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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 JUSTICE SCALIA: We'll hear argument now in  
4 Case No. 10-290, Microsoft Corporation v. i4i Limited  
5 Partnership.

6 Mr. Hungar, you may proceed.

7 ORAL ARGUMENT OF THOMAS G. HUNGAR

8 ON BEHALF OF THE PETITIONER

9 MR. HUNGAR: Thank you, Justice Scalia, and  
10 may it please the Court:

11 The Federal Circuit's clear and convincing  
12 evidence standard ensures the enforcement of invalid  
13 patents, even though this Court recognized in KSR that  
14 invalid patents stifle rather than promote the progress  
15 of liberal arts. Under this Court's decisions Grogan  
16 and Huddleston, the default preponderance standard  
17 should govern in all cases because section 282 does not  
18 specify a heightened standard of proof.

19 And as this Court suggested in KSR, it makes  
20 no sense to have a heightened standard of proof when the  
21 relevant prior art evidence was never even considered by  
22 PTO. Under any view, it was error to require clear and  
23 convincing proof of invalidity in this case.

24 JUSTICE GINSBURG: It would be hard to  
25 argue, Mr. Hungar, that it makes no sense, but it made

1 sense to Cardozo and Judge Rich.

2 MR. HUNGAR: Your Honor, Justice Cardozo was  
3 not addressing a case in which the evidence at issue had  
4 not been considered by the Patent Office. To the  
5 contrary, the Court made clear --

6 JUSTICE SCALIA: Well, you can't keep  
7 shifting horses, now. Are you going to argue for all  
8 the time, in which case, you can appeal to the general  
9 rule that we always apply, or are you going to say, oh,  
10 yes, we won't apply it normally but only when the prior  
11 art hadn't been considered? I mean, you -- you can't  
12 ride both horses. They're going in different  
13 directions.

14 MR. HUNGAR: Your Honor, our position and  
15 our view of the correct interpretation of the statute is  
16 that Grogan and Huddleston approach. The statute does  
17 not specify a heightened standard; therefore,  
18 preponderance, the default standard; applies.

19 I was attempting to answer Justice  
20 Ginsburg's question about the RCA case. And the RCA  
21 case didn't address the question that was discussed in  
22 KSR, but we believe, as I said, that the -- that the  
23 preponderance standard should govern across the board.

24 JUSTICE SCALIA: So, you're contradicting  
25 Cardozo?

1                   MR. HUNGAR: To the extent that -- that  
2 Justice Cardozo was discussing a heightened standard in  
3 the limited context of priority inventions, we think  
4 that that's not consistent with section 282, which, of  
5 course, came later. Moreover, I would note that the  
6 concerns that undergirded the Court's heightened  
7 standard in priority of invention cases, where -- those  
8 concerns were addressed to the -- the problem of  
9 primarily oral testimony being offered to substantiate  
10 priority of invention claims.

11                   The Federal Circuit has separately addressed  
12 that issue by means of its corroboration requirement,  
13 which operates separate and independent of the clear and  
14 convincing evidence standard, so the concerns that  
15 undergirded RCA are -- are completely taken care of by  
16 that as well.

17                   JUSTICE KAGAN: But Justice Cardozo  
18 certainly didn't limit his holding in the way you  
19 suggest. The language of that opinion is extremely  
20 broad. And if you read that opinion, no one would  
21 gather from that opinion the kinds of limits that you're  
22 suggesting on it.

23                   MR. HUNGAR: Actually, Your Honor, I agree  
24 that there is some grand language used in dictum in that  
25 case. Certainly, the holding doesn't extend beyond

1 the -- what was presented before the Court. But,  
2 actually, if you read the language carefully, you'll see  
3 again and again he refers to the fact that it's a  
4 question of -- of prior invention. He says when the  
5 defense is a prior invention, and then he quotes the  
6 heightened standard on page 7. Again, on page 8, he  
7 talks about the defense of invention by another.

8           So he -- and every single one of the cases  
9 that he cites there, without exception in that  
10 discussion on pages 7 to 8, is a priority of invention  
11 case, The Barbed Wire Patent case being the leading  
12 example which had explained this rationale for a  
13 heightened concern in that specific context. But you  
14 don't have cases applying -- Supreme Court cases  
15 applying the heightened standard in other contexts.  
16 And, indeed, you have many cases decided after RCA that  
17 don't mention any heightened standard in viewing  
18 invalidity questions.

19           JUSTICE GINSBURG: But just taking RCA  
20 itself, Cardozo said through all the verbal variances  
21 there runs this common core of thought and truth, that  
22 one otherwise an infringer who assails the validity of a  
23 patent bears -- upon its face, bears a heavy burden of  
24 persuasion and fails unless his evidence has more than a  
25 dubious preponderance.

1                   MR. HUNGAR: Yes, Your Honor. And read --  
2 taken out of context, that could have broad  
3 implications, but the sentences before and after clearly  
4 make -- indicate that he's talking about priority of  
5 invention. He talks about the title of the true  
6 inventor and so forth. So -- so, again, that's what  
7 those cases said, and that's what a fair reading of RCA  
8 says.

9                   But, regardless of the best reading of RCA,  
10 we -- the -- the question here is what did Congress do  
11 in 1952? And we know that Congress in 1952 could not  
12 possibly have understood the law to be an  
13 across-the-board clear and convincing evidence standard.

14                  JUSTICE GINSBURG: Then you -- then you have  
15 to be saying that Judge Rich got it wrong because he  
16 does deal with the --

17                  MR. HUNGAR: Well, certainly -- yes, Your  
18 Honor, certainly we think American Hoist is wrong,  
19 although I would note that Judge Rich, in American Hoist  
20 decision, says that the cases prior to 1952 were all  
21 over the map.

22                  But -- but the relevant question is what  
23 would Congress have thought the state of the law was in  
24 1952. If you think that there's any merit at all to the  
25 judicial codification argument, it's perfectly clear

1     that Congress could not have thought in 1952 that the  
2     law was an across-the-board heightened standard, because  
3     case after case after case rejected the proposition that  
4     there is a heightened standard or that the presumption  
5     was unaffected when the evidence was not considered by  
6     the Patent Office.

7                     The -- we've cited numerous cases in our  
8     brief at pages 34 through 36. The -- and we also in the  
9     reply brief at footnote 3 reference a list of over 200  
10    cases, some from before 1952 and some from after 1952,  
11    all recognizing that the presumption of validity was  
12    weakened or eliminated when the prior art evidence was  
13    not considered by the Patent Office. So, you just --

14                    JUSTICE KAGAN: Well, Mr. Hungar, it seems  
15    to me that RCA would matter, even under your view of the  
16    world, because if you think that Congress did not codify  
17    the existing state of the law as to the standard of  
18    proof and you think that Congress -- that -- that  
19    section 282 was essentially silent as to the standard of  
20    proof, then the question is, what do we do? And one  
21    answer to that question is we go with our prior  
22    precedent, which is RCA.

