

















































































1 JUSTICE BREYER: Okay. Now, why not?

2 MR. WAXMAN: Okay. I -- I understand your  
3 question, and I just want to bookmark the fact that I  
4 have not yet had a chance to answer Justice Ginsburg's  
5 question.

6 JUSTICE BREYER: Oh. Then go ahead and  
7 answer her question. At some point you can come back to  
8 it.

9 MR. WAXMAN: Okay. I'll answer Justice  
10 Ginsburg first and then Justice Breyer.

11 Justice Ginsburg, the only thing that  
12 Samsung was precluded from doing -- and this happened in  
13 the Daubert ruling with respect to their expert report,  
14 Mr. Wagner's report -- was they -- he was not allowed to  
15 present evidence about that -- about the value of design  
16 to the total product as a whole. That was  
17 apportionment, Judge Koh said.

18 He wanted -- he calculated total profits  
19 based on the phone. And his report then said, well, but  
20 I believe that only 1 percent of the value of the phone  
21 is due to the design or the design of the iconic front  
22 face of the phone. And that, she wouldn't allow him to  
23 do because that was apportionment.

24 The question -- the only issue with respect  
25 to article of manufacture that Samsung ever made in

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

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

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

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

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

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

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

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

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

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

9 MR. WAXMAN: Here's --

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

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

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

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

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

11 MR. WAXMAN: That's right.

12 CHIEF JUSTICE ROBERTS: So --

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

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

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

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

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



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

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

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

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

1 applied.

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

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

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

25           They suggest two things. Article of

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

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

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

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

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

14 MR. WAXMAN: Okay.

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

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

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

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

3 Experts would come in and say, but it's  
4 90 percent of the profits. It may be that the body  
5 accounts for only 10 percent of the cost of the car, but  
6 90 percent of the profits are attributable to the shape  
7 of the car. What's wrong with that analysis?

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

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

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

25 The -- the few courts that have addressed

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

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

13                   JUSTICE SOTOMAYOR: Please don't get off  
14 track.

15                   MR. WAXMAN: Okay.

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

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

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

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

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

24 Yes, Justice Kagan.

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

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

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

17 Do you agree with that?

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 REBUTTAL ARGUMENT OF KATHLEEN M. SULLIVAN

19 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

1 the right article of manufacture?

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

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

13 We think we should have had instruction  
14 42.1, but in a proper case, you might decide at summary  
15 judgment that the article of manufacture is the front  
16 face, and that could be instructed to the jury.

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

20 MS. SULLIVAN: Your Honor --

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

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

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

7 MS. SULLIVAN: Your Honor --

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

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

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

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

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

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

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

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

22 Thank you very much, Your Honor.

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

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



1 above-entitled matter was submitted.)  
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