either trial or in the Court of Appeals was that, as a matter of law in a multicomponent product, the article of manufacture must be the portion.

They never said that to the jury. They did propose a jury instruction, 42.1, which directed the jury that that's what it was supposed to do. It also directed the jury to apportion, and the judge didn't approve it. Now, it just so happens that they preserved no relevant objection to --

CHIEF JUSTICE ROBERTS: Mr. Waxman, we're spending an awful lot of time on an issue about what was raised below, what wasn't raised below, what was raised below, what wasn't raised. Maybe it's a good time to turn to Justice Breyer's question.

MR. WAXMAN: I would be very happy to do that.

Justice Breyer, the -- there is no question that in an appropriate case the jury can decide whether the article of manufacture to which the design is applied and to which it provides a distinctive and pleasing appearance could either be the article that's actually sold to consumers, that's bought by consumers, or it could be a component of it.

In the case of a wall hanging, there's really not much dispute. In the case of the cup-holder,

there really isn't much dispute. It is a question of fact for the jury.

We believe that the -- the four factors that the Solicitor General articulated would be appropriate factors to consider.

I think that a -- in a case in which --

JUSTICE KENNEDY: What -- what is the question of fact?

MR. WAXMAN: Here's --

JUSTICE KENNEDY: The article to -- to which the law applies? What -- what is the question of fact?

MR. WAXMAN: Here is what I would say. In a case in which the jury heard evidence as to competing articles of manufacture, as to what total profits should be applied to, the jury would be told, if you find infringement, total profits are awarded on the article of manufacture to which the patented design was applied for the purpose of sale and to which it gives peculiar or distinctive appearance.

You may determine that the article of manufacture is the entire product or a distinct component of that product. In making that determination, you may consider, and this would depend on the evidence in the case, among other factors I would include the Solicitor General's, and there may be other

things. For example, most importantly the identity of what it is that is typically consumed by purchasers. Whether the patented design is likely to cause consumers to purchase the infringing product thinking it to be the patentee's product.

CHIEF JUSTICE ROBERTS: I -- maybe I'm not grasping the difficulties in the case. It seems to me that the design is applied to the exterior case of the phone. It's not applied to the -- all the chips and wires, so why --

MR. WAXMAN: That's right.

CHIEF JUSTICE ROBERTS: So --

MR. WAXMAN: That's absolutely right. And, you know, of course you can't get a design patent on something that the consumer can't see. And yet Congress --

CHIEF JUSTICE ROBERTS: So there should -- there shouldn't be profits awarded based on the entire price of the phone.

MR. WAXMAN: No. The profits are awarded on the article of manufacture to which the design is applied.

CHIEF JUSTICE ROBERTS: The outside, the case is part of it.

MR. WAXMAN: Well, maybe and maybe not. I

think the -- the difficulty here is that it's important to understand that design is not a component and the patented design is not the article of manufacture. The patented design is something that's applied to an article of manufacture.

CHIEF JUSTICE ROBERTS: Okay. Well, these -- these little, the chips and all are articles of manufacture, right? How is the design of the case applied to those chips?

MR. WAXMAN: The same way that -- I mean, if you look at, for example, in the early days, when the patent -- when the design -- when design patents were first permitted by statute in 1842, the first hundred -- of the first hundred patents that were issued, 55 of them were for stoves and furnaces and steam engines and things like that. Congress -- when Congress said that you are entitled, you know, in response to the Dobson cases, that as an alternative remedy, if there is infringement of a design -- which, by the way, does not happen innocently.

When there is infringement of a design, the patentee may choose an alternative remedy which is essentially to have the jury put him or her in the shoes of the infringer. That is, to -- to disgorge the profits from the article to which the design was

applied.

There's no doubt the steam engine had plenty of working components, but a design is not a component. A design is applied to a thing. And the jury has to decide in the case of the VW Beetle that you have either a cup-holder or a patented hubcap, or the iconic shape of the car, I think that a jury could very well conclude that because someone who sees the iconic shape of a VW Beetle and buys it thinks that they are buying the Beetle, that is, after all the reason why the infringer copied it.

The -- we know from Samsung's own documents in this case, for example, that are recounted in our brief, Samsung realized that it faced what this executive called a crisis of design. And the crisis of design was reflected, the documents show, in the telephone company saying, you have to create something like the iPhone, and a directive came out to create something like the iPhone so we can stop use -- losing sales. And in three months --

JUSTICE SOTOMAYOR: Mr. Waxman, can we go back to the government's test, because if -- so far your test has a lot of steps, but I don't know what it's going towards. Okay.