23                    MR. HUNGAR: Well, first of all, again,  
24    because RCA in context was a case where there was a  
25    priority of invention dispute that had been adjudicated



1 in the Patent Office on the same evidence previously  
2 resolved by the Court, a priority of defense dispute,  
3 where the heightened standard cases had some  
4 application, it clearly wouldn't affect the standards in  
5 this case. But, more fundamentally, that's not what  
6 Congress thought in 1952, and when you don't have a  
7 clear rule to be codified, the default rules of  
8 statutory construction apply. The default rule of  
9 statutory construction in a -- on this question, in  
10 Grogan and Huddleston, the preponderance standard  
11 applies.

12 And, moreover, while the statute does not  
13 specify a heightened standard, it does actually speak to  
14 and -- and preclude the argument that i4i makes, because  
15 the first sentence refers to patents being presumed  
16 valid under this Court's precedent, a presumption shifts  
17 the burden of going forward, and the second sentence of  
18 the original statute refers to the burden of proof.  
19 Under their interpretation, presumption does all the  
20 work. The first sentence not only shifts the burden of  
21 going forward, also shifts the burden of proof, and does  
22 so under a heightened standard, which has never been how  
23 presumption is interpreted generally in the law, and it  
24 renders the second sentence entirely superfluous.  
25 There's no need for it.

1 JUSTICE GINSBURG: It's -- it -- it is true  
2 that the Federal Circuit has been consistent now since  
3 almost the beginning, since that court came on the  
4 scene, and it does have a monopoly on appeal in patent  
5 cases since 1984. Because the -- the Federal Circuit  
6 has consistently taken this position, one would have  
7 expected that there would have been bills proposed to  
8 change it. Were there any?

9 MR. HUNGAR: No, Your Honor, not that I'm  
10 aware of. But I would note that this is, I think, i4i's  
11 congressional acquiescence argument, if you will, and  
12 that argument fails for numerous reasons.

13 First of all, if there could be any  
14 acquiescence, and we don't think that the -- this  
15 Court's extremely high requirements for such a claim  
16 have been satisfied here, but if there could be any  
17 acquiescence at all, the first 30 years after enactment  
18 of the statute would be the most relevant consideration  
19 in determining what Congress had acquiesced in, and it's  
20 perfectly clear that the regional circuits all rejected  
21 the across-the-board heightened standard that i4i is  
22 arguing for.

23 So if Congress acquiesced in anything, it  
24 was not an across-the-board heightened standard.

25 JUSTICE SOTOMAYOR: Counsel, I -- I --

1   having read some of those cases that you've cited that  
2   you claim weakened or eliminated the burden of proof  
3   standard, most of them didn't quite eliminate it.  
4   Virtually all of them added an instruction to the jury  
5   of some sort that said that the application of the  
6   standard should take into account the fact that the PTO  
7   did not consider evidence -- did not consider the prior  
8   art relied upon in the invalidity challenge.

9                   You didn't ask for such an instruction in  
10   this case; is that correct? And if you didn't, why  
11   isn't that adequate to convey the point that you're  
12   trying to convey, that a jury should, in fact, consider  
13   that the PTO never got to see that prior art?

14                  MR. HUNGAR: Your Honor, if I understand  
15   the -- the question correctly, first of all, I would  
16   disagree with the characterization of the cases, but  
17   with respect to the preservation issue, we objected to  
18   the clear and convincing evidence instruction, and we  
19   also said that if -- if any instruction on the  
20   heightened standard is going to be given, it needs to  
21   reflect that -- the fact that, at least with respect to  
22   prior art combinations that were not considered by the  
23   Patent Office, the standard should be a preponderance.  
24   And, indeed, that's true of all of the prior art  
25   combinations that were at issue in the case.

1 JUSTICE SOTOMAYOR: But other judges give a  
2 slightly different standard. They give a clear and  
3 convincing standard, and they add a separate instruction  
4 that tells the jury, in applying that standard, you  
5 should consider the fact that the PTO did not see this  
6 evidence. You didn't ask for that?

7 MR. HUNGAR: We didn't ask --

8 JUSTICE SOTOMAYOR: You just asked for the  
9 preponderance of the evidence charge?

10 MR. HUNGAR: But, Your Honor, we did object  
11 to the clear and convincing evidence instruction, and so  
12 if -- we don't think that's the right answer, the more  
13 easily satisfied instruction, if that's what Your Honor  
14 is referring to. But if that were the court's  
15 conclusion, that that is in fact what the law requires,  
16 then our objection to the clear and -- the unmodified  
17 clear and convincing evidence instruction would justify  
18 a new trial here. But more fundamentally, even the  
19 Federal Circuit --

20 JUSTICE SOTOMAYOR: Why?

21 MR. HUNGAR: Because that in effect --

22 JUSTICE SOTOMAYOR: I mean, you said to the  
23 judge below: All you have to charge is preponderance of  
24 the evidence. You never told him: Please explain to  
25 the jury that under clear and convincing they can take

1     into account --

2                   MR. HUNGAR:   Your Honor, that construction  
3     would not solve the fundamental problem, which is that  
4     when the Patent Office didn't even consider the  
5     evidence, it makes absolutely no sense, as the KRSR  
6     court indicated, to have this heightened deference.  The  
7     statute requires a degree of deference by shifting the  
8     burden of proof and the burden of going forward, but for  
9     i4i to say that we need to go beyond what the  
10    presumption is, the normal default standard of  
11    preponderance, you need some heightened reason for that.  
12    There's absolutely none, particularly when the Patent  
13    Office didn't consider the evidence, didn't make a  
14    decision, there was no decision and no evidence  
15    considered going to the relevant question.  That's  
16    not --

17                  JUSTICE BREYER:  I have one question here I  
18    would like to get your view on.  I'll assume that the  
19    language is open enough in the history so that we could  
20    make what would be a change, I think it would be a  
21    change.  The reasons as I get from the brief for doing  
22    that are because there are two types of errors:  It's a  
23    bad thing not to give protection to an invention that  
24    deserves it; and it is just as bad a thing to give  
25    protection to an invention that doesn't deserve it.

1 Both can seriously harm the economy.

2 And you are also saying that the Patent  
3 Office is out of control, not through its own fault, but  
4 there are too few people and too many inventions. And  
5 therefore type two error is a real risk.

6 So I'm turning you to and say: Well, what  
7 should we do about it? I know your proposal. But we  
8 have also seen in these briefs the following proposal:  
9 One, somebody who thinks there is a type two error, go  
10 back to the Patent Office and ask for reconsideration.  
11 That's pretty good. We get the experts to look at it  
12 again.

13 And then that's coupled with: Tell the  
14 district judges to stick very closely to their job,  
15 allow the clear and convincing standard to apply to  
16 facts, and by that we mean brute facts, and let them  
17 decide the brute facts, but let the judge decide whether  
18 that amounts to obviousness, novelty, or any of the  
19 other prerequisites.

