just have (f)(2),  
11    and said, well, we need -- we need (f)(1), too. That  
12    is, we -- we need the analog not just to contributory  
13    infringement, but to induced infringement, that they  
14    would have seen these two components as so far apart  
15    that their gears never mesh, when, as this Court has  
16    said, it is a commonplace that there is overlap between  
17    270 -- between contributory and induced infringement.  
18    It's not a complete --

19           JUSTICE GINSBURG: If you need -- you need  
20    (f)(1) to -- to -- to overturn *Deepsouth*.

21           MR. WAXMAN: Oh, no, no, not at all. Not at  
22    all.

23           What *Deepsouth* said is, the patent is on the  
24    combination. If the combination occurs overseas, there  
25    is no infringement. There's no 271(a) liability abroad.

1 Congress didn't touch that.

2 What it said was, okay, 271(a) is direct  
3 infringement; 271(b) and (c) are what we call secondary  
4 infringement. It makes somebody liable even if they  
5 weren't infringing, and because the combination overseas  
6 doesn't infringe the U.S. patent, we are going to enact  
7 these two provisions that address only U.S. conduct.

8 The -- the tort of 271(f)(1) --

9 JUSTICE BREYER: That's U.S. conduct, but  
10 you read the brief of the German companies, and they  
11 said it's a fairly common thing. We've been making  
12 product X forever, and now we invest in an American  
13 company, and lo and behold, we just want to import some  
14 wood. You know, just some wood, and -- and -- and we  
15 can't do it, because we'll be had up under this, because  
16 wood is an important -- some kind of -- is -- 30 percent  
17 of some kind of a patented thing that we've been making  
18 for years.

19 MR. WAXMAN: Justice Breyer --

20 JUSTICE BREYER: So they are worried about  
21 it, in other words.

22 MR. WAXMAN: I -- I think that I -- I -- I  
23 don't think that their worry is validated by a correct  
24 understanding of the statute. Their -- their concern  
25 makes no mention of the requirement that the U.S.

1 manufacturer act -- not send wood, but send a  
2 substantial portion of the components, which wouldn't be  
3 wood or saline solution or something like that, and,  
4 importantly, has to take the additional steps of  
5 actively inducing.

6 And in Grokster, this Court, when it was  
7 underscoring what "active inducement" means, said,  
8 quote, "Showing that the infringement was encouraged  
9 overcomes the law's reluctance to find liability when a  
10 defendant merely sells a commercial product suitable for  
11 some unlawful use."

12 And that is -- that's the point. The point  
13 here is that we're talking about conduct that occurs  
14 only in the United States that must require -- that must  
15 include the act of active inducement, specific intent  
16 and knowledge, and a component or components that  
17 constitute a substantial portion of the components of  
18 the invention. And --

19 JUSTICE SOTOMAYOR: Mr. Waxman --

20 MR. WAXMAN: -- the notion -- I'm --

21 JUSTICE SOTOMAYOR: -- if Life Technologies  
22 sold this polymer to another company that it hadn't had  
23 a relationship with, would that other company be  
24 considered to be infringing?

25 MR. WAXMAN: No. No. I mean, unless --

1 when you say "Life" -- in other words, if --

2 JUSTICE SOTOMAYOR: This company --

3 MR. WAXMAN: -- from the United States --

4 JUSTICE SOTOMAYOR: Any other company but  
5 Life Technologies could have taken this expired patent  
6 in England and brought all of these -- this component,  
7 this polymer, from the United States, and it wouldn't be  
8 liable? What would --

9 MR. WAXMAN: The importation of the -- may I  
10 finish?

11 CHIEF JUSTICE ROBERTS: Sure.

12 MR. WAXMAN: The importation of the polymer  
13 is not reached. A foreign -- a foreign assembler who  
14 imports something from the United States is not touched  
15 by a provision that -- that looks at and addresses only  
16 U.S. conduct.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Four minutes, Mr. Phillips.

19 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

20 ON BEHALF OF THE PETITIONERS

21 MR. PHILLIPS: Thank you, Mr. Chief Justice.

22 I don't intend to use all four minutes.

23 First of all, what I want to respond to is,  
24 you know, my friend has spent a lot of time talking  
25 about active inducement and the mens rea elements of

1 271. And I understand that, and that's certainly a  
2 significant protection.

3 But Congress did not take 271(b) and (c) and  
4 simply apply them in the (f)(1) context or the (f)(2)  
5 context. What it said is, there has to be a substantial  
6 portion, all or a substantial portion. And that's a  
7 fundamentally significant independent requirement that  
8 cannot be satisfied in a situation where you're talking  
9 about a single component.

10 Justice Sotomayor, I just wanted to respond  
11 to your -- you know, the three that are major, it's  
12 important to recognize that two of those are clearly not  
13 coming from the United States. So I go back to the  
14 point you made later, which is, if there are three major  
15 components, how can one of them be the substantial one?  
16 I think the answer is, it cannot be under those  
17 circumstances.

18 Justice Kennedy, you asked the question  
19 about, you know, what are we supposed to do in these  
20 circumstances as -- you know, with supply chains? And  
21 the answer is -- you know, the answer that my colleague  
22 gave you was one that basically says, this is a recipe  
23 for the trolls of the world to go and chase down every  
24 supply opportunity. And do what? Send them notice that  
25 what you're sending is a staple article that's a major

1 component of a piece that's in the patent, and that if  
2 you send -- keep sending that, you're going to violate  
3 that patent and we're going to come after you.

4           And what's that going to do? That's going  
5 to disrupt the supply chain in the United States, and  
6 the ultimate effect is going to be twofold: Either  
7 purchasers outside the U.S. will stop purchasing from  
8 inside the U.S., or U.S. manufacturers will go offshore.  
9 And the one thing we know that 271(f) was never intended  
10 to do was to accomplish that kind of an -- that kind of  
11 an impact -- negative impact on the U.S. economy.

12           I urge the Court to reinstate the -- the  
13 judgment as a matter of law that the District Court  
14 entered.

15           Thank you, Your Honors.

16           CHIEF JUSTICE ROBERTS: Thank you, counsel.  
17 The case is submitted.

18           (Whereupon, at 11:14 a.m., the case in the  
19 above-entitled matter was submitted.)

20

21

22

23

24

25

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