They suggest two things. Article of

manufacture is the article of manufacture. They have a four-part test. Do you agree that that four-part test with respect to identifying just the article of manufacture?

MR. WAXMAN: Yes, with the following caveat only. What -- the factors that the jury will be told will depend on the evidence that the parties educe --

JUSTICE SOTOMAYOR: Please don't go to the -- to the record.

MR. WAXMAN: I'm not going to the -- I'm sticking with the test.

JUSTICE SOTOMAYOR: All right. That's the test.

MR. WAXMAN: Okay.

JUSTICE SOTOMAYOR: So let's assume, because it makes logical sense to me, it may not to anybody else, okay, that the Volkswagen body, not the innards, are the article of manufacture.

Now, the government would say, go to the second test, which takes in some of the things that you were talking about, to figure out how much of the profits that VW makes from the Bug are attributable to the shape of the car.

Now, as Justice Alito said, some people don't care a wit about the shape of the car. They want

just a small car. They want the car that has a certain trunk. People buy cars for a multitude of reasons.

Experts would come in and say, but it's 90 percent of the profits. It may be that the body accounts for only 10 percent of the cost of the car, but 90 percent of the profits are attributable to the shape of the car. What's wrong with that analysis?

That's what I understand the government's analysis to be. That that's what a jury has to be told to do, to decide how much value the design is to the product being sold. That's the government's test in a nutshell.

MR. WAXMAN: So -- okay. So this is a test that the government has articulated here at oral argument. It has not been briefed by anybody.

The issue of how you calculate total profits on something less than the whole article as sold was wrestled with, I think, best by the Second Circuit in the second Piano case, where in the second Piano case, the Court said, well, okay, the first part of the test, how do you determine what the article of manufacture is, hasn't provided a lot of difficulty. The real difficulty is in calculating a hundred percent of the profits from that article of manufacture.

The -- the few courts that have addressed

this that I've seen it have done it in a way that I think probably makes the most sense and is the least difficult conceptually which is to say, okay, what were the costs of producing that article, that particular subcomponent, and what was the company's profit margin on the product as a whole applied to that little component?

Now, the difficulty with that -- I mean, I think that's what courts have generally done. And what it underscores, and in appropriate cases it may be appropriate, like the cup-holder example, but what it underscores is the very --

JUSTICE SOTOMAYOR: Please don't get off track.

MR. WAXMAN: Okay.

JUSTICE SOTOMAYOR: Do you endorse that part of the government's test? How we measure it, you're saying, hasn't been briefed adequately. The government is saying the same thing. But is -- conceptually, is that right?

MR. WAXMAN: Conceptually, it is correct that under Section 289 the patentee is entitled to the total profits on the sale of the articles of manufacture to which the design has been applied. That is relatively straightforward when, in a contested case,

the jury concludes that the article of manufacture is the product that's sold. It is more complicated when the jury concludes that the relevant article of manufacture, as was the case in the piano cases where customers could choose an array of cases in which to put the piano mechanism, it is more difficult to figure out total profits from the manufacture and sale of the case.

But the decided cases that I have seen have looked at the question what was the manufacture -- what were the direct costs associated with producing the relevant piano cases and what was the profit margin on the piano as applied to that.

And may I just add one other point which I think is still on track. The problem with that is that it runs headlong into the kind of thing that Congress was concerned about in 1887 when it passed the Design Patent Act, because the concern was that counterfeiters and copyists would -- if the only penalty -- if the only compensation was something that could be viewed as the cost of doing business, that is okay, you're going to get a 10 percent margin on $2.50 for what it cost to produce this little component, there would be no deterrents to what Congress deemed to be an emergency.

Yes, Justice Kagan.

JUSTICE KAGAN: Let's take a case -- and I

think that the VW example is a good example for this reason -- where the thing that makes the product distinctive does not cost all that much. There's not been a lot of input. Somebody just -- some engineer or some graphic artist or whatever woke up one day and said I just have this great idea for an appearance. But that's the principal reason why the product has been successful. I mean, the car has to run, and it has to do all the other things that cars do, but the principal reason why the car has been successful has to do with this particular appearance, the design.

As I understood the government, that does not come into the first inquiry. That does not come into the question of what is the article. It only comes into the second inquiry, which is how much of the profits are attributable to that article.