20 Now, I've gotten that out of the amicus  
21 briefs, some of which say they support you but they  
22 really don't. So I would like -- I would like your  
23 views on those two suggestions as being sufficient to  
24 cure the problem that you point to.

25 MR. HUNGAR: Yes, Your Honor. First of all,

1 with respect to re-exam, re-exam is not a solution to  
2 the problem or an answer to the absence of justification  
3 for a heightened standard, for several reasons. First  
4 of all, re-exam is limited in scope. It can only  
5 consider certain types of prior art evidence and issues.  
6 It couldn't, for example -- it was not available for the  
7 issue that we're talking about here, the on-sale bar.  
8 There are various issues, the section 112 issues, such  
9 as written description and best mode and the like, are  
10 not susceptible of re-examination. Statutory subject  
11 matter is not susceptible of re-examination. Many kinds  
12 of prior art, anything other than actual patents or  
13 publications, cannot be referenced in the examination.

14 So it is a limited mode of inquiry that does  
15 not address many types of prior art that come up in many  
16 types of important cases, technology cases in  
17 particular. So that's one reason why the re-exam  
18 solution is not a problem, and of course it can't  
19 possibly be used to infer some intent on the part of  
20 Congress.

21 I4i and the government try to suggest that  
22 this was part of the scheme of Congress and this is why  
23 clear and convincing makes sense. But re-exam was  
24 enacted in 1980, long after the '52 act, so it doesn't  
25 shed light on Congress's intent in enacting section 282.

1 And it was enacted before the Federal Circuit had  
2 created its heightened standard, so it can't possibly  
3 have been an attempt to address the problems created by  
4 an across-the-board heightened standard that did not  
5 exist at the time. In 1980 the law was clear that a  
6 preponderance standard governed in most or all cases and  
7 a preponderance standard, of course, governs in re-exam  
8 as well. So re-exam is not a solution. The more easily  
9 satisfied instruction or that type of approach. If  
10 that's what I understand --

11 JUSTICE BREYER: I'm getting that out of the  
12 American Intellectual Property Law Association. I don't  
13 blame them for my phrasing of it, but that is what  
14 struck the thought in my mind that careful instructions  
15 limiting the juries to brute facts and giving the judge  
16 the notion, the job of characterizing that -- you heard  
17 what I said -- that that will go a long way towards  
18 curing the problem you're worried about.

19 MR. HUNGAR: Your Honor, I don't think it  
20 addresses the problem because the fundamental problem is  
21 imposing this heightened standard on the jury that has  
22 no moorings in the statute and no moorings in common  
23 sense, particularly in a case like this one where the  
24 relevant evidence was not only not considered by the  
25 Patent Office but withheld from the Patent Office.



1 Under those circumstances --

2 JUSTICE BREYER: It might not in your  
3 situation. But the problem is in principle as it's put  
4 to us that the office and the Federal Circuit emerge  
5 giving protection to things that aren't really novel,  
6 that aren't really advances on the prior art, et cetera.  
7 Now, if that's the problem, and you carefully instruct  
8 the jury, the bad fake patents will go away because the  
9 judge will say: Look, this metal case called a battery  
10 leakproof is not really novel.

11 MR. HUNGAR: But, Your Honor, if that were  
12 -- the judge can't give an instruction like that.

13 JUSTICE BREYER: No, no. The judge says: I  
14 want you to find if this metal container is leak proof.  
15 Jury: Yes. Now it's up to the judge.

16 MR. HUNGAR: Your Honor, I think in many of  
17 these cases it would be extremely difficult or  
18 impossible for judge to fashion at that level of  
19 specificity the factual issues to be considered by the  
20 jury. But more fundamentally, if you're getting into  
21 that level of detail and addressing questions that the  
22 Patent Office didn't even consider or certainly did not  
23 have an opportunity to consider with the full array of  
24 procedural advantages that litigation and discovery  
25 offer, it just makes no sense to impose a heightened

1 standard. As one of Your Honor's earlier questions  
2 pointed out, the fundamental problem here is that the  
3 interests on the i4i side of the equation, the policy  
4 interests, are outweighed if anything by this Court's  
5 repeated recognition that invalid patents stifle  
6 innovation and competition and are very harmful.

7 JUSTICE GINSBURG: Mr. Hungar, could we go  
8 back to the statute that was enacted in 1952. Before  
9 that the burden of proof on the issue of validity of the  
10 patent or the effect of the patent, that was on the  
11 challenger. So when Congress added a presumption of  
12 validity, it must have had in mind something more than  
13 the defendant would have the burden of proof and the  
14 normal standard is preponderance. So by adding a  
15 presumption of validity, must Congress have intended to  
16 do something more than simply repeat that the defendant  
17 has the burden of proof?

18 MR. HUNGAR: No, Your Honor. The law  
19 actually before 1952 was quite unsettled on that  
20 question, as we noted in our brief and as Judge Rich, I  
21 believe, noted in the American Hoist case, there were  
22 actually cases prior to 1952 saying that the burden was  
23 on the patent HOLDER to establish a validity. So what  
24 Congress --

25 JUSTICE KENNEDY: Burden of going forward or

1 burden of persuasion?

2 MR. HUNGAR: I believe -- you know, the  
3 cases aren't crystal-clear on that. I think certainly  
4 they were talking about the burden of persuasion and  
5 presumably also the burden of going forward. But I  
6 don't think -- I don't recall that they speak to that  
7 level of specificity.

8 But certainly there are cases saying the  
9 burden is on the patent holder. Congress overturned  
10 those cases by imposing -- by stating in the second  
11 sentence that the burden of proof would be on the  
12 defendant. But it only makes sense, as I indicated  
13 earlier, for Congress to have added that sentence if it  
14 didn't view the presumption sentence as shifting the  
15 burden of proof to the defendant, let alone shifting it  
16 under a heightened standard, so --

17 JUSTICE ALITO: If the challenger has the  
18 burden of persuasion, wouldn't it almost go without  
19 saying that the challenger would also have the burden of  
20 production on the issue of invalidity? So what would be  
21 added then by -- what role is played then by that  
22 sentence, a patent shall be presumed valid?

23 MR. HUNGAR: I think that's unclear, Your  
24 Honor. Certainly there are circumstances in which the  
25 party with the ultimate burden of proof does not bear --

1 does not have the burden of persuasion at every stage.  
2 And Congress -- there were also cases prior to 1952  
3 suggesting that the presumption had gone away, that  
4 there was no longer a presumption of validity or that  
5 the presumption went the other way.

6 And so again, Congress wanted to be clear;  
7 it was saying there is a presumption which shifts the  
8 burden of going forward under this Court's precedence,  
9 and there is a burden of proof on the defendant, and  
10 that's all it did. To infer that it did something much  
11 more, much more than the pre-1952 cases authorized --  
12 there are literally dozens of pre-1952 cases cited in  
13 that list of 200 cases referenced at footnote 3 of our  
14 brief, from prior to 1952, rejecting the notion that  
15 there's an across-the-board heightened presumption of  
16 validity; saying, no, if the evidence was not considered  
17 by the Patent Office or in some -- the Western Auto  
18 case, for example, from the Sixth Circuit says well,  
19 there's this -- the exception for oral testimony of  
20 prior invention, that's the RCA case; but everything  
21 else is preponderance. So there's no -- there's no  
22 heightened presumption of validity in any other  
23 circumstances.

