



1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SCA HYGIENE PRODUCTS AKTIEBOLAG, :

4 ET AL., :

5 Petitioners : No. 15-927

6 v. :

7 FIRST QUALITY BABY PRODUCTS, LLC, :

8 ET AL., :

9 Respondents. :

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11 Washington, D.C.

12 Tuesday, November 1, 2016

13

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 11:01 a.m.

17 APPEARANCES:

18 MARTIN J. BLACK, ESQ., Philadelphia, Pa.; on behalf of
19 the Petitioners.

20 SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of the
21 Respondents.

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P R O C E E D I N G S

(11:01 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 15-927, SCA Hygiene Products Aktiebolag v. First Quality Baby Products.

Mr. Black.

ORAL ARGUMENT OF MARTIN J. BLACK

ON BEHALF OF THE PETITIONERS

MR. BLACK: Mr. Chief Justice, and may it please the Court:

In *Petrella*, the Court reaffirmed the principle that when Congress enacts a limitations period, that courts may not apply the doctrine of laches to shorten the statutory period.

In patent law, Congress prescribed a six-year lookback period from the date of suit and a 20-year patent term. Injecting judicial discretion into the statutory scheme would frustrate the will of Congress, and create uncertainty about something as fundamental as the timeliness of suit.

There is nothing in the Patent Act which compels the creation of a unique patent law rule, and if the Court were to create an exception here, that would invite litigation in the lower courts over a wide range of Federal statutes.

1 CHIEF JUSTICE ROBERTS: You don't dispute
2 that equitable estoppel applies across the board?

3 MR. BLACK: That's correct, Your Honor.
4 Equitable estoppel applied has been part of the law, on
5 the law side of the Court, since the mid-18th century,
6 as the Court held in -- in Dickerson in 1879. It was
7 originally actually called "estoppel in pays," and it
8 became known as equitable estoppel, but it's been a
9 legal principle for over -- well over a hundred years,
10 and it applies to all actions at law and in equity.

11 JUSTICE BREYER: For this -- for this
12 argument I'm not sure, because of course they dispute
13 that, and they have a long list of cases, Alsterbach --
14 or what, Aukerman and so forth, going back into history.
15 And they have the man who wrote the statute, and they
16 have words in the statute. And they say if we look
17 through all of those cases, what we will find is that
18 there is a long history of applying laches in one legal
19 context, or that it's -- that it's patents. And anyway,
20 almost all patent cases were equitable cases, and so it
21 would be a big change, and you know all those arguments.

22 Now you've come back and you have two
23 arguments -- two cases the other way, and you say two
24 are mistaken. So it seems to me what I have to do on
25 that one is read the cases. And if I come to the

1 conclusion that there is this long history here, then
2 the laches should stay. And if I come to the conclusion
3 that no, if you really look at these cases, there isn't
4 that history, then it should go. But neither is it a
5 case, one way or the other, of us making up anything.
6 It's a question of what was the heart of the law for
7 quite a long time before.

8 MR. BLACK: Your Honor, let me address --

9 JUSTICE BREYER: Is that right? I mean,
10 that's how I'm approaching it, and I'm asking you to
11 comment on that because I don't want to waste a lot of
12 time reading cases I don't have to read.

13 MR. BLACK: No, Your Honor. You don't have
14 to read the cases. What you should read is the statute.
15 The statute is what controls.

16 JUSTICE BREYER: In the statute is the word
17 "enforcement." And -- and when it is invalid, what's
18 the word --

19 MR. BLACK: "Unenforceability."

20 JUSTICE BREYER: -- "unenforceable." And
21 that could apply just to the -- the -- you know,
22 monkeying around with the patent, doing bad things to
23 the patent, or it could include laches. And the guy who
24 writes it says, yeah, it includes laches. And you could
25 read it the other way not to. So I didn't get too far

1 with the statute, either.

2 MR. BLACK: Your Honor, let's discuss
3 unenforceability. One of the interesting facts about
4 the case is that the Federal Circuit did not actually
5 take up the position that the word "unenforceability"
6 meant laches. And I think part of the reason for that
7 is for those of us who practice in this area every day,
8 we just don't think of laches as an unenforceability
9 doctrine.

10 Unenforceability brings to mind rendering
11 the patent unenforceable, may not be enforced. And that
12 certainly applies when there has been egregious conduct,
13 like patent misuse or a fraud on the patent office. But
14 it does not apply to laches. The patent can still be
15 enforced in this case and any others, seeking damages
16 from the date of suit through the date of trial.

17 We did not have a dictionary definition here
18 of "unenforceability," from 1952 or any other time. The
19 Respondent's position is that it was known, but they
20 don't actually have any support in a dictionary
21 definition, in the case law, or in the legislative
22 history. And the --

23 JUSTICE SOTOMAYOR: They have some cases
24 from us in other courts relating unenforceability to
25 patents. We even called one patent unenforceable

1 because of laches. So -- I mean, I agree with Justice
2 Breyer that the case law on both sides is fairly sparse.
3 I don't know what judgments to draw from that. But
4 there are some cases that use the word "unenforceable"
5 in that sense.

6 MR. BLACK: I believe --

7 CHIEF JUSTICE ROBERTS: And that's what --
8 that's what Federico -- Federico did, right?

9 MR. BLACK: Well, Mr. Federico --
10 Mr. Federico's -- I believe there's only one case that
11 actually used "unenforceability" or "unenforceable" with
12 laches. Occasionally, the word "enforce" is used.

13 But let me address Mr. Federico's
14 commentary --

15 JUSTICE SOTOMAYOR: Their timing.

16 MR. BLACK: I take that -- I take that
17 point.

18 Let me address Mr. Federico's commentary.
19 All he said was that laches was included. He didn't say
20 it was an unenforceability. Federal Circuit didn't take
21 that position up. And he certainly didn't say --

22 CHIEF JUSTICE ROBERTS: Well, just to stop
23 you there. I'm just reading what the -- this is in the
24 red brief, so you can correct it if it's wrong, but he
25 said the commentary, his commentary explained that,

1 quote, "unenforceability," end quote, was, quote, "added
2 by amendment in the Senate for greater clarity, and that
3 as amended, the defenses would include equitable
4 defenses such as laches."

5 Now there are words in between the quoted
6 passages, so are you going to tell me those are --

7 MR. BLACK: There -- there are words in
8 between. We have to interpret sort of the semicolons in
9 Mr. Federico's post-1952 commentary to reach the result.

10 He believed that laches was included in the
11 statute, but he never said -- and no court has ever said
12 -- that the form of laches which is being asserted here,
13 which would be unique in all of Federal law, was
14 applicable. We have Section 283 of the Patent Act,
15 which applies the remedial provision for injunction.
16 And we have Section 284, which provides the damage
17 remedy.

18 Section 283 says that injunctions may be
19 issued according to the principles of equity. That
20 certainly includes laches, and that's our position, and
21 that's consistent with the court below.