Do you agree with that?

MR. WAXMAN: I don't think that that -- I don't agree with -- if that is the government's test as you have articulated it, I wouldn't agree with that. I think that the government's -- if you look at the government's factors, you know, one factor is the relative prominence of the design within the product as a whole. And the government says that whether the design -- in other words, whether the design is a

significant attribute of the entire product affecting the appearance of the product as a whole would suggest that the article should be the product.

Another factor in the government's test is the physical relationship between the patented design and the rest of the product. In other words, as the government's brief says, can the user or the seller physically separate it, or is it manufactured separately.

Another factor is whether the design is conceptually different from the product as a whole, as, for example, a design on a book binding is different from the intellectual property reflected in the copyright material in the book. Those -- we agree with all those factors as relevant, but I do think directly, you know, speaking to the question that you raised, the first factor that I mentioned, the relative prominence of the design within the product of the whole is in essence asking -- and it is a relevant question in determining the article of manufacture -- whether the patented design is likely to cause the consumers to purchase the infringing product thinking it to be the patentee's product. So in the VW Beetle example -- I can't bring myself to call it a "bug." In the VW Beetle example, nobody would look at the cup-holder that was

similar to what was in a VW Beetle that was in a Jeep or a Porsche and say, oh, this must be a VW. But somebody who looked at the exterior of a Jeep that copied the iconic side profile of the VW Beetle might very well say that, and a jury would take that into account.

JUSTICE KENNEDY: Is the approach -- is the approach that you're discussing fairly described as "apportionment," or is that a bad word?

MR. WAXMAN: That is a really bad word. And if there's a -- I mean, in some --

JUSTICE KENNEDY: What other -- what -- what word would you use to describe your approach?

MR. WAXMAN: What is the thing, the article of manufacture, to which the design is applied for purposes of sale in order to give it a distinctive and pleasing appearance. Apportionment is what their expert, Mr. Wagner, tried to do in his report saying the total profits on the phone are X hundreds of millions of dollars, but I find that only one percent of consumers buy phones because of the front face of the phone either off or on.

JUSTICE KENNEDY: But once you've identified the relevant article, then it seems to me necessarily what you're doing is apportioning profits. I just don't see how we can get away from that word.

MR. WAXMAN: Yes. In this sense, Justice Kennedy, the vernacular sense of "apportionment," once you -- if you -- if the jury answers the question at step 1 and says no, no, no, the article of manufacture is the refrigerator latch or the cup-holder, how do we determine total profits from the sale of that thing? You do have to engage in a kind of an apportionment that looks to how much did it cost to make the cup-holder and what is the -- you know, what is the profit margin for the car or the refrigerator or something like that. That, it seems to me, is the way that you would do it if you found it.

So, you know, in this case it's a little difficult to figure out what the alternative article of manufacture would be. I mean, in the trial court even before the trial judge, they never even suggested what the article of manufacture could be for the 305 patent, the graphical user interface. And --

JUSTICE ALITO: Listing factors is not helpful unless the jury or whoever the fact finder is knows what the determination must -- what determination must be made. The factors are helpful in making the determination.

Now what you just said about the article of manufacture is, it is the thing to which the design is

applied. Is that -- is that basically what you said?

MR. WAXMAN: What I would tell the jury is quoting the statute and this Court's decision in 1872 decision in Gorham, is that the article of manufacture is the thing to which the design is applied for purposes of sale, and to which it gives distinctive and pleasing, attractive appearance. That's all you're trying to find out --

JUSTICE ALITO: Yeah, but in a physical sense -- that -- you can answer it easily, and that's what the Chief Justice was talking about. It's applied to the outside in a physical sense. But you mean it in a different sense, and I don't really understand what -- what that means. Once you get beyond the pure -- where is the design applied? Is it applied to the inside? No. It's applied to the outside.

MR. WAXMAN: Well, the design, by definition, applies to the outside. It has to apply to something that --

JUSTICE ALITO: Okay. So when you say what it's applied to, you're not talking about it in terms of the physical world, so what is -- what are you talking about?

MR. WAXMAN: The jury is being asked to decide was this -- if you find that this was a -- that

this was a patentable design and you find under Gorham that it was infringed, what is the thing to which that design was applied to give it a pleasing appearance. Obviously, it's not a transistor or some circuit or the software. It is applied to the phone. Now, they could if they had, if they had wanted to, suggested to the jury no, no, no, the relevance --

CHIEF JUSTICE ROBERTS: It's applied to the outside of the phone.