24 So I think the law was clear, and the  
25 treatises we cite at page 9 of our reply brief also make

1 clear the treatise writers understood, there was no  
2 across-the-board heightened presumption that it was  
3 weakened or eliminated when the evidence was not before  
4 the Patent Office. And some of the cases said --  
5 actually RCA itself cites with approval two court of  
6 appeals cases that we note in our reply brief, the  
7 Studie case and the Wilson case, which rejected the  
8 notion of a heightened standard across the board. They  
9 said well, that's true when the issue was adjudicated  
10 before the Patent Office, but here where the Patent  
11 Office did not adjudicate the issue that doesn't apply.  
12 So again you just can't get out of the pre-1952 case law  
13 -- the rule that i4i is urging.

14 If the Court has no further questions, I  
15 would like to reserve my time.

16 ORAL ARGUMENT OF SETH P. WAXMAN

17 ON BEHALF OF THE RESPONDENTS

18 MR. WAXMAN: Justice Scalia, and may it  
19 please the Court.

20 JUSTICE SCALIA: Mr. Waxman.

21 MR. WAXMAN: The long-settled, clear and  
22 convincing evidence standard is correct, one, as a  
23 matter of statutory interpretation, two, as a matter of  
24 stare decisis in a field in which stability is  
25 particularly important, and, three, as a matter of first

1 principles.

2 As to one, in 1952 Congress codified a long,  
3 uniform line of decisions from this Court holding that  
4 the presumption of validity imposes a heightened burden  
5 of proof, a burden of proof that this Court in RCA  
6 unanimously described as, quote, "clear and cogent  
7 evidence." And for the past 28 years Congress has  
8 actively acquiesced in the Federal Circuit's consistent  
9 holding expressly drawn from RCA that the standard is  
10 "clear and convincing."

11 JUSTICE GINSBURG: How actively do we  
12 acquiesce?

13 JUSTICE SCALIA: Yes, I would like that  
14 notion of active acquiescence.

15 MR. WAXMAN: I thought that might get a rise  
16 out of you.

17 (Laughter.)

18 MR. WAXMAN: I hope I'll get a chance to go  
19 to first principles, but having made that provocative  
20 statement, the point is --

21 JUSTICE SCALIA: It's like passive activity,  
22 right?

23 MR. WAXMAN: I may want to submit a  
24 supplemental brief on that point.

25 (Laughter.)

1                   MR. WAXMAN: What I mean to say is that this  
2 is not a statute that Congress enacted and then forgot  
3 about. This is a statute in which beginning in 1980,  
4 even before the Federal Circuit was created, Congress  
5 started amending the law to address the problem of  
6 low-quality patents, with the first re-examination  
7 procedure in 1980, any number of amendments, including  
8 to section 282, the creation of interparties  
9 re-examination in 1999, and the current consideration of  
10 a post-grant review process.

11                   So Congress has been very, very active in  
12 this field, and what I mean by active acquiescence is it  
13 has been very active in this field, it is well aware of  
14 the clear and convincing evidence standard, and it has  
15 done nothing whatsoever to change it, even make any  
16 effort to consider making such a sweeping change in  
17 long-standing doctrine.

18                   JUSTICE KAGAN: Mr. Waxman --

19                   JUSTICE ALITO: If I could take you back to  
20 first principles, which is where you started, I have  
21 three problems in seeing your interpretation in the  
22 language of section 282.

23                   First, the statute says the burden of  
24 establishing invalidity of a patent, et cetera, et  
25 cetera, shall rest on the parties asserting such

1     invalidity.  If Congress wanted to impose a clear and  
2     convincing burden, why in the world would they not have  
3     said that expressly in that sentence?

4                 Number two, if the first sentence, "a patent  
5     shall be presumed valid," means that -- is talking about  
6     the burden, then it's superfluous, because that's dealt  
7     with in the second sentence.

8                 And, third, the phrase "shall be presumed  
9     valid" doesn't seem to me at all to suggest clear and  
10    convincing evidence.  A presumption normally doesn't  
11    have anything to do with clear and convincing evidence.  
12    Most presumptions can be disproved by much less than  
13    clear and convincing evidence.  So how do you read that  
14    in -- your -- your position into the language of the  
15    statute?

16                MR. WAXMAN:  Well, as to presumptions  
17    generally, I found particularly persuasive your opinion  
18    for the Third Circuit in *GI Holding*.  But more --

19                JUSTICE ALITO:  I've gotten a lot smarter  
20    since then.

21                (Laughter.)

22                MR. WAXMAN:  More directly to the point, and  
23    with all due deference to the sensibilities of the  
24    presiding Justice for this argument, when Congress  
25    enacted section 282 in 1952, the revisers note the House



1 Committee report, the Senate committee report said that  
2 they were, quote, "codifying the existing presumption of  
3 patent validity," and this Court had unanimously said --  
4 and this is language from RCA that Microsoft does not  
5 address -- on page 2 of its opinion says, quote, "even  
6 for the purpose of a controversy of -- with strangers  
7 there is a presumption of validity, a presumption not to  
8 be overthrown except by clear and cogent evidence.

9           Now, to be sure, that was dicta in the sense  
10 that the case in itself involves a priority issue. But  
11 it was the holding of the Court 3 years later in Smith  
12 v. Hall; it was repeated on the very same day in Mumm,  
13 and it was -- the Court spent an entire page, I think  
14 page 7, the better part of page 7 and 8 of its opinion,  
15 explaining that -- enunciating a general principle of  
16 the law, and it would be a cruel joke on Congress to  
17 have said, we are, when it said we are codifying the  
18 existing presumption, that that presumption was not  
19 exactly what the Supreme -- the Supreme Court  
20 unanimously had said, which is a presumption not to be  
21 overthrown by clear and convincing evidence.

22           Now, that's -- it's not that the first  
23 sentence uses the word presumption. It uses the word  
24 essentially presumption of patent validity, which is a  
25 feature, a uniform feature of the Supreme Court's

1 jurisprudence since the Court first started addressing  
2 this issue in 1873, and indeed when Justice Story first  
3 decided the Washburn v. Gould case, there is -- their  
4 argument is the standard is a preponderance.

5           There is not one opinion, there is not one  
6 sentence, there is not one phrase in any of this Court's  
7 line of decisions that supports that proposition -- and  
8 when Judge Rich said in 19 -- shortly after 1952 that  
9 there was some disarray in the courts' opinions, he  
10 was -- and you can look at his opinion in context. He  
11 was talking about lower court decisions that had either  
12 ignored or misinterpreted this Court's very clear  
13 holdings -- holdings which, by the way, refute not only  
14 their argument for a universal standard, preponderance  
15 standard, but directly refute their argument that there  
16 somehow is some other standard of proof that applies  
17 with respect to evidence that assertedly was not before  
18 the Patent Office.

