



1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SAMSUNG ELECTRONICS CO., :

4 LTD., ET AL., :

5 Petitioners : No. 15-777

6 v. :

7 APPLE, INC., :

8 Respondent. :

9 - - - - - x

10 Washington, D.C.

11 Tuesday, October 11, 2016

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:05 a.m.

16 APPEARANCES:

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18 the Petitioners.

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20 General, Department of Justice, Washington, D.C.;;
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22 neither party.

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24 Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case No. 15-777, Samsung Electronics v. Apple, Incorporated.

Ms. Sullivan.

ORAL ARGUMENT OF KATHLEEN M. SULLIVAN

ON BEHALF OF THE PETITIONERS

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

A smartphone is smart because it contains hundreds of thousands of the technologies that make it work. But the Federal Circuit held that Section 289 of the Patent Act entitles the holder of a single design patent on a portion of the appearance of the phone to total profit on the entire phone.

That result makes no sense. A single design patent on the portion of the appearance of a phone should not entitle the design-patent holder to all the profit on the entire phone.

Section 289 does not require that result, and as this case comes to the Court on the briefing, Apple and the government now agree that Section 289 does not require that result. We respectfully ask that the Court hold that when a design patent claims a design

1 that is applied to a component of a phone or a component
2 of a product, or, to use the language of Section 289,
3 when a design patent is applied to an article of
4 manufacture within a multi-article product, we request
5 that you hold that Section 289 entitles the
6 patent-holder to total profit on the article of
7 manufacture to which the design patent is applied, and
8 not the profits on the total product.

9 JUSTICE KENNEDY: The problem is, is how to
10 instruct the jury on that point. Both parties, not the
11 government, both parties kind of leave it up and say,
12 oh, give it to the juror. If I were the juror, I simply
13 wouldn't know what to do under your -- under your test.

14 My preference, if -- if I were just making
15 another sensible rule, is we'd have market studies to
16 see how the -- the extent to which the design affected
17 the consumer, and then the jury would have something to
18 do that. But that's apportionment, which runs headlong
19 into the statute.

20 You can't really have apportionment, so it
21 seems to me you leave us with no -- one choice is to
22 have a de minimis exception, like the cup-holder example
23 that's in the car -- maybe the boat windshield, which is
24 a little more difficult -- and just follow the -- and
25 just follow the words of the statute. But it seems to

1 me neither side gives us an instruction to work with.

2 MS. SULLIVAN: Your Honor --

3 JUSTICE KENNEDY: One -- I mean, it's one
4 thing to leave it to the jury. It's the other thing --
5 if I were the juror, I wouldn't know what to do under
6 your brief.

7 MS. SULLIVAN: Your Honor, we do not propose
8 a test that simply leaves it to the jury without
9 guidance. The instruction we proposed and that was
10 rejected by the district court appears in the blue brief
11 at page 21, and what we would have told the jury is that
12 the article of manufacture to which a design has been
13 applied is the part or portion of the product as sold
14 that incorporates or embodies the subject matter of the
15 patent.

16 So, Justice Kennedy, our test is very
17 simple.

18 JUSTICE KENNEDY: If I'm the juror, I just
19 don't know what to do. I'd have the iPhone in the jury
20 room; I'd -- I'd look at it. I just wouldn't know.

21 MS. SULLIVAN: Your Honor, what we
22 respectfully suggest is that there are two parts to the
23 test for what constitutes an article of manufacture.
24 And to be clear, I'm now stressing our
25 article-of-manufacture argument, not the causation

1 argument we gave as an alternative.

2 As the case comes to the Court, all we ask
3 is that you rule in favor of us on article of
4 manufacture.

5 And, Justice Kennedy, the statute tells us
6 what to look at --

7 JUSTICE KAGAN: Could I really quickly make
8 sure I understand that, that in other words, you're --
9 you're saying we should only look to what an article of
10 manufacture is and not your other argument that there
11 should be apportionment as to any particular article of
12 manufacture.

13 MS. SULLIVAN: That is correct, Your Honor.
14 We're pressing here, as you all you need to resolve the
15 case, that a jury should be instructed that total profit
16 must be profit derived from the article of manufacture
17 to which the design has been applied.

18 And, Your Honor, the statute does support
19 our test because the statute asks us to look at the
20 article of manufacture to which the design has been
21 applied.

22 JUSTICE GINSBURG: And what is that in
23 this -- in this case?

24 MS. SULLIVAN: Your Honor, in this case it
25 is -- there are three patents. The D'677 is on the

1 front face of a phone. The rectangular, round-cornered
2 front face of a phone.

3 In the D'087, it's also the rectangular,
4 round-cornered front face of the phone with certain
5 aspect ratio and corner radii.