22 Section 284 is the damage remedy. And there
23 is no -- there is no power granted to courts to overrule
24 the clear language in Section 286, which is the time
25 limitation on damages in the Patent Act.

1 CHIEF JUSTICE ROBERTS: But the clear
2 language argument really doesn't help you at all. I
3 mean, it doesn't say -- there is no clear language
4 saying laches doesn't apply in this context. It gives
5 you a time limit. And the question whether laches is
6 applied is just an issue that's not addressed in that
7 language.

8 MR. BLACK: Respectfully disagree, Your
9 Honor.

10 Section 286 is entitled -- it is titled
11 "Time Limitation on Damages." That is the timeliness
12 rule that Congress selected for patent infringement
13 cases in 1896. It was enacted for a very clear purpose:
14 To create a statute of limitations. That's what they
15 called it in 1896, to supplant this Court's ruling in
16 Campbell v. Haverhill, where the Court was put to the
17 Hobson's choice of saying that the law -- the patent
18 law, was that there either was no limitations period or
19 we apply State law.

20 The result was that the Court had to rule
21 State-by-State limitations period. The intent of
22 Congress was to abolish State-by-State limitations
23 period, and I think that they would be very surprised to
24 find that it's now judge by judge under the doctrine of
25 laches.

1 Laches has never been applied in the face of
2 the Federal statute of limitations. The Court looked at
3 that issue exhaustively in Petrella and could not find
4 Respondents one single example --

5 JUSTICE BREYER: I have one question on
6 that. I dissented in Petrella, and I thought to myself,
7 I lost. Okay? I lost that case. How right I was, but
8 nonetheless.

9 So I don't want, I think in this case, just
10 to repeat, I'm still dissenting, so I'll take Petrella
11 as the law, at least I'm tentatively doing that. And
12 then I looked here to say, well, is there a significant
13 difference? And I found so far you've mentioned them.

14 Maybe case law and history, but I have to
15 look that one up. Maybe language, but there are two
16 sides to that too.

17 Then I found this. That in Petrella, to me
18 in dissent a major point, which was well-answered by the
19 majority, is what's going to happen after about 30 years
20 where the plaintiff has just laid in wait to see if the
21 material is a success, after they spend all the money
22 it's a success, and he sues for the last six years and
23 collects all the profit while the defendant was the one
24 who paid all the money that earned the profit.

25 Never fear, said the majority, because you

1 can deduct all that expense from the six years' profit
2 that you're suing for. Never fear. And I didn't really
3 overcome that argument very well.

4 But in this case, it isn't true that you can
5 deduct, and therefore plaintiffs can lie in wait to see,
6 and it is 40 times more difficult for a company that has
7 relied on their not suing to change the hundreds of
8 billions of dollars in investment, and in case we think
9 that's theoretical, Dell has filed a brief involving
10 Sprint, Lucent and other companies where they spent
11 close to billions knowing there was somebody out there
12 who might sue, but he wasn't going to. He led them to
13 believe he wasn't, approximately. And then later on
14 they come back and they try to get all this money, just
15 the profit, without the deduction of the loss when it's
16 too late for the company to change.

17 Now, I'll look into that, but that, in my
18 mind, is a big difference.

19 MR. BLACK: Understood, Your Honor. Let
20 me -- so let me address that a couple of ways.

21 First of all --

22 JUSTICE GINSBURG: May -- may I just
23 clarify?

24 Petrella explained, in the context of that
25 case, that it wasn't unscrupulous for this woman to wait

1 to see whether there was anything in it for her. Why
2 should she spend her money on a lawsuit when there
3 wasn't anything in the bank?

4 So the -- the point was that it wasn't
5 unscrupulous to wait to see whether the suit was worth
6 the expense of suing. That was --

7 JUSTICE BREYER: I accept that.

8 MR. BLACK: That's my answer, Your Honor.

9 JUSTICE BREYER: No. No, that isn't. If it
10 isn't -- look. If it isn't unscrupulous -- if it isn't
11 unscrupulous, laches doesn't apply. If there is nothing
12 unjust or inequitable about it, laches doesn't apply.

13 I am not getting into an argument about who
14 did or didn't behave unscrupulously. I am assuming that
15 there was unscrupulous behavior that would ordinarily
16 call into play laches. I am assuming that.

17 For example, after telling him, don't worry,
18 I won't sue, he phoned him up every day to see if the
19 evidence has been burned up.

20 MR. BLACK: That would be estoppel, Your
21 Honor. And that -- that would be estoppel.

22 JUSTICE BREYER: I want to --

23 MR. BLACK: For all --

24 JUSTICE BREYER: No, you -- please.

25 I think that whether there is unscrupulous

1 behavior or bad or unfair behavior is a function of
2 whether an existing doctrine, laches, applies to the
3 case. And that I think is the issue here.

4 So I have to assume laches applies to the
5 case, if laches applies at all, and that's what we are
6 arguing about.

7 MR. BLACK: Okay.

8 JUSTICE SOTOMAYOR: I'm sorry, but don't
9 lose the estoppel argument there.

10 MR. BLACK: I'm not going to, Your Honor.
11 I'm --

12 JUSTICE SOTOMAYOR: I want to hear what you
13 were going to say.

14 MR. BLACK: Lying in wait -- the lying --
15 it's the lying-in-wait question. There are a couple --

16 JUSTICE BREYER: No, it's not. It's the
17 difference -- the difference that when, in fact, in an
18 appropriate case, you do sue under copyright, what you
19 get is the profit from the last six years, minus the
20 costs to produce that profit.

21 When you do sue in patent, and the examples
22 are in the Dell brief, you get the profit for the last
23 six years without subtracting the money that previously
24 went in to produce that profit, and moreover, companies
25 spend hundreds of millions of dollars in reliance on

1 whatever conduct gave rise to laches. That's the
2 differences.

3 MR. BLACK: Okay. Three points, at least.

4 First, there is a significant difference
5 between laches, which requires only delay and is a
6 timeliness rule, delay and prejudice, it's a timeliness
7 rule, and it conflicts with the timeliness rule in 286.

8 For egregious conduct we still have
9 estoppel. Estoppel requires misleading conduct that
10 leads the infringer to believe that they will not be
11 disturbed. That still applies. Estoppel is -- is not
12 being addressed here. We are only talking about laches,
13 which is delay, and it is a timeliness rule that was
14 developed in the equity courts and was used occasionally
15 in the law courts when there was no statute of
16 limitations. But as --

17 JUSTICE GINSBURG: Wait, wait. This is --
18 this is still an issue in this case. There is an issue
19 whether estoppel would apply.

20 MR. BLACK: Yes, Your -- yes, Your Honor.

21 What happened -- what happened below is
22 summary judgment was granted on estoppel and laches.
23 Went up to the court of appeals, they reversed on
24 estoppel finding there was a genuine issue of material
25 fact on whether or not the defendant actually relied on

1 any -- on any conduct of the plaintiff, and sent it back
2 down.