19           That was true of most of this Court's cases  
20 decided before RCA, and for that matter after RCA.

21           JUSTICE GINSBURG: Would you agree, looking  
22 to Judge Rich's opinions, that it would have been in  
23 order for the judge to instruct, if the judge had been  
24 asked to do so, that the evidence would carry more  
25 weight if it hadn't been presented, defendant's evidence

1 would carry more weight if it hadn't been presented to  
2 the Patent Office?

3 MR. WAXMAN: Yes, and the Federal Circuit  
4 has said that over and over and over again. I mean, I'm  
5 going to quibble with the word "would" because I think  
6 the actual language of the instruction can't invade the  
7 province of the jury. But you could -- certainly could  
8 say that the defendant contends that the patent is  
9 invalid because the law presumes that a patent issued by  
10 the PTO is valid, the defendant bears the burden of  
11 proving invalidity by clear and convincing evidence, and  
12 in deciding whether the defendant has met that burden,  
13 you may find it more easily met with evidence that you  
14 conclude the Patent Office did not consider in  
15 evaluating patentability.

16 That is the long-standing established rule  
17 of the Federal Circuit. It was stated, as was  
18 recognized in *American Hoist*, in 1984, and the  
19 explanation for it, Judge Rich's explanation is exactly  
20 the same in cite that this Court's statement's in *KSR*  
21 is, which is that there -- there are -- there are  
22 reasons independent of deference to a particular PTO  
23 decision that warrant a clear and convincing evidence  
24 standard, and -- and this is key -- there is no case  
25 from this Court, to my knowledge, in Anglo-American

1 jurisprudence, that creates or sanctions a regime in  
2 which there are different standards of proof with  
3 respect to a particular issue that a jury has to decide.

4 The question -- when there is --

5 JUSTICE KENNEDY: Well, there are case --  
6 there are cases in which the presumption disappears?

7 MR. WAXMAN: Well, there -- are you  
8 referring to cases of this Court?

9 JUSTICE KENNEDY: Yes. Well, I mean,  
10 there -- there -- there are instances in which a  
11 presumption disappears and then the -- the parties begin  
12 again with burden of persuasion, et cetera.

13 MR. WAXMAN: Well, okay. I'm -- I'm talking  
14 here about -- the argument here is about the standard of  
15 proof, that is, a jury has to be instructed is it beyond  
16 a reasonable doubt, is it preponderance, is it clear and  
17 convincing? I'm not aware of any instance in  
18 Anglo-American jurisprudence, and certainly Microsoft  
19 and its amici have not cited one in which the jury is  
20 told that depending on the weight you ascribe to the  
21 evidence you heard, you should apply a different  
22 standard of proof.

23 The issue goes to the weight of the  
24 evidence. I mean, imagine a case in -- a regime in  
25 which you said, well, you've heard eyewitness testimony.

1 If you, ladies and gentlemen of the jury, find that the  
2 eyewitness really had an unimpeded view, the standard is  
3 preponderance, but if you think that the view was  
4 impeded or obscured, the standard is clear and  
5 convincing evidence.

6 The -- the assertion that there was evidence  
7 that the jury -- that the PTO didn't hear, and as the  
8 briefs point out it is far from black and white what the  
9 PTO does or doesn't consider. And in addition the --  
10 it's far from clear whether the unconsidered evidence  
11 is, quote, more pertinent than evidence that was  
12 considered. Even assuming that, the jury is told, for  
13 reasons of first principles, that I will articulate in a  
14 moment if left to my own devices, that the burden of  
15 proof is clear and convincing evidence, but you may find  
16 that burden more easily met if you find that there was,  
17 in fact, evidence relating to validity that was not, in  
18 fact, considered by the PTO when it issued this property  
19 right.

20 Now, the first --

21 JUSTICE SOTOMAYOR: Isn't there a lower  
22 court that has ruled that that standard, in the manner  
23 that you've articulated, could confuse a jury as to what  
24 clear and convincing evidence means?

25 MR. WAXMAN: The --

1 JUSTICE SOTOMAYOR: In fact, it's not clear  
2 and convincing evidence if you phrase it that way, that  
3 it's something less than that.

4 MR. WAXMAN: Well, I mean, a lot --

5 JUSTICE SOTOMAYOR: And so, the amici here  
6 have suggested alternatives to that language that you're  
7 endorsing --

8 MR. WAXMAN: There -- there are -- there are  
9 any number of formulations that trial courts have given.  
10 I think the one that would be clearest would be one that  
11 says in deciding whether the defendant has met his  
12 burden, you may give added weight to evidence that you  
13 find the PTO didn't consider in deciding validity.

14 The case I think you're referring to was  
15 Microsoft's earlier case involving z4, where unlike this  
16 case, Microsoft did ask for an instruction but it was  
17 rejected by the court -- it was -- it was rejected by  
18 the court and found not to be an abuse of discretion.  
19 The key point with respect to that instruction goes to  
20 the articulation that was suggested earlier, because in  
21 that case the instruction said you -- you make -- I  
22 instruct -- I don't have it in front of me, but it was  
23 essentially a mandatory instruction to give greater  
24 weight or that the burden would be more easily met.

25 JUSTICE SCALIA: Of course the instruction

1 that you've proposed to the jury, like your adversary's  
2 proposition, would require determining what it was that  
3 the Patent Office considered. So you -- you haven't  
4 avoided the -- the -- the problem of litigating an -- an  
5 issue that -- that would better be avoided.

6 MR. WAXMAN: Well --

7 JUSTICE SCALIA: You have to do it for your  
8 instruction just as -- as he will have to do it for his.

9 MR. WAXMAN: There is a -- there is a great  
10 difference, Justice Scalia, between telling individual  
11 jurors what amount of weight they may or may not give to  
12 certain evidence in creating a dual standard of proof  
13 which would, for reasons that -- that Microsoft's own  
14 amici point out, requires -- would require the jury  
15 first to determine whether this evidence was or wasn't  
16 considered and was or wasn't more pertinent --

17 JUSTICE SCALIA: Yes, but your -- but your  
18 instruction requires that, too. You're inviting the  
19 parties to litigate that issue so that the jury can be  
20 instructed. If you -- if you find that it wasn't  
21 considered, you can give it --

22 MR. WAXMAN: Justice Scalia, as -- as I  
23 think all the parties agree, and we reflect the -- we  
24 reflect the -- the research, I believe, on footnote 12  
25 of our brief, the -- this point is argued in many, many,

1 many cases. That is -- and it was true in this case.  
2 Evidence is put on that the jury -- that the PTO didn't  
3 consider this particular prior art, although, you know,  
4 in this case the file wrapper shows that there were five  
5 prior art rejections based on other art before the  
6 patent was allowed, and counsel argue it to and fro to  
7 the jury, as the Allison and Lemley article points out,  
8 the statistics bear out the common sense, which is that  
9 juries are, in fact, very influenced by the fact that  
10 there was art going to or questioning validity that was  
11 not considered by the PTO.