6 In the D'305, it is the display screen on
7 which the graphical user interface appears.

8 So, to answer Justice Kennedy's question,
9 the jury should have been instructed either with our
10 instruction: Instruction 42.1 would have said to the
11 jury, I'm giving you guidance. There's an article of
12 manufacture here, but it may be less than the entire
13 phone. The article of manufacture may be a part or
14 portion of the phone, and you should look at two things,
15 Your Honor.

16 You should look at the patent, and, Justice
17 Kennedy, with respect -- you shouldn't just look at
18 the -- at the phones in the jury room. You ought to
19 look at the patent because, Justice Ginsburg, the patent
20 is going to be the best guide to what the design is
21 applied to in many, many cases, as in this case.

22 JUSTICE SOTOMAYOR: Ms. Sullivan, you seem
23 to be arguing, as when you opened, that as a matter of
24 law, you were right. And I don't see that as a matter
25 of law.

1 I believe that your basic argument, everyone
2 is in agreement, that the test is an article of
3 manufacture for purposes of sale.

4 But I am like Justice Kennedy, which is, how
5 do we announce the right test for that? Because the
6 phone could be seen by a public -- a purchasing consumer
7 as being just that rounded edge, slim outer shell. That
8 might be what drives the sale. I don't know.

9 Certainly your expert didn't tell me how to
10 figure out the component part. I don't know where in
11 the record you would have enough to survive your
12 argument.

13 MS. SULLIVAN: So, Your Honor, let me back
14 up and restate the test, the burden, and the evidence.

15 The -- the test -- and I want to agree with
16 Your Honor. To be clear, we say that what the Federal
17 Circuit held was wrong as a matter of law. It is wrong
18 as a matter of law to hold that the entire product is
19 necessarily the article of manufacture from which you
20 measure total profit. That's wrong as a matter of law,
21 but we did not argue, Your Honor, that the test has to
22 hold we're right on the article as a matter of law.

23 It's an -- it's a -- it's a question of
24 either fact or, as you said in Markman, a mongrel
25 question of law and fact.

1 And why does it involve both? Because we
2 know that district courts look at patents. You assign
3 them that task in Markman, and we perform it daily. And
4 when they look at a patent for a claim construction,
5 we're asking for part of the test to be very similar.

6 The district court can look at the patent
7 and say, oh, this is Apple's front face patent. This
8 isn't one of Apple's 13 other patents on other parts of
9 the phone, or Apple's other patent on the design of the
10 entire case. This is the front face patent.

11 JUSTICE GINSBURG: Then how do -- how would
12 you determine the profit attributable to the relevant
13 article of manufacture?

14 MS. SULLIVAN: Three ways, Your Honor.

15 First, through ordinary accounting that
16 would look to the cost of goods sold in relation to
17 revenues for the relevant component.

18 You could look, if -- if a company buys the
19 component from an original equipment manufacturer, you
20 would look to their profit margins and apply that.

21 If, as sometimes happens within a company,
22 one division makes the glass front face and another
23 division makes the innards of the phone, you would find
24 out the transfer pricing between the divisions.

25 JUSTICE KENNEDY: So we find out the -- the

1 production cost if -- if a billion dollars were spent on
2 the inner parts and a hundred million was spent on the
3 face, then it's a 10:1 ratio.

4 MS. SULLIVAN: That's absolutely right, Your
5 Honor. Apple didn't --

6 JUSTICE KENNEDY: So you'd have expert
7 testimony on all of that.

8 MS. SULLIVAN: Yes, Your Honor, you would.
9 And you would -- but that's just one way.

10 JUSTICE KENNEDY: Suppose -- suppose you had
11 a case where it's a stroke of genius, the design. In --
12 in two days, they come up with a design -- let's --
13 let's assume the Volkswagen Beetle analogy that some of
14 the briefs refer to. Suppose the Volkswagen Beetle
15 design was done in three days, and it was a stroke of
16 genius and it identified the car. Then it seems to me
17 that that's quite unfair to say, well, we give three
18 days' profit, but then it took 100,000 hours to develop
19 the motor.

20 MS. SULLIVAN: Well, Your Honor, here's what
21 we would do with the Beetle.

22 JUSTICE KENNEDY: I mean, that's what -- it
23 seems to me that that's what you would be arguing.

24 MS. SULLIVAN: It's not, Your Honor. To
25 answer Justice Ginsburg's question, there are three ways

1 Apple could have but did not even attempt to prove the
2 total profit from the relevant article of manufactures
3 here, the front face, or the display screen. One could
4 have been accounting. One could have been consumer
5 demand evidence, Justice Kennedy, as you suggested.
6 Apple could have said well, people really like the front
7 face disproportionately to all the other parts of the
8 phone, so they could have used consumer survey evidence
9 to prove that. But -- and so accounting evidence or
10 indirect evidence through consumer survey. But, Your
11 Honor, as to the Beetle, we concede that the total
12 profit from the article of manufacture may sometimes be
13 a substantial part of the total profit on the product.

