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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 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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21  
22  
23  
24  
25

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