12 In other words, the instruction, whether the  
13 instruction is necessary or not, juries get it, and  
14 juries apply it. What they're not required to do is  
15 apply two different standards of proof following all  
16 sorts of predicate determinations that they would have  
17 to make.

18 May I simply list the first -- the first --  
19 JUSTICE GINSBURG: But -- but why -- why --  
20 why not, Mr. Waxman? If the whole reason for this extra  
21 deference, for this clear and convincing standard is a  
22 Patent Office is expert and so we defer juries similarly  
23 to defer to their judgment, but if they haven't judged  
24 anything, what is the justification for continuing to  
25 have the clear and convincing standard?



1                   MR. WAXMAN:   There -- here are four  
2   independent principles that justify the clear and  
3   convincing evidence standard across the board regardless  
4   of what the jury considered.

5                   Number one, an infringer's validity  
6   challenge is a collateral attack on a government  
7   decision that has already been made, quite unlike Grogan  
8   and Huddleston, that bestows property rights by written  
9   instrument.

10                  Number two, the harm from an erroneous  
11   determination is hugely asymmetrical.   A single holding  
12   of invalidity by a single lay jury vitiates for all time  
13   the patent and all of the reliance interest by the  
14   inventor and the investors and the licensees who have  
15   relied upon that ex ante.

16                  Third, this grant of property rights not  
17   only induces reliance, which lack, like the land patent  
18   cases induce reliance, this is a grant of a property  
19   right that under the Constitution is specifically  
20   designed to induce reliance in exchange for the  
21   inventor's honoring her half of the patent bargain, that  
22   is public disclosure of her intellectual property for  
23   the public benefit, and the commitment of capital by  
24   investors and licensees that's necessary to bring into  
25   fruition for the public benefit.

1 JUSTICE KAGAN: Isn't there a limited amount  
2 of reliance that any patent holder can have, given the  
3 re-exam system?

4 MR. WAXMAN: Yes, and the fact -- yes, the  
5 re-examine system -- I think your point actually, I wish  
6 I had thought to make this point myself. Re-examine is  
7 often invoked by the patent holder. That is, because  
8 re-exam is done by the expert agency and allows the  
9 patent -- allows the agency not to have a binary choice  
10 of yes, the patent's fine or no, it's invalid for all  
11 time, but can narrow the scope of the patent in re-exam,  
12 many re-exams are requested by the patent holder.

13 And more -- and also, when you request  
14 re-examination or when the PTO makes a re-exam decision,  
15 that decision is good for all time, whichever way it  
16 goes, unlike the stark asymmetry in trial court  
17 litigation where the patent holder has to win 100  
18 percent of the time. If the patent holder loses once,  
19 the patent under nonmutual offensive collateral  
20 estoppel, *Blonder-Tongue*, the patent is out. And I  
21 should point out that this Court's opinion in  
22 *Blonder-Tongue*, which of course was a case about patent  
23 validity --

24 JUSTICE BREYER: All those first principles  
25 are along the lines of how important patents are and

1    what a disaster is it is to the person once they're  
2    invalidated.  Okay.  I think the other side will say:  
3    In today's world, where nobody really understands this  
4    technology very well, a worse disaster for the country  
5    is to have protection given to things that don't deserve  
6    it because they act as a block on trade, they act as  
7    monopolies, and they will tie the country up in  
8    individual monopolies that will raise prices to  
9    consumers, et cetera.  You can imagine my spelling out  
10   this argument.

11                   MR. WAXMAN:  Yes.

12                   JUSTICE BREYER:  So I can't work out in my  
13   own mind whether in today's world these first principles  
14   cut for the patentee or cut for the challenger to the  
15   patent.

16                   MR. WAXMAN:  Those are policy arguments that  
17   have --

18                   JUSTICE BREYER:  And the first are not?

19                   MR. WAXMAN:  Excuse me?  No, the fact that  
20   -- the fact that it's a collateral challenge on a  
21   government decision bestowing property rights by written  
22   instrument, no.  The fact that the harm from an  
23   erroneous decision is totally asymmetrical, no.  The  
24   fact that what Congress intended was that this grant of  
25   property rights actually induced reliance, and

1 finally -- and this is my final first principle, I  
2 suppose -- that changing this long-standing standard  
3 would marginalize the PTO, the expert agency that we  
4 know Congress created to superintend the issuance and  
5 re-examination of patents, and to the extent that there  
6 are significant policy concerns which I agree with --  
7 may I finish my sentence?

8 JUSTICE SCALIA: Finish your sentence.

9 MR. WAXMAN: - which I agree with: A,  
10 Congress is on the job; and, B, there is -- those policy  
11 reasons say nothing about what Congress thought about  
12 the Patent Office in 1952 when it applied this Court's  
13 unanimous presumption.

14 Thank you.

15 JUSTICE SCALIA: Thank you, Mr. Waxman.

16 ORAL ARGUMENT OF MALCOLM L. STEWART

17 ON BEHALF OF THE UNITED STATES,

18 AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

19 JUSTICE SCALIA: Mr. Stewart, we'll hear  
20 from you now.

21 MR. STEWART: Justice Scalia, and may it  
22 please the Court:

23 I would like to begin by addressing briefly  
24 this Court's decision in RCA, because I think it's  
25 important to notice not only that Justice Cardozo used

1 fulsome and extensive language that was intended to  
2 sweep broadly and that was intended to announce a  
3 categorical rule; the other thing is the discussion in  
4 RCA was intended and was set forward as a recapitulation  
5 of prior doctrine. That is, Justice Scalia -- Justice  
6 Cardozo did not purport to announce for the first time a  
7 rule as to the weight that should be given a prior  
8 patenting decision. He explained that this is what the  
9 Court had done since the latter part of the 19th century  
10 and in fact it had been done by Justice Story riding  
11 circuit in the early part of the 19th century.

12           And the court in RCA said a patent is  
13 presumed to be valid until the presumption has been  
14 overcome by convincing evidence of error. The  
15 requirement of heightened proof was part and parcel of  
16 the presumption itself in the same way that I think most  
17 lawyers in this country would say that the requirement  
18 of proof beyond a reasonable doubt is part and parcel of  
19 the presumption of innocence in criminal cases. If a  
20 new criminal statute were enacted saying that the  
21 defendant is presumed innocent, but the presumption can  
22 be overcome by a preponderance of the evidence, that  
23 might be a presumption of innocence, but it wouldn't be  
24 the presumption of innocence as it's historically been  
25 understood in our country.