MR. WAXMAN: Well, it's applied -- Justice -- Mr. Chief justice, it's always applied to the outside of an article. It has to be applied to the outside of an article.

I see my time is expired. Thank you very much.

CHIEF JUSTICE ROBERTS: Thank you, counsel. Miss Sullivan. Four minutes.

REBUTTAL ARGUMENT OF KATHLEEN M. SULLIVAN

ON BEHALF OF THE PETITIONERS

MS. SULLIVAN: Mr. Chief Justice, and may it please the Court:

Justice Kennedy, Congress did not say that all apportionment is forbidden. Congress said you can't apportion the value of the design in relation to the article. We're conceding that here. What Congress did

not say is you can't segregate the proper article from the other articles that make up the product. So we can segregate article from other articles within the product. And, in fact, Section 289 requires us to do that because it allows total profit only from that article of manufacture to which the design has applied.

Now, the test that we ask the Court to announce on remand. As has been discussed, it has two parts.

The first is -- the antecedent question is identify the relevant article of manufacture. Sometimes that will be very easy if you do it from two main factors. What does the patent scope claim, a front face, or as the Chief Justice said, the exterior casing? And, in fact, we asked Mr. Chief Justice for the instruction, you allude to it, blue brief 21, we actually asked the jury to be told that where the article of manufacture is a case or external housing, that's the article of manufacture.

The second question is quantum of profits. And I think Justice Kagan put it exactly right in saying that a lot of the expert determinations about how much did the Beetle exterior drive demand will come into play, as the government said and we agree, only at the second question: What is the quantum of profits from

the right article of manufacture?

But, Justice Alito, you asked how similar are we to the government's test? And, Justice Kennedy, you asked if this will lead to a lot of inconsistency among juries.

We think the answer to the first question can be made more consistent and uniform if we focus mainly on two factors: What does the design in the patent claim: front face, exterior casing holding the front face? And second, what is the product to which it has been applied? That will help judges to guide juries.

We think we should have had instruction 42.1, but in a proper case, you might decide at summary judgment that the article of manufacture is the front face, and that could be instructed to the jury.

JUSTICE BREYER: The problem, of course, is that Congress meant the whole wallpaper, even though they only want to apply it to the front.

MS. SULLIVAN: Your Honor --

JUSTICE BREYER: And that's the problem in the case. So I thought -- and that's why I pointed to the brief I did point to -- that history is matters here, and we're talking here about a multicomponent product.

MS. SULLIVAN: That's right, Your Honor.

JUSTICE BREYER: And if you don't tell the jury that there is that distinction, I think you either disregard what Congress meant in its statute or you create the kind of absurd results that your brief is full of. So that's what I'm looking for.

MS. SULLIVAN: Your Honor --

JUSTICE BREYER: And that's why I looked at page 23, and it says that seems to do it.

MS. SULLIVAN: We're fine with page 23 of the tech company's brief, and that points to why you must remand in this case.

This case was tried under the improper rule of law. We tried at every juncture to get the correct rule of law adopted. And the district court said, I forbade apportionment. And we said, no, no, we're not asking for apportionment; we're asking for article of manufacture. And we were shut down over and over again on that.

So you must remand and tell the nation's economy that no one can claim a partial design patent on a portion of a front face of an electronic device and come in and get the entire profits on the phone. Juries should be instructed that the article of manufacture either is the Beetle exterior or there might be, Justice

Breyer, still today, there might be cases of unitary articles, just like the Dobson rugs. The Gorham spoon might be a unitary article. The patents on the handle, but nobody really cares about the sipping cup of the spoon. So we say the article of manufacture is the spoon. And if you get the profits from the spoon, that's all right.

JUSTICE GINSBURG: Who has the burden of showing what is the relevant article? I assume in a case like this, Apple will say it's the whole phone.

MS. SULLIVAN: Justice Ginsburg, if I leave you with the most important disagreement we have with the government and with Apple, the burden is on the plaintiff. The burden is on the plaintiff to show what the article of manufacture is.

Why is that? The burden is on the plaintiff to show damages. And subsidiary questions subsumed in what the damages are are also always the plaintiff's burden, as the entire market value rule in the Federal Circuit shows. With respect, we request that you remand -- vacate and remand.

Thank you very much, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:07 a.m., the case in the

above-entitled matter was submitted.)

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