14 Let's take the Beetle, or let's take a cool,
15 shark-shaped exterior body on a car like the Corvette.
16 It may be that the article of manufacture to which the
17 design patent is applied is just the exterior body of
18 the car, but it may be that nobody really wants to pay
19 much for the innards of the Corvette or the Beetle.
20 They want to pay for the cool way it looks.

21 If that's so, it should be open to the
22 patent-holder to prove that the bulk of the profits come
23 from the exterior of the car.

24 JUSTICE ALITO: Is there any difference in
25 practical terms between that and your causation argument

1 or apportionment?

2 MS. SULLIVAN: Yes, Justice Alito.

3 JUSTICE ALITO: What is the difference?

4 MS. SULLIVAN: The difference is we concede
5 under article of manufacture that the holder of the
6 patent gets profit from the article, even if the profit
7 does not come entirely from the design.

8 Let me give you an example with a phone's
9 front face. Consumers may value the front face because
10 it's scratch-resistant, because it's water-resistant,
11 because it's shatterproof. We're going to give the
12 patent-holder under our article-of-manufacture test all
13 the profits for the front face, even if it includes
14 profit from those non-design features of the front face,
15 where the pure apportionment test or pure causation test
16 would limit the profits to the profits from the design
17 parts rather than the functional parts. So, Your Honor,
18 that's a little bit overinclusive. We're getting a
19 little more with article of manufacture than we do with
20 a pure causation test, and plaintiffs should be happy
21 for that.

22 But the reason we think it's consistent with
23 Congress's purpose, Your Honor, is that what Congress
24 was trying to do was provide a rule that gives
25 design-patent holders total profit from the article of

1 manufacture.

2 That's a little bit overinclusive, because
3 if you get total profit on the rugs that were at issue
4 in the Dobson cases, you'll get a little profit from the
5 design, and there will be a little extra you're getting
6 perhaps from the fiber or the weave. We think Congress
7 was entitled to exercise its fact-finding power to say
8 that it is appropriate as a matter of causation to say
9 that design causes value in a single article product
10 like a rug.

11 JUSTICE SOTOMAYOR: Now, I look at this
12 record, and they were claiming the profits on the whole
13 phone. If you read the Federal Circuit's decision, they
14 were saying people buy -- bought this product mostly --
15 this was their argument to the jury and it sold the
16 Federal Circuit -- because of the look of this phone,
17 that, you know, all smartphones basically function the
18 same. People don't really put much value on the unit.
19 This is what they were arguing, and they put on an
20 expert that gave total profits. If the jury credited
21 them, could you -- and you were properly -- it was a
22 properly instructed jury, could you overturn that
23 finding?

24 MS. SULLIVAN: Your Honor, let's go back to
25 the proper instruction. The jury was not properly

1 instructed here.

2 JUSTICE SOTOMAYOR: I accept that,
3 Miss Sullivan. I'm asking you --

4 MS. SULLIVAN: Two answers, Your Honor. If
5 the article of manufacture was the entire ornamental
6 appearance of the phone and Apple does have a patent on
7 the entire outside of the phone, why didn't they assert
8 it here? Because the entire outside of a Samsung phone
9 does not look substantially similar to the entire
10 outside of a Samsung phone. The reason why design
11 patents carve the product up into multiple partial
12 design claims is so they can make a narrow infringement
13 argument and find a little sliver of the phone on which
14 infringement can be found, and it's inappropriate to
15 give total profit when they do that.

16 So, Your Honor, if there had been a design
17 patent on the entire case, then, yes, absolutely, Apple
18 could have tried to get total profit on the entire case.

19 JUSTICE SOTOMAYOR: And you're answering
20 "no" to my question. You're saying a properly
21 instructed jury on the evidence presented in this case
22 could not have found for Apple. Is that what --

23 MS. SULLIVAN: That is correct, Your Honor.
24 That is very much our position.

25 JUSTICE SOTOMAYOR: So besides the jury

1 instruction, what was the legal error?

2 MS. SULLIVAN: The legal error was in the
3 jury instruction --

4 JUSTICE SOTOMAYOR: I said besides a
5 properly instructed jury, could they have found in favor
6 of Apple on the evidence presented?

7 MS. SULLIVAN: They could not, Your Honor,
8 because --

9 JUSTICE SOTOMAYOR: And so what, besides the
10 jury instruction -- 'cause I'm assuming that a proper
11 instruction was given -- what would have been the legal
12 error?

