IN THE SUPREME COURT OF THE UNITED STATES

LIFE TECHNOLOGIES CORPORATION, ET AL., Petitioners : No. 14-1538

v.

PROMEGA CORPORATION, Respondent.

Washington, D.C.

Tuesday, December 6, 2016

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

APPEARANCES:

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ZACHARY D. TRIPP, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting the Petitioners.

SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of the Respondent.

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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

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

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

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

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

JUSTICE SOTOMAYOR: Could you tell us --

MR. PHILLIPS: -- a violation.

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

MR. PHILLIPS: Taq polymerase?

JUSTICE SOTOMAYOR: Yes.

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

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

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

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

MR. PHILLIPS: Right.

JUSTICE GINSBURG: -- were made in England.

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

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

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

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

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

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

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

in the U.K.?

MR. PHILLIPS: Yes. Yes, absolutely. And -- and -- and, indeed, in this case, Promega had -- I think Promega -- at least somebody had a patent in the U.K., but that patent had expired, which is, candidly, not surprisingly, why the activity was taken.

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

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

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

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

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

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

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

JUSTICE ALITO: So here, there were five components?

MR. PHILLIPS: Yes, Your Honor.

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

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

JUSTICE ALITO: -- four would be enough?

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

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: But those are --

MR. PHILLIPS: -- to sort out.

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

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

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

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

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

JUSTICE KENNEDY: No, no, no --

MR. PHILLIPS: -- adapted or especially --

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Well --

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

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

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

MR. PHILLIPS: That's exactly --

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

MR. PHILLIPS: Right.

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

MR. PHILLIPS: Yeah --

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

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

(Laughter.)

JUSTICE BREYER: Well, I --

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

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

JUSTICE ALITO: Do you think --

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

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

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

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

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

JUSTICE ALITO: Right.

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

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

--

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

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

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

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

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

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

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

JUSTICE GINSBURG: And what are --

MR. PHILLIPS: -- quantitative analysis.

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

MR. PHILLIPS: This Court in Microsoft said

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Tripp.

ORAL ARGUMENT OF ZACHARY D. TRIPP

FOR UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

MR. TRIPP: Well, I think --

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

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

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

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

So if I could give --

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

MR. TRIPP: I think --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. TRIPP: I -- I think --

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

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

JUSTICE BREYER: That's what worries me.

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

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

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

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

(Laughter.)

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

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

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

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

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

But I think, frankly --

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

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

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

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

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

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

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

MR. TRIPP: Well, no --

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

know what the scope of the combination is.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. WAXMAN: Okay. I got it.

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

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

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

MR. WAXMAN: Okay. That is --

JUSTICE BREYER: Is that illegal?

MR. WAXMAN: -- not illegal, because in

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

JUSTICE BREYER: Exactly.

MR. WAXMAN: Now, after that --

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

MR. WAXMAN: So if the --

JUSTICE BREYER: Yeah. Yeah.

MR. WAXMAN: Sorry.

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

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

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

the work, they import from the United States.

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

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

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

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

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

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

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

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

MR. WAXMAN: Yeah.

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

MR. WAXMAN: So --

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

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

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

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

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

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

JUSTICE GINSBURG: And what were the instructions?

MR. WAXMAN: Excuse me?

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

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

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

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

JUSTICE SOTOMAYOR: Let's assume the --

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

JUSTICE SOTOMAYOR: Sure.

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

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

(Laughter.)

MR. WAXMAN: Thank you very much.

Justice Sotomayor?

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

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

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

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

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

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

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

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

So what would you tell a jury that means?

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

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

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

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

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

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

JUSTICE KENNEDY: Do they have to figure --

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

JUSTICE KENNEDY: Well, that -- that --

MR. WAXMAN: This is the molecule.

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

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

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

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

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

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

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

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

(Laughter.)

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

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

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

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

Congress didn't touch that.

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

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

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

MR. WAXMAN: Justice Breyer --

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

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

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

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

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

JUSTICE SOTOMAYOR: Mr. Waxman --

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

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

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

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

JUSTICE SOTOMAYOR: This company --

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

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

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

CHIEF JUSTICE ROBERTS: Sure.

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Four minutes, Mr. Phillips.

REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONERS

MR. PHILLIPS: Thank you, Mr. Chief Justice. I don't intend to use all four minutes.

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

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

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

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

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

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

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

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

Thank you, Your Honors.

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

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

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