1           The second thing I would say about  
2 Congress's presumed intent when it acted in 1952 was  
3 that, at least when this Court's precedents are clear,  
4 Congress when it uses words that come right from those  
5 cases should be presumed to have codified this Court's  
6 holdings, not the decisions of lower courts that may  
7 have deviated from this Court's instructions. And I  
8 think the presumption that Congress acts against the  
9 background of existing law, it's less a prediction or an  
10 assessment of what percentage of the legislature were  
11 actually aware of the details of RCA. It's more a  
12 method of making the system work, by telling  
13 conscientious legislators: If you do read up, if you do  
14 understand the contours of Supreme Court's decisions,  
15 you can be confident that your words will be --

16           JUSTICE SOTOMAYOR: Counsel, the problem  
17 with your argument, assuming its validity, is why do you  
18 need the second sentence? If Congress was intending to  
19 sweep up in the use of the word "presumption" the need  
20 to overturn it by clear and convincing evidence, why did  
21 you need the second sentence saying that the other side  
22 now bore the burden of persuasion?

23           MR. STEWART: I think there is a belt and  
24 suspenders quality to the statute, no matter how you  
25 parse it, but I think that Microsoft has essentially the

1 same problem, because they have constructed a theory  
2 under which the second sentence does something that the  
3 first has not, does not, but they haven't constructed  
4 any theory as to why the first sentence is not  
5 superfluous. That is, given the second sentence to the  
6 effect that the burden of establishing invalidity is on  
7 the challenger, there's no more work to be done by the  
8 first sentence.

9           The other thing I would say in response to  
10 Justice Alito's question, which also goes to the natural  
11 meaning of the statute, Justice Alito asked, I think,  
12 basically, if these precedents were not on the book and  
13 we were just looking fresh at the language, what would  
14 we assume the standard to be? And I think we would say,  
15 let's look at what the defendant is asking the judge or  
16 jury to do. The defendant is asking the judge or jury  
17 to set aside a decision that has been made by then the  
18 Patent Office, now the PTO, and we would ask what sort  
19 of standard of proof ordinarily applies when a litigant  
20 asks a court to set aside an administrative decision.

21           In a sense, this court had a variant of that  
22 problem a few years ago in *Dickinson v. Zurko*, which  
23 dealt with direct court of appeals review of a denial by  
24 the PTO of a patent applicant's application, and the  
25 statute clearly authorized judicial review in the

1 Federal Circuit, but said nothing about what standard  
2 would apply. And the Court said in the absence of a  
3 conflicting standard imposed by the statute, we will  
4 look to background principles and administrative law,  
5 and the standard will be substantial evidence. And  
6 that's basically what this Court said back in 1894 in  
7 Morgan v. Daniels. It said the reason that we apply a  
8 heightened standard when an individual attacks the  
9 validity of an issued patent is that that litigant is  
10 asking the Court to set aside a decision made by the  
11 appropriate executive branch agency.

12 JUSTICE ALITO: But that ground doesn't  
13 carry very much weight when the matter was never  
14 considered by the PTO.

15 MR. STEWART: I think you are correct that  
16 if Congress had focused specifically on the category of  
17 cases in which the only evidence brought forward to show  
18 invalidity had not been considered by the PTO, it might  
19 have addressed that separately. In our view there are  
20 three independent reasons that it makes sense to apply a  
21 heightened standard even in that category of cases. The  
22 first two have to do with the interests of the patent  
23 applicant, the third has to do with the interests of the  
24 PTO.

25 The first one is that the patent -- the



1 grant of a patent has historically been understood to  
2 reflect a quid pro quo between the applicant and the  
3 government, and the applicant's part of the bargain was  
4 disclose that which might otherwise be maintained as a  
5 trade secret, and the government's part of the bargain  
6 was give a period of exclusivity.

7           And I think there is a thread in this  
8 Court's cases, especially in the barbed wire patent  
9 cases, to the effect that once the patent applicant has  
10 honored his part of the bargain a court should be  
11 hesitant to essentially deprive him of the benefit for  
12 which he contracted unless the evidence is clear. The  
13 court in the barbed wire patent cases said that whatever  
14 doubts there may be as to whether the patentee was  
15 actually the first inventor should be resolved in the  
16 patentee's favor because without question he was the one  
17 who first disclosed the information to the public, made  
18 it available to the public through the patent  
19 application process itself.

20           The second is related to the patentee's  
21 reliance interests, but is more instrumental. That is,  
22 independent of our concerns for fairness to the patent  
23 applicant, Congress could reasonably determine that  
24 there are enough uncertainties along the way to getting  
25 a patent, to having it overturned on various other

1 grounds that in an invalidity suit the patent -- the  
2 patentee should have reasonable confidence that it won't  
3 be overturned unless the evidence is clear.

4           And I would like to respond briefly to Your  
5 Honor's question, Justice Kagan, about why isn't that  
6 diminished by the re-examination process. I think it is  
7 diminished somewhat. Re-examination is different both  
8 because it's done by the expert agency and because it's  
9 more nuanced. There is. The option to narrow the  
10 claims to revise the language. It's not a blunderbuss  
11 tool, like setting it aside. But I would still  
12 acknowledge the force of your observation that to some  
13 extent, the patent holder's confidence would be greater  
14 if there were no re-examination process at all. And I  
15 guess I would say this is just one aspect of the patent  
16 law's balancing of competing interests in a way that  
17 doesn't serve either to the exclusion of the other; and  
18 to use an obvious analogy, the current term of patent  
19 protection is 20 years from the -- the date of the  
20 application. Obviously Congress thought 20 years was  
21 better than 10 and presumably that was because 20 years  
22 gives greater incentive to innovation. If somebody  
23 asked --

24           JUSTICE ALITO: Why is -- why is  
25 re-examination sufficient to answer the concerns that

1 Justice Breyer mentioned, when re-examination can't  
2 consider certain issues, and a case such as this doesn't  
3 necessarily have to be stayed while re-examination takes  
4 place?

5 MR. STEWART: It's not fully sufficient to  
6 resolve all challenges to the -- the validity of an  
7 issued patent. Now Congress now has it before it  
8 legislative proposals, one of which has passed the  
9 Senate, one of which has been voted out of committee in  
10 -- in the House, and is currently pending before the  
11 court -- the full -- full House of Representatives, that  
12 would expand the availability of post, what we now call  
13 post-grant review proceedings, where for a limited  
14 window of time after a patent is issued, people who  
15 oppose the issuance of the patent can come in and object  
16 on any ground. And that wouldn't be limited to the --  
17 the grounds that are specified in the current  
18 re-examination proceeding.

19 So this would -- it reflects Congress's  
20 understanding that there is a problem with patents that  
21 should not have been issued, but its desire to create  
22 additional mechanisms for the PTO to address that  
23 problem, rather than to have it be done through  
24 litigation. But that -- the point I was going to make  
25 about the 20 and the 10 years is somebody could ask,

1 well if 20 years is better than 10, why wouldn't 30 be  
2 better than 20? And the only answer is 30 presumably  
3 would give the patentee even more -- or the potential  
4 patentee even more incentive to invent, but at a certain  
5 point Congress decides that countervailing  
6 considerations require an end.