13 MS. SULLIVAN: There would have been -- no
14 reasonable jury could have found on this record that the
15 entire product was the article of manufacture to which
16 the design has been applied. Two reasons.

17 One, design patents cover ornamental
18 appearance. They cannot, by definition, cover the
19 innards of the phone. So the functional innards of the
20 phone cannot be part of what is claimed by the design
21 patent.

22 JUSTICE SOTOMAYOR: Well, you can't claim
23 the design patent for a Volkswagen doesn't cover the
24 innards, but you just admitted that a jury could find
25 its -- could find that the consumers and others would

1 perceive the Volkswagen to be a Volkswagen by its looks
2 only.

3 MS. SULLIVAN: Your Honor, we're talking
4 about design patents, not trademark or copyright.
5 There's no requirement of consumer confusion here on
6 the --

7 JUSTICE SOTOMAYOR: I don't disagree with
8 you, but --

9 MS. SULLIVAN: Your Honor, let me answer
10 your question as precisely as I can. Just because you
11 can show that most of the profit comes from the Beetle
12 exterior does not mean the car is the article of
13 manufacture. There's two steps here in our test.

14 First, determine what is the article of
15 manufacture.

16 Then second step, determine the quantum of
17 damages, quantum of profits in this case, from that
18 article.

19 Under your hypo, what -- if Apple got almost
20 all its profits from the exterior case, people were
21 indifferent to whether they could read their e-mail,
22 navigate, take photos, or any other functions. If you
23 could prove that it's a counterfactual that couldn't
24 happen, but if you could prove that, as in the Corvette
25 or the Beetle hypo, then the total profit from the

1 article of manufacture could be a substantial portion of
2 the total product and the profit. That's not this case.

3 JUSTICE GINSBURG: Did Samsung, at the
4 trial, propose basing damages on profits from an article
5 less than the whole phone?

6 MS. SULLIVAN: Six times, Your Honor. And
7 we were rebuffed every time. At the -- in the jury
8 instruction -- sorry. At the -- before the trial began,
9 we submitted a legal brief. It's Docket 1322. We said
10 very clearly article of manufacture is less than the
11 total phone and profit should be limited to the profit
12 from the article. We said again in the jury
13 instructions -- and here I would refer you respectfully
14 to joint Appendix 206, 207 and to the result of that on
15 petition Appendix 165A. What happened is we went to the
16 court and we said please listen to us about article of
17 manufacture, if you only get the total profit on the
18 article. The district court said, no, I already said no
19 apportionment back in the Daubert. Because I said no
20 apportionment, she shut us out of both theories. The
21 district court shut us out of article of manufacture as
22 the basis for total profit, and it shut us out of
23 causation or apportionment, which we don't press here.

24 So that's twice. Our legal brief, our
25 charge conference. And then again in our 50A and the

1 key rulings on 50A at the close of evidence, we again
2 said article is separate from apportionment, and the
3 article here is less than the phone. At 197 we said
4 at -- sorry. At JA197 we again said article is less
5 than the phone. And in the 50B at the close of the
6 first trial, we again said article is less than the
7 phone.

8 Second trial happens on certain phones.
9 Again, in the 50A and the 50B, the trial court says
10 again, I have ruled that there's no apportionment for
11 design patents. You cannot talk to me about article of
12 manufacture. We tried over and over and over again to
13 get the article of manufacture's theory embraced, and we
14 were rejected. And why does that matter, Your Honor?
15 Because there was evidence in the case from which a
16 reasonable, properly instructed jury could have found
17 that the components were the front face, the front face,
18 and the display screen. And the evidence came out of
19 Apple's own witnesses, which we're certainly entitled to
20 rely on. Your Honor, Apple's own witnesses again and
21 again said what are you claiming. And when the
22 witnesses got on to talk about infringement, they didn't
23 say the whole phone, the look and feel. They said we're
24 claiming a very specific front face, and by the way,
25 ignore the home button. We're claiming a very specific

1 front face and surrounding bezel, and by the way, ignore
2 everything that's outside the dotted lines.

3 And if I could just remind you that we've
4 reprinted the patents for you to see, and they may look
5 like an iPhone on page 7, which is the D'677. They may
6 look like an iPhone in the D'087, which was in
7 Blueberry, set 8, but the claim is not for the iPhone.
8 The claim is for the small portion of the external
9 appearance of the phone that is inside the solid line.
10 Apple disclaimed everything outside the solid line. It
11 disclaimed portions of the front face with dotted lines.

12 And Your Honor, the question for the jury
13 was not did people think that the look and feel of an
14 iPhone was great. The question for the jury was did the
15 very small portion of a smartphone that Samsung makes
16 look substantially similar to the very small portion of
17 the patent claim?