3 But with respect to the laches, the court
4 said, well, we have these presumptions that apply, and
5 therefore, there is no -- there is nothing to try.

6 JUSTICE SOTOMAYOR: So is estoppel an
7 unenforceable -- unenforceable?

8 MR. BLACK: Estoppel -- it's --

9 JUSTICE SOTOMAYOR: Render the patent
10 unenforceable?

11 MR. BLACK: It's -- it's unclear. There are
12 certainly some cases that tie the two together, but it
13 probably just --

14 JUSTICE SOTOMAYOR: Just like here with
15 laches.

16 MR. BLACK: Laches, no. There -- there
17 are -- there are some cases on estoppel, but I think the
18 estoppel doctrine really emanates from the same place it
19 emanates in copyright law, which is, it's a general
20 defense, generally applicable in actions in law. Like
21 collateral estoppel. Like a coordinate satisfaction.
22 Everything doesn't have to be in 282.

23 CHIEF JUSTICE ROBERTS: You've got two more
24 points that you wanted to raise.

25 MR. BLACK: Yes, Your Honor.

1 Lying in wait. We have to understand what
2 the practicalities are at the district court level. For
3 those of us that live in the trenches, here's what
4 really happens.

5 So you have Section 287 of the Patent Act,
6 which the Respondents really don't want to talk about.
7 Congress considered this lying-in-wait problem, the
8 problem of a defendant who doesn't know about the
9 infringement, and it did three things.

10 First of all, it made patent filings public,
11 and they're searchable on the Internet, and there are
12 patent attorneys on the other side of this who are fully
13 capable of looking these things up.

14 Second, they enacted Section 287, which is
15 specific limitation on damages. You cannot claim back
16 damages in a patent case unless you comply with
17 Section 287. 287 says, you must give actual notice to
18 the patent -- to the -- to the defender, to the
19 defendant, or you have to mark your product with the
20 patent number. There are some extensions, but that was
21 the way Congress dealt with this problem of the
22 infringer who wouldn't know about a patent.

23 CHIEF JUSTICE ROBERTS: But most of the
24 things we are worried about, we are not worried about
25 the lever or something, it's chips and things like that,

1 and you can't mark those.

2 MR. BLACK: That's right. So what that
3 means is the plaintiff can't mark; the plaintiff
4 therefore, in most cases, has to give actual notice to
5 the infringer.

6 Now, once that happens, the infringer is a
7 tortfeasor, and they are on notice. So they have a
8 couple of choices.

9 They can go to the patent office, under the
10 old rules and new rules, to try to defeat the patent.
11 They can file a declaratory judgment action. They can
12 change their behavior, or, they can do what happened
13 here, on full notice, they decided to plow ahead, to
14 collect a lot of profits over years, and at the end of
15 the day they might have to pay what the statute
16 requires: A reasonable royalty.

17 There is nothing unreasonable about that.
18 Unlike copyright law where the infringer can be stripped
19 of its profits, the remedy is a reasonable royalty in
20 patent cases.

21 So going back to the statute, which really
22 has the control here, Section 286 is the timeliness rule
23 that Congress provided. They had a very clear
24 delineation of the remedies. 283 is injunctions. 284
25 is damages. Then they had the time limitation on

1 damages, which they called the statute of limitations.
2 That's how they set the statute up. And they put a
3 separate requirement that in order to claim back
4 damages, you must comply with Section 287.

5 This is an integrated whole. And you also
6 have a 20-year patent life from the date of filing of
7 the application now, which means usually 17 years.
8 Takes a couple of years to get through the patent
9 office, unlike copyright law where the copyright could
10 go on for 70 years and with a three-year rolling window.
11 Patent law is limited. You have a six-year window. And
12 most of the time, patents are not as valuable in the
13 first couple of years. It takes time for technology to
14 make its way into the marketplace.

15 Once it does, the patentholder has a choice.
16 Patentholder, if he sees a small -- he or she sees a
17 small infringer who is not a threat, just like in
18 Petrella, they can decide, you know, I don't want to go
19 to the expense of Federal litigation. I don't want to
20 spend ten years and millions of dollars on litigation.
21 But if down the road that little threat, which was not
22 much of a threat, turns into an existential threat, the
23 patentholder can sue.

24 But Congress dealt with that problem by
25 saying, you can only get six years of back damages when

1 that happens. Six years. And your patent term is going
2 to run out at some point. So the rolling window is
3 going to collapse into the patent term end in a
4 relatively short period of time. And that's the
5 structure of the statute that Congress set up.

6 This Court has said that if it's going to
7 make -- assume that Congress intended a clear departure
8 from well-established equity rules that it will demand
9 that the party asserting that provide clear -- evidence
10 a clear statement. There is a good discussion of this
11 in the Medinol amicus brief.

12 The Court said it in eBay. Same principle.
13 You had an equitable principle that was applied by the
14 Federal circuit in a way which was very different from
15 applied in other contexts. And the Court insisted that
16 patent law be conformed to other areas of the law.

17 JUSTICE BREYER: Can I go back a step,
18 because you may have -- if I understand what you're
19 saying, we have a case that would otherwise be laches.
20 That is, every one agrees that Smith has Jones' patent.
21 But Smith thinks that Jones has given him approval, a
22 license, a very complex kind, and so he goes ahead and
23 uses it. Jones sells to a -- let's use a phrase that's
24 not happy, but "patent troll."

25 The patent troll gets the patent. The

1 patent troll looks at the license. The patent troll
2 says, I don't think this really works, the license. I'm
3 going to bring a lawsuit.

4 He brings a lawsuit. The judge thinks this
5 is very unfair, given what the patent troll and everyone
6 else had told the defendant. Laches would normally
7 apply.

8 And I was saying now they're going to get
9 vast profit without the expense that went into making
10 the profit. You say I'm wrong. The reason I'm wrong is
11 because you only get a reasonable royalty. And in
12 calculating the reasonable royalty, the judge will
13 subtract the costs of producing that royalty during the
14 six-year period, so you'll end up where you end up in
15 copyright.

16 Now, do I have the argument correctly?

17 MR. BLACK: Not close, but let me just
18 clarify one point to make sure we are on the same page
19 here.

20 If the patent -- let's say the defendant
21 has -- or the infringer has a profit margin of
22 40 percent. In copyright law, all 40 percent could be
23 stripped away, and then the defendant has to kind of
24 work backwards to apply the costs to that.

25 It's not how it works in patent law. In

1 patent law, expert will come in and say, well, what's a
2 reasonable royalty that arm's length transaction would
3 have resulted in if the negotiation had taken place the
4 day before infringement began? And the number might be
5 3, 4, 5, 7 percent, but it wouldn't be 40, because a
6 40 percent royalty wouldn't leave anything for the
7 defendant, and that's not what happens in -- in real
8 life.

