

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 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.)

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