18 Now that, Your Honor, there is no basis in
19 this record for a conclusion that the entire product,
20 profit on the phone, corresponds to the entire profit
21 from those articles. What Apple should have done is
22 done either of the two things we discussed earlier,
23 accounting evidence about revenues minus cost of goods
24 sold on the components, or it should have done consumer
25 survey evidence like our expert did.

1 JUSTICE ALITO: The Solicitor General has
2 proposed a test with four factors to determine the
3 article question. Do you agree with those? Are there
4 others you would add?

5 MS. SULLIVAN: Your Honor, I'll answer
6 briefly, and then I'd like to reserve my time.

7 We -- we like the Solicitor General's test.
8 We propose a briefer test that we think is more
9 administrable. We propose that you look to two factors:
10 The design in the patent and the accused product. We
11 think our test is more administrable, and it can often
12 be done, Justice Kennedy, by judges as they do in
13 Markman, who will then instruct the jury and give them
14 guidance. And I'll be happy to explain further on
15 rebuttal. Thank you very much.

16 I'd like to reserve the balance of my time,
17 Mr. Chief Justice.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.
19 Mr. Fletcher.

20 ORAL ARGUMENT OF BRIAN H. FLETCHER
21 FOR UNITED STATES, AS AMICUS CURIAE,
22 SUPPORTING NEITHER PARTY

23 MR. FLETCHER: Thank you, Mr. Chief Justice,
24 and may it please the Court:

25 This case presents two related questions

1 about the scope of the remedy that's available for
2 design-patent infringement under Section 289. If I
3 understood my friend Ms. Sullivan's presentation
4 correctly, the parties are now in agreement about both
5 of those legal questions.

6 Just to summarize briefly, first, the court
7 of appeals correctly held that Section 289's provision
8 for an award of total profits means that the
9 patent-holder can recover all of the profits from the
10 sale of the infringing articles and manufacture and not
11 just the portion of the profits that the patent-holder
12 can prove was caused by or attributable to the design as
13 opposed to other features of the article.

14 But second, we read the court of appeals'
15 opinion to have held that the relevant article of
16 manufacture for which profits are owed is always the
17 entire product that the infringer sells to customers.
18 And we think that's a mistake, and we understand all
19 parties to agree with that now.

20 Instead, the relevant article of manufacture
21 to which a patented design may be applied will sometimes
22 be a part or a component of a larger product sold in
23 commerce. And when that is the case, all parties now
24 agree that the patent-holder is entitled only to the
25 profits from that infringing article and not to all --

1 JUSTICE GINSBURG: When the -- when the
2 component -- when the article of manufacture isn't sold
3 apart from the entire product, how should the -- the
4 judge charge the jury on determining the profit
5 attributable to the infringing article?

6 MR. FLETCHER: So we think that there'd be
7 two factual questions in a case where that's disputed.
8 The first one would be what is the relevant article, and
9 there may be a dispute on that as there is in this case.

10 The second question, once the fact-finder
11 identifies the relevant article, is the question that
12 you asked, which is how much of the total profits from
13 the device are attributable to the infringing article?

14 JUSTICE SOTOMAYOR: What's the first step,
15 and how do you figure it out?

16 JUSTICE GINSBURG: May he -- may he complete
17 his answer to my question?

18 MR. FLETCHER: So Justice Ginsburg, on the
19 second step, we urge the Court not to speak to that in a
20 lot of detail because it hasn't been briefed in this
21 case. This case sort of stopped at the first step. But
22 we think that courts could sensibly look to the way that
23 courts have handled other analogous questions, and I
24 point to two areas of law where that's happened.

25 The first is utility patent damages under

1 the Patent Act, before 1946, permitted an award of the
2 infringer's profits. And in those cases, very often a
3 patent would apply to part of a larger product sold in
4 commerce, and the fact-finder would say you're entitled
5 to the profits that are attributable to the infringing
6 part, but not the whole machine.

7 JUSTICE KENNEDY: This is Justice -- Justice
8 Ginsburg's question. Is that -- is your answer to her,
9 adequately summarized, the test that you propose at
10 page 9 of your brief relevant considerations include?

11 MR. FLETCHER: So I think the test we
12 propose at page 9 goes to the first of the two questions
13 that I was speaking to, which is what's the article of
14 manufacture to which the design has been applied? Once
15 the fact-finder makes that judgment, that's the test
16 that we proposed, and that's, I think, I took to be
17 Justice Sotomayor's question.

18 I understood Justice Ginsburg to be asking
19 once the fact-finder decides that the relevant article
20 is, say, the windshield on the boat or the cup-holder on
21 the car, how do they separate out the part of the
22 profits that are attributable to that component from the
23 whole.