9 Another point about the patent -- the patent
10 trolls, there is an FTC report that came out on
11 October 6th of this year. FTC has been concerned that
12 what they call patent assertion entities, the polite
13 term, that what is the effect on the economy?

14 And they've been looking at this for several
15 years. They actually did a study where they collected
16 confidential data from lots of different participants in
17 the patent assertion arena, and they came up with some
18 interesting conclusions, with which -- actual data.

19 And what happens often in court is that
20 people say "patent troll," and you don't really know --
21 we don't really know exactly what they mean by that. We
22 don't really know what the effect is. But we know two
23 things:

24 First of all, SCA is no patent troll. It's
25 an operating company. You have Medinol, whose got a

1 petition pending, an operating company. You have Romag
2 that has a petition pending, an operating company that's
3 out on laches after five months. The companies that get
4 hurt by this are operating companies who don't like to
5 sue and therefore wait until they have to.

6 The patent trolls normally can't file patent
7 cases and get back damages because they usually can't
8 comply with Section 287 and they don't -- if they give
9 notice ahead of time, they have to sue to monetize.

10 The Court said in Halo, one of the arguments
11 made there -- it was rejected on the grounds of the
12 statute controls. One of the arguments made in Halo was
13 that the patent trolls were collecting a lot of money
14 based on licensing threats, sending letters and
15 collecting money.

16 The FTC has actually now done a study, and
17 they concluded on October 6th that that's not what's
18 happening, that the lower end of the stratum, what we'd
19 probably think of as the patent trolls, are actually
20 only making money if they file lawsuits. They have an
21 interest in bringing lawsuits quickly.

22 And there was something you said about a
23 license and the patent troll. I just want to make
24 another thing clear. If somebody buys a patent from a
25 predecessor, they are bound by the predecessor's

1 licenses. That's part of the law. So the patent --
2 company buying a patent that wants to sue on it, they're
3 bound by prior licenses and they're bound by the actions
4 of their --

5 JUSTICE BREYER: No, I was thinking of the
6 examples in the Dell brief, which undoubtedly you've
7 read.

8 MR. BLACK: Yes.

9 JUSTICE BREYER: Those are the examples in
10 my mind.

11 MR. BLACK: Sure, Your Honor.

12 One of them was an estoppel case. It was
13 decided on estoppel laches wasn't necessary. One of
14 them, the first one, which I guess is their poster
15 child, I think that at the district court level, there
16 was only 10 months of damages at issue because the
17 entity which bought the patent waited so long, and they
18 were only going to get a reasonable royalty for 10
19 months. The case was decided on summary judgment on
20 invalidity.

21 What you won't see in the cases or when you
22 do Westlaw searching is a lot of cases that actually get
23 decided on laches. What's not been said here is two
24 things:

25 One is the ABA and the AIPLA, you have a

1 pretty broad brief, have both said that laches is a
2 burden, that it's not necessary to deal with the patent
3 trolls. They've come out very strongly in getting rid
4 of the doctrine of laches and conforming patent law to
5 the other areas of law.

6 The other thing is that -- the reality is
7 that there aren't -- there aren't -- there's a lot of
8 litigation over laches. What happens in the real world
9 and the trenches is that a plaintiff files a complaint
10 for patent infringement. The plaintiff seeks back
11 damages. The defendant is pretty much bound to file an
12 answer claiming laches. Why? Because the Federal
13 circuit has said under its presumptions that, well,
14 laches can apply at any time, and it applies by
15 presumption after six years.

16 So every case -- you have answers filed all
17 the time in patent cases with laches. The plaintiff
18 then says, okay, I've got a defense; I have to deal with
19 it. They send an interrogatory. They say, what's your
20 prejudice?

21 Defendant usually says, prejudice is I
22 expanded my business.

23 The plaintiff says, well, you probably would
24 have done that anyway -- which is what happened in this
25 Court -- and then we have to go off and have a trial on

1 that issue.

2 And most of the time -- this case is the
3 exception -- those trials take place after the trial in
4 front of the jury, but there's a tremendous amount of
5 discovery. In this case, there were 15 deposition
6 excerpts submitted with summary judgment. But there are
7 very few decisions that actually reach a conclusion that
8 laches is applicable. And if you search for cases where
9 so-called patent trolls have been barred by laches, you
10 will find very, very few.

11 If I may reserve the rest of my time, Your
12 Honor.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Waxman.

15 ORAL ARGUMENT OF MARTIN J. BLACK

16 ON BEHALF OF THE PETITIONERS

17 MR. WAXMAN: Mr. Chief Justice, and may it
18 please the Court:

19 This Court has repeatedly recognized that
20 the 1952 Patent Act sought to retain and reflect patent
21 law as it then existed. When Section 282 codified
22 defenses applicable in any patent action, it did so
23 against the backdrop of a decades-long consensus that
24 laches is an available defense.

25 JUSTICE GINSBURG: Where is the

1 codification? I don't see anything in that -- what is
2 it? 2 -- 282? -- other than the word "enforceable."

3 MR. WAXMAN: Right. And that -- well, the
4 lower court -- the Federal circuit didn't specify
5 whether it was codified under the words "unenforceable"
6 or "absence of liability." But as we point out in our
7 brief, this Court repeatedly and other courts have
8 recognized, as did PJ Federico, that laches is an
9 unenforceability defense, and that in enacting those
10 defenses --

11 JUSTICE GINSBURG: Well, how could it be
12 when it doesn't make the patent unenforceable?

13 MR. WAXMAN: It -- it does in exactly the
14 same way, for example, Justice Ginsburg, that estoppel
15 does; that is it is a defendant-specific defense, just
16 as estoppel, which all concede is an unenforceability
17 defense. And for that matter, if we can just cast our
18 memories back --

19 JUSTICE GINSBURG: I don't know -- I don't
20 know if all would concede that. I think we were just
21 told that unenforceability relates to things that would
22 bar you from ever enforcing the patent, like patent
23 misuse or misrepresentation to the patent office.

24 MR. WAXMAN: Justice Ginsburg, in the 46
25 years since this Court decided *Blonder-Tongue*, we've

1 become accustomed to the principle of non-mutual
2 offensive collateral estoppel, that is that permits a
3 party that wasn't a party to the prior suit to raise
4 defenses that were successfully waged against another
5 party. That principle did not exist in 1952. There was
6 non-mutuality for all of these equitable defenses that
7 are concededly covered by unenforceability, including
8 patent misuse and inequitable conduct, which Your Honor
9 was referring to. That is unenforceability, as all of
10 the cases recognized, and we've cited this Court's
11 opinions and lower court opinions applied to equitable
12 defenses, none of which were applicable to the law --
13 the world as a whole, prior to this Court's opinion in
14 *Blonder-Tongue*.