7           And it has essentially done something of the  
8 same thing with re-examination. It said we're not going  
9 to go so far in the direction of protecting patent  
10 holders' reliance interests as to preclude the PTO from  
11 reassessing what it's done, but that doesn't mean that  
12 reliance interests aren't important.

13           And the third thing I would say is even when  
14 a defendant in an infringement suit comes forward with  
15 prior art that was not itself considered by the PTO,  
16 there's always the possibility that that prior art will  
17 be substantively equivalent to prior art that the PTO  
18 did consider; and so in cases like this, in form the  
19 defendant would be asking the jury to make a  
20 determination that the PTO had never made, but in  
21 substance, what the defendant would be asking the jury  
22 to do is conclude that what the PTO thought was a  
23 patentable advance really was not so.

24           JUSTICE SCALIA: Thank you, Mr. Stewart.  
25 Mr. Hungar, you have 8 minutes for rebuttal.

1 REBUTTAL ARGUMENT OF THOMAS G. HUNGAR  
2 ON BEHALF OF THE PETITIONER

3 MR. HUNGAR: Thank you, Justice Scalia. A  
4 few points that I would like to make.

5 First of all, with respect to the suggestion  
6 that the jury should be instructed on the weight to be  
7 given various forms of evidence, I note that in the z4  
8 case that's been discussed, the Federal Circuit rejected  
9 the very, quote, "more easily carried," closed quote,  
10 instruction that i4i suggests as the solution, and it  
11 did so because it would confuse the jury about what the  
12 standard is.

13 Having effectively three standards of proof  
14 in patent cases rather than two is hardly a solution to  
15 the problem; but more fundamentally, whatever  
16 instructions might or might not be appropriate regarding  
17 the particular evidence before the jury, there has to be  
18 a justification for departing from this default  
19 preponderance standard, and no sufficient justification  
20 has been offered.

21 The statute doesn't provide for it, the  
22 legislative history doesn't reference it, the pre-1952  
23 case law can't reasonably be read in that way. That the  
24 -- i4i and its amici do not point to a single case in  
25 the -- in the years leading up to 1952, the 15 or so

1 years prior where a court of appeals or any court or any  
2 commentator said that the rule is clear and convincing  
3 evidence across the board. No one understood that to be  
4 the rule. No one read RCA that way. Congress would not  
5 have done so, either, so you can't get there under  
6 codification. You certainly can't get there under  
7 principles of administrative deference. Even the  
8 government admits those that principles don't justify a  
9 heightened standard.

10 JUSTICE BREYER: What about the rule where  
11 -- I'm trying this on, I don't buy it necessarily -- the  
12 -- the heightened standard exists where the Patent  
13 Office did consider it or could have considered it had  
14 the infringer asked for reconsideration?

15 In other words, put the burden on the  
16 infringing party to use this procedure, and if he does  
17 use it, it's going to get a heightened burden if he  
18 loses --

19 MR. HUNGAR: Well, first --

20 JUSTICE BREYER: And if he doesn't use it,  
21 it should get a heightened burden because he should have  
22 used it.

23 MR. HUNGAR: First of all, Your Honor, I  
24 don't see that any way you can get that out of the  
25 statute. But it also wouldn't work, because re-exams --

1 JUSTICE BREYER: The statute itself doesn't  
2 -- we're all going on history here, I mean, and history  
3 brought up to date with the words of the statute I don't  
4 think cover it either way. They talk about presumption,  
5 but put that to the side.

6 MR. HUNGAR: Well, there --

7 JUSTICE BREYER: I wanted your opinion on  
8 that as the validity or a useful instruction for juries.

9 MR. HUNGAR: Well, Congress certainly  
10 couldn't have intended that in 1952 because it hadn't  
11 yet created re-examination.

12 JUSTICE BREYER: I'm not asking that  
13 question. I'm asking the question of whether in your  
14 experience as a patent lawyer or -- would -- what we're  
15 trying to do is we're trying to get a better tool, if  
16 possible, to separate the sheep from the goats. That's  
17 what we're after, I think, and so what is that better  
18 tool?

19 MR. HUNGAR: Your Honor, as you know,  
20 re-exam is not available for many of the types of  
21 invalidity issues that arise. But in any event, if --  
22 if -- if the Court had such a rule, the problem is,  
23 re-exam takes a long time, patents plaintiffs generally  
24 oppose stays of litigation for re-examination, because  
25 they want to get to the jury because they know that

1     juries are much more likely to uphold patents than  
2     either judges or the Patent Office on re-exam. So they  
3     want to get the case litigated as quickly as possible so  
4     you get through the court system before the re-exam has  
5     been completed.

6                 So to the -- in fact if it were true, as  
7     some of the amici argue, that a patent applicant --  
8     patent holders are afraid of juries and want the experts  
9     at PTO to resolve the questions, which we don't think as  
10    a -- as a factual matter is accurate, but if that were  
11    true, the patent applicant, the patent holder has the  
12    absolute right to initiate re-exam themselves, and they  
13    could certainly go to the court and say please stay  
14    proceedings pending re-examination. Normally when --  
15    courts refuse to stay proceedings, because they don't  
16    want to prejudice the plaintiff, who is opposing a stay,  
17    but if the plaintiff is asking for a stay, there's not  
18    going to be any problem.

19                So the system already permits patent holders  
20    to -- to -- to follow that procedure and get  
21    re-examination if they want it. The problem is they  
22    usually don't. And in fact a preponderance standard  
23    would encourage that.

24                With respect to the reliance arguments, the  
25    re-examination problem we think addresses that. The



1 fact that this is a procedural rule under this Court's  
2 precedence makes clear that reliance interests are  
3 lessened. In any event, the reliance interests aren't  
4 nearly as strong as the same arguments made by many of  
5 the same parties in KSR, and MedImmune and eBay where  
6 this Court was not persuaded. It should not be  
7 persuaded here, either.

8           With respect to the legislative history that  
9 they rely on, if you're going to look at the legislative  
10 history, what it actually says is that Congress is  
11 referring to the presumption as stated by the courts,  
12 plural -- not the Supreme Court, courts plural -- so if  
13 you're going to look at legislative history it actually  
14 makes clear that Congress was not looking only at the  
15 RCA case which is not even referenced in the legislative  
16 history, but was looking at rule as it was understood to  
17 exist in 1952, which is not the rule that i4i urges.

18           With respect to the -- the presumption  
19 point, the presumption clearly does serve a purpose, the  
20 presumption language in the statute, by overturning the  
21 courts -- the prior to 1952 decisions that had rejected  
22 the presumption, and by making clear that the burden of  
23 going forward is on the defendant, so the plaintiff  
24 doesn't have the burden that it would otherwise have of  
25 pleading and putting forward evidence at trial of

1 validity.

2 For all these reasons, we ask that the  
3 judgment of the court of appeals be reversed.

4 JUSTICE SCALIA: Thank you, Mr. Hungar.

5 The case is submitted.

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

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