24 And as to that question, we haven't briefed
25 it in a lot of detail, but I was trying to explain to

1 Justice Ginsburg that there are analogous problems that
2 courts have confronted in other areas of law. One was
3 utility patent damages, as I described. Another one is
4 discussed at some length in this Court's decision in the
5 Sheldon case under the Copyright Act. That was a case
6 where the copyright was on a script --

7 JUSTICE KENNEDY: Would expert witnesses be
8 called on in order to show part one or part two or both?

9 MR. FLETCHER: I -- I would think very often
10 both.

11 JUSTICE KENNEDY: And what would those
12 expert witnesses -- who would they be? What would they
13 say?

14 MR. FLETCHER: So I think it will depend
15 on -- on the circumstances of the case.

16 JUSTICE KENNEDY: In this case.

17 MR. FLETCHER: In this case, I think someone
18 familiar with the industry, someone who had worked in
19 the industry, either at -- a manufacture of a smartphone
20 company, or someone who is familiar with the market for
21 smartphones and who could speak to on the first question
22 how smartphones are put together, how they are
23 manufactured, how they're used by the users, the extent
24 to which the components of a smartphone are separable.

25 And then on the second question, the one

1 that Justice Ginsburg was asking, I think they would --
2 the experts would probably be speaking -- or could be
3 speaking to some of the issues that Your Honor raised in
4 your question in the Sullivan, which is things like
5 consumer surveys, to what extent do the various
6 components of a smartphone drive consumer demand and
7 contribute to the value of the phone.

8 CHIEF JUSTICE ROBERTS: Well, one of the
9 things that was mentioned was cost in terms of that. I
10 don't understand how that helps on this question. It
11 would seem to me the higher the cost, the less it
12 contributed to profits.

13 MR. FLETCHER: So I think, Mr. Chief
14 Justice, it will depend on the case. Sometimes you --
15 you might try to build up the share of the profits from
16 the bottom up by saying, what's the cost of each of
17 these components, and then what share of the revenue is
18 attributable to each of these components. And then you
19 say this component is 10 percent of the cost and 20
20 percent of the revenue, and we -- we do a bottom-up
21 calculation and try to do it that way.

22 Courts haven't always done that. Sometimes
23 that won't be feasible. Sometimes instead they've --
24 they've done a more impressionistic approximation and
25 said the total profits on this product are \$10 million,

1 and we think that the component at issue here, based on
2 expert testimony, is responsible for a quarter or
3 25 percent.

4 CHIEF JUSTICE ROBERTS: But you said based
5 on expert testimony. What would -- what would they be
6 talking about?

7 MR. FLETCHER: So I think the -- the Sheldon
8 case that's cited on page 27 of our brief from this
9 Court that was a Copyright Act case but discussed these
10 problems sort of generally discussed how you apportion
11 the portion -- the profits from a movie that are
12 attributable to the script as opposed to the actors or
13 the directors or other things. And they had experts who
14 were familiar with the industry and who said the script
15 is important but, really, a lot of the value and
16 particularly for a movie like this comes from other
17 things.

18 And there were various expert testimonies
19 that gave varying percentages, and the Court ended up
20 saying that the court below had awarded 20 percent of
21 the total profits from the movie, and this Court
22 affirmed that award and said that's a reasonable
23 approximation.

24 We're not -- never going to be able to get
25 to certainty, but on these sorts of profits questions

1 and these sorts of remedies questions, a reasonable
2 approximation is good enough, and it's certainly better
3 than awarding all or nothing. And courts have been able
4 to come to those reasonable approximations by using
5 expert testimony in some of the ways that we've
6 discussed.

7 JUSTICE KAGAN: Mr. Fletcher, could you
8 speak about this VW Bug example, because as -- as I
9 understand Ms. Sullivan's answer, she said, well, that
10 distinctive appearance, that distinctive shape, it's
11 just -- it's still -- the article is only the body of
12 the car. And -- and you say, no, there's a real
13 question as to whether it is being -- the design is
14 being applied to the car itself.

15 So how would you go about thinking about
16 that question, or how is a fact-finder supposed to, and
17 under what instructions?

18 MR. FLETCHER: So we think the basic
19 question for the fact-finders, what's the article of
20 manufacture to which the design has been applied. We
21 think the fact-finder should bear in mind this Court's
22 observation in Gorham. It's 1871, first design patent
23 case that the -- what a design is, is it's the thing
24 that gives the distinctive appearance to an article of
25 manufacture.

1 And the point we're making with the VW Bug
2 example is that in some cases, that's going to be very
3 easy. If the patented design is for a refrigerator
4 latch, no one is going to think that the latch gives the
5 distinctive appearance to the entire refrigerator.