15 JUSTICE GINSBURG: I do -- I do understand
16 you mentioned the issue preclusion in -- in
17 *Blonder-Tongue* is such a case. So what -- what is there
18 about issue preclusion that was different than --

19 MR. WAXMAN: So -- so, for example in -- in
20 the first case, the claim for patent infringement is
21 defeated on an argument of, you know, collateral --
22 inequitable -- equitable estoppel or inequitable conduct
23 or patent misuse or prosecution laches. That defense
24 was not established, and had to be litigated anew by the
25 defendant in the second, third, and fourth case. And if

1 I --

2 JUSTICE GINSBURG: Some of them -- some of
3 them, misuse would go across the board -- board. But
4 you can have an estoppel as to one alleged infringer,
5 and not have it to another.

6 MR. WAXMAN: So --

7 JUSTICE GINSBURG: So I don't see how -- how
8 issue preclusion would then work.

9 MR. WAXMAN: Justice Ginsburg, the question
10 in this case is what Congress understood the patent law
11 doctrine was in 1952. And we think that there is a --
12 there is a literal mountain of cases. Every single case
13 that was decided in any court at any level from 1897
14 when the six-year damages cap was put into place until
15 today, with the exception of one district court decision
16 in Massachusetts which demonstrably misapplied the two
17 authorities that it cited, every single case has
18 recognized that -- that laches was a defense in an
19 appropriate case to claims for damages. And no case has
20 ever said or suggested to the contrary. And so,
21 therefore --

22 CHIEF JUSTICE ROBERTS: That mountain of
23 cases were in equity, right?

24 MS. SULLIVAN: Well, in equity and in law.
25 There were law cases that were applied and --

1 CHIEF JUSTICE ROBERTS: But that's where
2 your mountain becomes a mole hill, right? I mean,
3 the -- the cases in which laches was applied at law
4 were -- is insignificant, certainly not enough to
5 support a consensus that Congress could be understood to
6 have adopted for the simple reason that -- that, as you
7 point out, actions were brought in equity, because you
8 could get both an injunction and damages.

9 MR. WAXMAN: That's right. As was sought,
10 for example, in this case and almost every case, that
11 is --

12 CHIEF JUSTICE ROBERTS: Well, it's a little
13 hard to talk about this mountain if they are all equity
14 cases.

15 MR. WAXMAN: Will, I don't -- I don't think
16 so, but let me take my -- let me take my run at the
17 mountain of your question.

18 As you point out, almost all of the cases,
19 98 percent, according to Professor Lemley, were brought
20 on the equity side, and they don't even have an argument
21 that laches wasn't available as a defense to claims for
22 damages which could be sought in equity courts beginning
23 in 1870, and there are plenty of cases showing that.

24 Now, there were, as Your Honor suggests,
25 that some cases -- if I just may finish -- there were

1 some cases that were brought at law, usually where the
2 patent had expired and no equitable -- no injunctive
3 relief could be sought. We have cited the Court to
4 those decisions that have considered the question.
5 Every single one of those decisions that considered the
6 question -- and there are not many; there are the Ford
7 cases, the Seventh Circuit cases, I think are the ones
8 that were available before the merger in law and equity.
9 The point is, whether it's a mountain or a mole hill,
10 the cases all went in that direction, and whether the
11 petitioner thinks that those Ford cases were wrongly
12 decided or not, they were the law. And after 1938 --

13 CHIEF JUSTICE ROBERTS: But you would -- you
14 would concede that if you're just looking at those four
15 cases, that's not enough of a well-accepted consensus
16 that Congress could have considered to have adopted the
17 rule in those cases.

18 MR. WAXMAN: Well, I don't think that when
19 Congress was -- was enacting the '52 law they were only
20 looking at the pre-1938 cases. They were also looking
21 at all the cases --

22 JUSTICE GINSBURG: Maybe they were -- they
23 were looking at what the statute of limitations -- what
24 the -- the origin was that equity invented laches
25 because there was no statute of limitation. And so

1 there was a gap to fill on the equity side. On the law
2 side, you had a statute of limitations. And we are
3 told, and I think it's right, that this Court has said
4 that when you're seeking damages at law and there is a
5 statute of limitations, the statute of limitations is
6 what Congress ordered, not laches. It's just like it
7 was in the old days, when you went into a law court for
8 damages, you had a statute of limitations, and that was
9 what applied, and not an extra delay -- not an extra
10 doctrine.

11 MR. WAXMAN: Justice Ginsburg, I will return
12 to respond to -- to complete my previous answer. But,
13 Justice Ginsburg, the State -- whether or not you think
14 that what is now Section 286 is a statute of limitations
15 or not, and it notably does not run from the time of
16 knowledge and -- and inactionable knowledge, unlike
17 laches and the copyright statute of limitations, the
18 fact is, that unlike in the copyright context, the 1952
19 Congress was not creating a statute of limitations of
20 sort, or even amending it. It was simply continuing a
21 provision that was put in place, by the way, in the
22 equity provision of the revised statute, Section 4120 --

23 JUSTICE GINSBURG: Does it support a time
24 limitation?

25 MR. WAXMAN: Excuse me --

1 JUSTICE GINSBURG: In support -- sorry.

2 MR. WAXMAN: It is a -- it is a limitation
3 on the damages. You can only recover damages for six
4 years out of the 18-year patent term.

5 But the point I'm trying to make -- and if I
6 make no other point, please let me not be misunderstood
7 here -- Congress in 1952 simply continued in haec verba
8 the statute that had existed on the books since it was
9 put in on the equity side in 1897. And there were --
10 whether it is a mountain, a mole hill, or a mesa, all of
11 the -- okay. Never mind. I'll just stick with mountain
12 or mole hill. All of the -- I mean, I -- I don't think
13 -- I hope I live long enough to have another case where
14 I can come to Court and say, all of the case law that
15 decide -- that examine this question, all of which was
16 adjudicating the applicability of laches to claims of
17 damages alongside the six-year damages limitation
18 provision, all of them recognize that laches existed
19 comfortably alongside that provision.

20 And there is nothing really anomalous about
21 that, Justice Ginsburg. The very same thing occurs, for
22 example, in Title VII, where there is a statute of
23 limitations. You've got to bring your claim within 180
24 days or 300 days, but there is also a damages limitation
25 that says you can only get two years of back pay. And

1 the fact of the matter is, the question is what was --
2 what did Congress think that it was either codifying, if
3 you accept our 282 argument, or what it was
4 interpreting -- what 286 -- what became 286 meant, it
5 looked back and it could find nothing in the case law.
6 And there are nine circuits, Mr. Chief Justice. Three
7 never considered the question. Nine circuits that by
8 1952 -- and I think for that matter by 1946 and 1938 --
9 had all recognized that laches was an applicable defense
10 in those instances in which it was proven for claims of
11 damages and other forms of relief. Whether the claims
12 came up on the law side or the equity side, and I -- I
13 simply.