6 JUSTICE KAGAN: Right. But let's talk about
7 the hard cases.

8 MR. FLETCHER: Right. So the hard cases,
9 like the Bug, one can reasonably say that it's either
10 the body or the car. Then we've given the Court four
11 factors, and we think the fact-finder or a jury, if the
12 jury is the fact-finder, ought to be instructed on those
13 factors. And so we say you should compare the scope of
14 the patented design as shown in the drawings in the
15 patent, how prominently that design features in the
16 accused article, whether there are other conceptually
17 distinct innovations or components in the article that
18 are not part of or associated with the patented design,
19 and finally the physical relationship between the
20 patented design and the rest of the article.

21 JUSTICE KENNEDY: If you were a juror, how
22 would you decide the Beetle case, or what experts would
23 you want to hear?

24 MR. FLETCHER: I would want to hear as -- as
25 to the article, what's the article --

1 JUSTICE KENNEDY: Shouldn't have given you
2 that second option.

3 MR. FLETCHER: I -- I do think it's a
4 factual question. I do think you'd want to hear from
5 experts who can speak to the question of how is the
6 Beetle put together, and what other parts of the -- the
7 Beetle --

8 CHIEF JUSTICE ROBERTS: How is the Beetle
9 put together? It's put together like every other car.
10 I mean, I don't see how that's going to tell you whether
11 the shape of the body is distinctive or not.

12 MR. FLETCHER: Well, I think you'd also want
13 to know, to put it in terms of all four factors, that
14 the scope of the claim design covers the whole article,
15 but not the interior of the car. There are design
16 features in the interior that the driver sees that
17 aren't the body of the article.

18 As to the second factor, how prominent is
19 the design feature, I think that's one that cuts in
20 favor of finding that the design does cover the whole
21 article.

22 Then the third one is conceptually distinct
23 innovations, and I think that one cuts the other way.
24 There are going to be lots of other features of the car
25 or innovations in the car -- the engine, the steering

1 system, things like that -- that's an area where you
2 might want to hear adverse testimony.

3 JUSTICE SOTOMAYOR: But that's the first
4 part of the test.

5 MR. FLETCHER: Correct.

6 JUSTICE SOTOMAYOR: That's the article of
7 manufacture.

8 So now take the second part of the test and
9 apply it to the Bug.

10 MR. FLETCHER: So supposing that we've
11 decided that the Bug -- the relevant article in the Bug
12 is just the body of the Bug.

13 JUSTICE SOTOMAYOR: Exactly.

14 MR. FLETCHER: Then I think the question is
15 the best way to determine that, at least that I can
16 think of right now, would be consumer surveys addressed
17 to, to what extent are people who buy Bugs making their
18 purchasing decisions based on the look of the car, and
19 to what extent are they instead valuing other things
20 like --

21 JUSTICE KAGAN: So you think that that
22 question is not relevant to the first question. In
23 other words, suppose I think that people who buy VW Bugs
24 buy them because of the look of the car.

25 MR. FLETCHER: Yes.

1 JUSTICE KAGAN: But you think that that's
2 only relevant at question 2 rather than at question 1,
3 which is the question of whether it's the body or the
4 whole car that the design is being applied to?

5 MR. FLETCHER: I do. I think that's the
6 statute -- the way the statute reads. It says you get
7 profits from the article of manufacture. And so,
8 logically, I think the way to approach it would be
9 identify the article and then let the patent-holder make
10 the argument that even though the article may be just a
11 part of the product sold -- and here, maybe it's just
12 the case of the front face -- really, that's what sells
13 it. And so that that test still lets the patent-holder,
14 in a case where it is the design of the article that's
15 selling the whole product, still recover a very
16 substantial portion of the profits --

17 JUSTICE ALITO: But this hypothetical is --

18 MR. FLETCHER: -- in a different way.

19 JUSTICE ALITO: This hypothetical is not
20 helpful to me, because I can't get over the thought that
21 nobody buys a car, even a Beetle, just because they like
22 the way it looks. What if it, you know, costs, I think,
23 \$1800 when it was first sold in the United States? What
24 if it cost \$18,000? What if it got 2 miles per gallon?
25 What if it broke down every 50 miles?

1 So if that is a real question, if it is a
2 real question whether the article of manufacture there
3 is the design or the entire car, gives me pause about
4 the test for determining what is the article of
5 manufacture.

6 MR. FLETCHER: Well, I think that those
7 things can be taken into account at the second step of
8 the test, if you decide that the relevant design -- the
9 relevant article of manufacture is the body of the car,
10 but for all of the reasons you just pointed out.

11 JUSTICE ALITO: No. But what if you -- you
12 were saying it's an open -- it would be a difficult
13 question. You'd have to apply numerous factors to
14 determine what is the article of manufacture there.

15 MR. FLETCHER: Well, I -- then I think if
16 you're skeptical about that, I think our test for
17 article of manufacture also lets some of those
18 considerations play into that test, because it gets to
19 whether there are other conceptually distinct invasions,
20 or other components of the product unrelated to the
21 design.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 MR. FLETCHER: Thank you, Chief Justice.

24 CHIEF JUSTICE ROBERTS: Mr. Waxman.

25 ORAL ARGUMENT OF SETH P. WAXMAN

1 MR. WAXMAN: Thank you, Mr. Chief Justice,
2 and may it please the Court:

3 Before I address the Court's many questions
4 initiated by Justice Kennedy about what should the jury
5 be instructed under what we and the government believe
6 to be the relevant question -- that is, the factual test
7 of whether the relevant article of manufacture is the
8 article as sold or a distinct component of it -- and I
9 think it's very clear to address the questions that
10 Justice Ginsburg and Justice Sotomayor asked, and
11 Ms. Sullivan's response to what actually happened in
12 this case.

13 There is no -- whatever you determine the
14 right instruction should be, there is no basis to
15 overturn the jury's damages verdict in this case.

16 There were two trials below. In neither
17 trial did Samsung, either in argument, statement, or
18 witness testimony, ever identify for the jury any
19 article of manufacture other than the phones themselves.
20 In both trials, Samsung's expert witness, Mr. Wagner,
21 calculated total profits under 289 only on the phones
22 themselves. And thus there is no -- no reasonable juror
23 in these trials could possibly have awarded total
24 profits on anything other than the phones, unless this
25 Court holds --

1 JUSTICE GINSBURG: Is that because the
2 district judge limited them?

3 MR. WAXMAN: Absolutely not. What happened
4 was, we put in our initial papers saying -- there's a
5 pretrial statement that the parties have to file saying,
6 these are -- the phones are the -- the phones were
7 infringed. The phones are the things that were
8 infringed for purposes of sale, and here is what our
9 evidence is on total profits from the phone.

10 JUSTICE BREYER: So disagreement on this
11 point. So why, if -- we have a hard-enough question
12 trying to figure out what the standard is. Now, why
13 can't we just ask the lower courts to listen to your
14 arguments and theirs, and work it out?

15 MR. WAXMAN: Justice Breyer, this is not a
16 difficult -- the record in this case is not difficult.

17 JUSTICE BREYER: You don't think it's
18 difficult, but they think --

19 MR. WAXMAN: Well --

20 JUSTICE BREYER: -- they think it's
21 difficult. In fact, they think it's easy on their side.

22 So if I go through and come to the
23 conclusion, at least, that each side has a good
24 argument, under those circumstances, why don't we focus
25 on the question that is of great importance across

1 industries and leave the application of that and whether
2 it was properly raised to the lower courts?

3 MR. WAXMAN: Justice Breyer, if this were
4 difficult, it would be entirely appropriate for this
5 Court simply to announce what the law is, which I think
6 there is a great need for this Court to do. And we're
7 not suggesting that it wouldn't -- that it isn't
8 necessary for the Court to do it.

9 This is a case very much like global tech,
10 when you found that the lower court had applied the
11 wrong standard for intentional infringement, and then
12 found that the record -- even -- but under the correct
13 higher standard, the record admitted no other
14 conclusion. What's so easy about this case is that they
15 never identified to the jury, in either case, any
16 article of manufacture other than the phone. And all of
17 their evidence, Justice Breyer, was calculated based on
18 the total profits to the phone.

19 JUSTICE BREYER: I get your point. I'll
20 read it and I'll --

21 MR. WAXMAN: Thank you.

22 JUSTICE BREYER: But I have a question on
23 the general issue, which I think is tough. And the
24 general question that I have is I have been looking for
25 a standard. Now, one of the standards -- which are all

1 quite close; the parties actually in the government are
2 fairly close on this -- but is in a brief for the
3 Internet Association, the software industry. And you
4 know that brief I'm talking about on Facebook and some
5 others.

6 MR. WAXMAN: I do.

7 JUSTICE BREYER: Okay. What they did is
8 they went back into history. They have a lot of
9 different cases which they base the standard on, and
10 they come to the conclusion, which is a little vague,
11 but that the design where it's been applied to only
12 part -- it's on page 23 -- of a multicomponent product
13 and does not drive demand for the entire product, the
14 article of manufacture is rightly considered to be only
15 the component to which the design applies. And only
16 profit attributable to that component may be awarded.

17 Now, really, to understand it, you have to
18 have examples -- but antitrust cases are hard to
19 understand -- and our rule of reason and people do use
20 examples. And so that kind of standard, with perhaps
21 examples to explain it to the jury, you know, wallpaper,
22 you get the whole thing. A Rolls Royce thing on the
23 hood? No, no, no. You don't get all the profit from
24 the car.

25 MR. WAXMAN: Justice --

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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