14 JUSTICE GINSBURG: The question is not --
15 the question is not whether laches was available. The
16 question is whether it was available in face of a time
17 limitation set by Congress. And frankly, I don't see a
18 big difference between the way the patent statute of
19 limitations work than the way the copyright statute did
20 in *Petrella*.

21 MR. WAXMAN: I -- I completely adopt your
22 articulation, Justice Ginsburg. The question was
23 whether laches was available in the context of, and in
24 light of, the time provision that was enacted in 1897
25 and that was continued in the 1952 Act, and the answer

1 is a resounding unquestionable yes.

2 There is no court, with the exception of one
3 district judge in Massachusetts, who ever even
4 questioned whether -- whether the case was brought at
5 law or in equity prior to 1938, laches was an available
6 defense. And to the extent, Mr. Chief Justice, that
7 that distinction still mattered in 1952, we have the
8 authoritative treatise at the time.

9 Walker on patents, the 1951 edition,
10 page 106 of the 1951 provision that says expressly --
11 I'm going to quote it as soon as I find it. Law may be
12 interposed -- "laches may be interposed in an action at
13 law."

14 And so what was Congress to understand the
15 rule was, either when it codified unenforceability as a
16 defense or when it continued Section 286 in the law as
17 it had been there for 55 years, and the answer was,
18 looking at the case law, looking at what that -- what
19 Mr. Federico was drafting for the committee and for
20 Congress, looking at the authoritative treatise writer,
21 and I'm not aware of any contemporary treatises that
22 even suggest otherwise, that, yes, laches coexists with
23 the Section 286 remedy.

24 And that's the question, Justice Ginsburg,
25 that this Court has to decide. What was -- what was

1 Congress's understanding when it enacted the 1952 Act?

2 Now, we also have --

3 JUSTICE GINSBURG: What about the
4 well-established understanding that laches cannot bar
5 claims for the legal relief that have their own time
6 limitation?

7 MR. WAXMAN: So, there is a maxim, and it
8 clearly did apply. It -- it doesn't apply in many
9 contexts, some of which are rehearsed in
10 Justice Breyer's dissent in the Petrella case. But in
11 any event, even if there -- even if patent law were the
12 only case, and I -- I've cited Title VII as another
13 example, but even if patent law were the only case, the
14 fact of the matter is, that what -- that as this Court
15 has explained repeatedly, including as recently as the
16 Halo decision this term -- last term, this year,
17 Congress was attempting to retain and reflect patent law
18 as it existed, not some general maxim that might apply
19 in another context. And in this case, whatever force
20 the general maxim had, and there are plenty of
21 exceptions to it, in patent law, the case law was
22 uniform and substantial that --

23 JUSTICE KAGAN: But speaking of the general
24 maxim, Mr. Waxman, wouldn't we expect that if Congress
25 wanted to make an exception for patent law or wanted to

1 continue exception that existed as a result of the
2 preexisting practice, that Congress actually would have
3 said so?

4 MR. WAXMAN: I -- I think not in a context
5 in which we are -- Congress is not enacting something
6 new. It's simply continuing the 1897 six-year
7 limitation against a backdrop of uniform case law,
8 uniform treatise writers.

9 The -- the legislative history of
10 Senator McCarren making one of the four amendments in
11 the Patent Act be unenforceability to include in what
12 became Section 282 and a cognate provision in the
13 damages remedy, Section 284.

14 JUSTICE GINSBURG: Did the senator that you
15 just quoted, did he use unenforceability the -- the way
16 you do?

17 MR. WAXMAN: Well, he said we need to
18 include unenforceability because of the -- and this
19 is -- this is recited; I can't remember what the
20 relevant language in our red brief -- we have to amend
21 this to include unenforceability, because there are
22 doctrines that are reported in the cases -- and these
23 are all equitable doctrines, including laches -- that
24 prevent the recovery of damages where -- even if a
25 patent is determined to be valid and infringed.

1 And that's why, he explained, there also had
2 to be an amendment in what became Section 284 so that it
3 didn't simply apply damages to patents that were valid
4 and infringed but only in cases in which the plaintiff
5 isn't otherwise entitled.

6 JUSTICE SOTOMAYOR: But the problem with
7 that argument that you're making is that, yes, that was
8 said. But we don't know what they had in mind. There's
9 nothing to show us directly what they had in mind, other
10 than what they spoke, and they spoke about the
11 traditional conditions like patent misuse and the other
12 things that are specified.

13 MR. WAXMAN: I -- I --

14 JUSTICE SOTOMAYOR: I still don't see in the
15 history where the people who were drafting at the time,
16 not two years later or time later, really were thinking
17 of this in the way you're speaking of.

18 MR. WAXMAN: Justice Sotomayor, you are
19 correct that in amending the statute to include an
20 unenforceability defense, and again, I want to reiterate
21 that even if you don't think unenforceability applies to
22 the litany of equitable defenses that have long since
23 been imported into substantive patent law on both sides,
24 even if you don't agree with that, you still have to
25 interpret 286, which they claim is the bar to the

1 application of laches against a backdrop of uniform,
2 very substantial case law from every circuit that
3 considered the question, that recognized that laches
4 was, in fact, such a defense.

5 But you -- you are --

6 JUSTICE SOTOMAYOR: You won't get very far
7 with me on that, because I don't know how to import
8 something in that's not stated by Congress in any way.

9 MR. WAXMAN: What is stated by Congress, and
10 this Court has accepted repeatedly, is that Congress in
11 1952 intended to retain and reflect patent law as it
12 existed, and that's why, for example, this Court found,
13 even though there is no codification, that the doctrine
14 of equivalence is still applicable after the 1952 Act,
15 even though nothing was said about it. And --

16 JUSTICE GINSBURG: There is a whole series
17 of decisions in the courts of appeal. On the legal
18 question it turns on the interpretation of a statutory
19 text.

20 This Court has never ruled on it. Is the
21 Court estopped because there have been a number of
22 courts of appeals who have ruled one way? This Court
23 has never addressed the question.

24 MR. WAXMAN: This Court is never estopped
25 from anything that it doesn't think it's estopped from.

1 But the legal -- the legal question in the
2 case, Justice Ginsburg, is what did Congress in -- did
3 Congress in -- in enacting the 1952 Act intend to retain
4 and reflect the patent law, laches case law, as it
5 intended to retain and reflect patent law in general?
6 And there are -- I mean, I gave you the example, for
7 example, to Justice Sotomayor's question of where was
8 the -- you know, an express intent to include laches, I
9 gave you the example of the doctrine of equivalence.

10 There are many, many other doctrines that
11 were continued and that this Court has found were
12 continued.

13 JUSTICE BREYER: A weak point in your
14 argument is all -- most of those prior cases were --
15 were equity cases, but the weak point's weakened because
16 most of those equity cases after 1897 were under
17 provisions that had a statute of limitations, and the
18 reason you didn't have laches in equity is because it
19 didn't have a statute of limitations. But here you did
20 have a statute of limitations.

21 So you have all those cases; that's your
22 argument. And I'm -- I'm actually just trying to
23 summarize it so you'll tell me where it's not correct.

24 MR. WAXMAN: I just want to strengthen it.

25 JUSTICE BREYER: Okay. Strengthen it, but

1 when you strengthen it, will you please spend about a
2 minute or two on what I thought was another argument,
3 which now has been seriously undercut, and I want to be
4 sure you have a chance to address it.

5 MR. WAXMAN: And this is --

6 JUSTICE BREYER: I was -- I was afraid of --
7 and I think I might have been well wrong to be afraid of
8 it -- but moved in part by the Dell brief, I was afraid
9 that a person with a patent or the transferee of that
10 patent, in year 2, would have told the -- a licensee, go
11 right ahead, go ahead, or not said anything when he
12 could have or something like that, that would have given
13 rise to laches. That licensee would have spent billions
14 on technology that is very hard to change.

15 MR. WAXMAN: Justice Breyer --

16 JUSTICE BREYER: And then in year 18, this
17 person, now the transferee of the patent, sues him, and
18 he is going to get six years worth of profits and
19 nothing deducted. Now they have told me that's totally
20 wrong because what you would have done is gone back to
21 year two, figured out a reasonable rate of return, and
22 that's what it would have gotten.

23 I'm still a little worried that he brings
24 the same lawsuit in 19 -- year 19, year 20, years
25 thereafter, and thereby really fixes this guy who has,

1 in fact, invested \$4 billion on the old technology.

2 MR. WAXMAN: Yep.

3 JUSTICE BREYER: But I want to give you a
4 chance.

5 MR. WAXMAN: Thank you.

6 Justice Breyer, the Dell brief is one of a
7 dozen briefs that addresses the very significant
8 consequences to extending Petrella to the very, very
9 different statutory and commercial context. The -- the
10 industry as a whole, across the board, is so clear that
11 -- that laches should apply and continue to apply, that
12 the -- the Intellectual Property Owner's Association,
13 the group that represents people against whom laches are
14 asserted, has told this Court in an amicus brief
15 supporting neither party that laches existed, exists,
16 and should continue to exist in this case. And the
17 reason why is, in addition to --

18 JUSTICE SOTOMAYOR: Mr. Waxman, can you get
19 to Justice Breyer's question? What is the economic
20 consequence other than paying a reasonable royalty?
21 Let's assume somebody waits till year 19. They are only
22 going to get a reasonable royalty from year 14 or -- my
23 math is horrible -- year 13 to 19. What else? What's
24 the other economic loss?

25 MR. WAXMAN: Well, the -- the economic -- of

1 course we're now just talking about retrospective
2 damages. And as this Court explained in Petrella,
3 and -- and explained first in 1880 in the Menendez case,
4 laches can apply when the -- the severity that the
5 unreasonableness, and inexcusably, the delay is long
6 enough, and the prejudice is substantial, to defeat all
7 forms of remedy.

8 But the prejudice here is that, unlike in
9 the copyright area where Congress adds -- adds two whole
10 Roman numerals of this majority's opinion, and Petrella
11 explains, there are many, many signals otherwise in the
12 way that the copyright law is constructed, that Congress
13 was knowledgeably and intentionally assuming and
14 accepting that -- that claims would be brought years and
15 years after the fact that would limit the damages to
16 only those net profits for three years out of the
17 hundred-plus years of the copyright life.

18 In this case, we are talking about six years
19 of a 20 -- really more like 17 years -- and we are
20 talking about instances recounted in the amicus briefs
21 in which defendants are locked in. And they are not
22 just defendants in copyright law.

23 In order to be a defendant, you have to
24 copy. You have to know that you are copying something.
25 And copyright law doesn't apply to third parties or

1 people who use it or make nonpublic displays.

2 In the patent law, there is strict
3 liability. Independent invention is no defense.

4 JUSTICE ALITO: Well, Mr. Waxman, to follow
5 up on this point, Mr. Black made several -- made several
6 points. One is that asserting a laches defense is
7 obligatory, and therefore it leads to a lot of pointless
8 litigation, according to his submission.

9 And second, that the reasonable royalty is
10 not such a tremendous penalty.

11 So could you just respond briefly to those
12 two?

13 MR. WAXMAN: Well, I don't know how often
14 laches is asserted or not asserted. It is true that it
15 is not often found to have been satisfied. I mean, the
16 -- the existence of laches is -- and laches as a defense
17 to damages -- and then I will get to the economic harm
18 part -- was so settled, that -- I mean, that's the
19 reason why this Court has never addressed it. It was so
20 settled, that in this very case in which the plaintiff
21 sued for an injunction and damages and laches was
22 asserted, until after this Court announced its decision
23 in *Petrella*, the defendant never in any of its pleadings
24 or briefings or defenses said, laches? Laches doesn't
25 apply to damages.

1 JUSTICE GINSBURG: The Federal Circuit --
2 the Federal Circuit was the final word until this Court
3 stepped in.

4 JUSTICE SOTOMAYOR: All right.

5 JUSTICE GINSBURG: And the Federal Circuit's
6 position was clear.

7 MR. WAXMAN: That -- that's entirely right.
8 The point here is that -- that the principle that laches
9 applied to damages was so unexceptional, that it simply
10 wasn't defended.

11 Now, on the monetary damages, you have --
12 you can say, oh, yes, you know, perhaps the appropriate
13 remedy is reasonable royalty. Although reasonable
14 royalty is the floor, it's damages not less than
15 reasonable -- than a reasonable royalty. But it's being
16 applied against not just people who -- who make or sell
17 the invention, but people who use the invention, like in
18 theory -- in theory, any of us with respect to devices
19 that have chips that can't be marked, and against people
20 who had no idea that they were necessarily infringing a
21 patent.

22 The Petitioner's own amici make the point of
23 how difficult it is to know, even if you know of a
24 patent, how the claims will be construed, or whether it
25 will be -- you'll be ascertained to have, in fact,

1 infringed that particular --

2 JUSTICE BREYER: The part -- the part I'm
3 missing in your argument, I've focused it -- look. Year
4 13, okay? It all turns on a license. License. Year 1.
5 Gone. Disappeared. Far. Can't find any witnesses,
6 okay? So therefore, laches, if laches exists.

7 Now, you say, the difference with copyright
8 is that the people there involved are really locked in,
9 that -- those are your words, "locked in." I want to
10 say respect, locked in. So what? Why does that make a
11 difference?

12 MR. WAXMAN: Well, because, in the -- in the
13 copyright context, since in order to even commit the
14 tort of copyright infringement you have to know you're
15 copying, and you can always choose some other form of
16 expression.

17 In the patent doctrine, where it is -- it is
18 strict liability where independent invention is not a
19 defense, there are many, many opportunities recounted in
20 the amicus briefs in which there's every opportunity to
21 design around a particular patent claim.

22 JUSTICE BREYER: "Locked in" means you can't
23 change. Why is it relevant that you can't change?

24 MR. WAXMAN: It's relevant you can't change
25 because at the point -- at the later point in which the

1 -- the plaintiff who unreasonably and without excuse
2 comes in to your substantial prejudice and says, a-ha, I
3 got you, you don't have the option of mitigating.

4 You've built a \$1 billion plant, or the -- you're using
5 the patent to -- a -- a standards-essential patent --

6 JUSTICE GINSBURG: How much do you have to
7 pay? You have -- it's only six years. And if what you
8 have to pay is a reasonable royalty, that doesn't sound
9 so horrendous, does it? And it sounds like just what
10 Congress meant when it gave you a six-year statute of
11 limitations.

12 MR. WAXMAN: It is damages not less than a
13 reasonable royalty.

14 JUSTICE GINSBURG: What does the judge
15 usually charge -- now in many of these cases, at least
16 one of the briefs said, are tried to a jury. What does
17 the judge instruct the jury about the monetary recovery
18 in a patent suit?

19 MR. WAXMAN: Oh, there are -- I mean,
20 ordinarily, what plaintiffs will seek are the lost
21 profits of the -- of the plaintiff, or another measure
22 of damages, and the judge instructs the jury that as a
23 safeguard, the floor is not less than a reasonable
24 royalty. In other words, the judge instructs the jury
25 in accordance with the provisions of -- of Section 284.

1 But the point here is -- I mean, again, I --
2 you keep saying -- and whatever is -- and it is
3 certainly true that in the -- may I finish my sentence?

4 CHIEF JUSTICE ROBERTS: Sure.

5 MR. WAXMAN: In the event that there is a
6 statute of limitations, whether you call the 1897
7 provision one or not, what is one to make of a laches
8 defense? The case law and the commentators answered
9 that question pellucidly for the 1952 Congress.

10 Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Black, you have four minutes remaining.
13 Five minutes. Sorry.

14 REBUTTAL ARGUMENT OF MARTIN J. BLACK

15 ON BEHALF OF THE PETITIONERS

16 MR. BLACK: Thank you, Your Honor.

17 Patent law is an important branch of the
18 law, but it is just a branch, and this Court's
19 precedence is the trunk and the roots. And this Court's
20 precedent were very clear before 1952 -- in Homebrook in
21 1946, U.S. v. Mack, 1935; Wehrman, 1894 -- that laches
22 cannot bar damages within the period of a Federal
23 statute of limitations. On the equity side of the
24 Court, laches could bar a claim. It was almost treated
25 like a jurisdictional issue, and an issue in copyright

1 as well as in patent, because the way the equity courts
2 worked, if you wanted to seek injunctive relief, you
3 went to equity.

4 If you only wanted to seek a monetary
5 remedy, you could not go to the equity court. That's
6 under the Root case, and naked accounting was not an
7 acceptable basis for equity jurisdiction.

8 So plaintiffs would go to the equity court.
9 They would seek an injunction, and then they would
10 get -- as additional remedy if they survived the
11 liability phase and the laches findings, they would then
12 go on to -- go to see a Special Master to deal with an
13 accounting, an accounting of the profits. That was the
14 remedy on the equity side.

15 They've got a statistic in their brief about
16 damages in equity cases, but they were very rarely
17 awarded because the real candle was disgorging the
18 opponent's profits just as in copyright law. It's not
19 available in patent law.

20 The number of damages cases, if you really
21 wanted to look at it, you'd have to look at all the
22 cases on the law side because those are always about
23 damages, and a small fraction in which a Special Master
24 awarded on the equity side damages rather than the --
25 the accounting for profits.

1 Congress abolished that provision in 1946
2 because it was unworkable. The legislative history of
3 that Act reads like Bleak House. It was a horrible
4 procedure which frustrated the parties, which they
5 described as -- in terms of "justice delayed is justice
6 denied," and they abolished that.

7 So it was in front of Congress in 1952 with
8 three things. This Court's precedent that said that
9 laches could not be used to bar legal relief. You had
10 the merger of law and equity in 1938 which scrambled all
11 the eggs. You had the 1946 Lanham Act, which also went
12 through the committee on patents and copyrights where
13 they specifically included the word "laches" in the
14 statute. And you had the abolition of the remedy that
15 parties had been seeking as the primary means of
16 monetary relief in patent law for 60 years.

17 There is no way that you can look at that,
18 that fact, and get around it by pointing to a book, a
19 treatise, which, by the way, does not have a section in
20 it on unenforceability.

21 JUSTICE KAGAN: Well, Mr. Black, I take it
22 that Mr. Waxman's principal point is that what separates
23 out the patent context is that laches was operating true
24 in equity but with a statute of limitations, and that
25 that just wasn't true in other places. The Congress was

1 used to the notion that laches would operate with a
2 statute of limitations in place.

3 So what's your response to that?

4 MR. BLACK: Laches could bar the suit in
5 equity, but -- and then the plaintiff was out of court
6 but not on the law side. On the law side, damages were
7 available to the plaintiff.

8 There was an overall -- there was an overall
9 requirement, though, in Section 286. And in the
10 original 1897 version, which was just called a statute
11 of limitations, that said no matter what, if you're in
12 law, if you're in equity, you cannot get damages more
13 than six years before suit.

14 But what happened in the equity courts is
15 the courts would take a look at whether or not the
16 plaintiff had clean enough hands to continue pursuing
17 the case. And if they'd waited too long, the equity
18 courts had that power which was granted to them back at
19 common law -- not in common law -- back in England, and
20 they exercised the power to say, you know what, equity
21 is not going to help you because you waited too long.
22 Not true on the law side.

23 Now, my opponent says there weren't any
24 cases on the law side, but part of the reason for that
25 was you couldn't plead laches in a case of law. You

1 couldn't even plead it prior to 274(b), which I think
2 was 1919. Then courts got -- that was the beginning of
3 merger. Then courts got a little confused, and you have
4 cases like Banker, which just got it wrong.

5 But courts did not consider laches in cases
6 of law because they couldn't. It would have been like
7 pleading contributory negligence in a contract case. It
8 just wasn't a recognized defense.

9 But when we look at this Court's precedence,
10 it was very clear, laches cannot bar legal relief.

11 Petrella has a tremendous benefit to it. It
12 has a very clear -- clear rule of decision that decides
13 this case and any others that might come before the
14 Court on the nature of laches. We look to the nature of
15 the remedy in modern litigation, not to the vagaries of
16 the merger of law and equity or ancient equity practice.
17 We look to the remedy.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 The case is submitted.

20 (Whereupon, at 12:02 p.m., the case in the
21 above-entitled matter was submitted.)

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