

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 IMPRESSION PRODUCTS, INC., :

4 Petitioner : No. 15-1189

5 v. :

6 LEXMARK INTERNATIONAL, INC., :

7 Respondent. :

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9 Washington, D.C.

10 Tuesday, March 21, 2017

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:21 a.m.

15 APPEARANCES:

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17 the Petitioner.

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21 in part and vacatur in part.

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

2 (11:21 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next this morning in Case 15-1189, Impression Products
5 v. Lexmark International.

6 Mr. Pincus.

7 ORAL ARGUMENT OF ANDREW J. PINCUS

8 ON BEHALF OF THE PETITIONER

9 MR. PINCUS: Mr. Chief Justice, and may it
10 please the Court:

11 This case brings before the Court two
12 questions regarding the patent exhaustion doctrine, also
13 known as the first sale doctrine. As this Court said in
14 Bowman, under that doctrine, the initial authorized sale
15 of a patented item terminates all patent rights to that
16 item. And by exhausting the patentee's monopoly on that
17 item, the sale confers on the purchaser, or any
18 subsequent owner, the right to use or sell the thing as
19 he sees fit.

20 That principle goes back, of course, to the
21 15th century. The common law refused to enforce
22 restraints on alienations of chattels based on the
23 fundamental insight that you own the goods that you buy,
24 and you should be able to do with them what you wish,
25 and that clouds over Title -- hurt the marketability of

1 goods and intercommerce, and importantly, in the patent
2 context, allowing these downstream restrictions to be
3 forced would preempt secondary markets with -- which
4 check the patent owner's monopoly power.

5 Let me begin with the first question, which
6 is whether the authorized sale of an article embodying
7 the patent exhausts patent rights with respect to that
8 article, or whether the patentee may impose restrictions
9 enforceable under patent laws, such as on resale, repair
10 or reuse simply by stating such a restriction in the
11 sales agreement.

12 The courts --

13 CHIEF JUSTICE ROBERTS: I'm sorry to
14 interrupt you, but that limitation is critical, right?
15 Enforceable under patent law?

16 MR. PINCUS: Enforceable under patent law.
17 We -- there's no question here. The contract law, with
18 its limitations, would allow the enforcement of -- of
19 those restrictions if they were a valid contract. This
20 is all about whether the patent law remedies apply.

21 The courts' description and application of
22 the doctrine for more than 150 years makes clear that
23 such restrictions cannot be enforced under the patent
24 law. A --

25 JUSTICE KENNEDY: Are there other examples

1 of really important rules that have not been codified?

2 Why hasn't this been codified?

3 MR. PINCUS: In the Patent Act, Your Honor?

4 JUSTICE KENNEDY: Too busy or what?

5 MR. PINCUS: Well, I think -- I think
6 that -- that there were a number of -- of -- of patent
7 law rules that Congress didn't codify it fully or either
8 at all in the 1952 Act. This was one. The Court, in
9 the contributory infringement area, for example, has
10 looked to pre-1952 law to flesh out the details of
11 contributory infringement that the -- that Congress
12 didn't specify.

13 JUSTICE KENNEDY: Did that -- did the
14 failure to codify mean we should be somewhat cautious --

15 MR. PINCUS: I don't --

16 JUSTICE KENNEDY: -- in extending -- in
17 extending it?

18 MR. PINCUS: Well, I -- I don't think --

19 JUSTICE KENNEDY: Or in -- or in
20 interpreting -- you don't --

21 MR. PINCUS: -- there's a question about
22 extending it. I -- I think -- I think the Court's
23 enunciation of the rule in the cases prior to 1952 was
24 very clear and specific. So I think it was -- there's
25 really no doubt that when Congress enacted the law in

1 1952, it did so with the knowledge that there was the
2 principle that I've recited, and -- and the Bowman
3 recitation is consistent with -- with many, many
4 decisions of this Court dating back to the 1800s that
5 say the same thing, that when there is an authorized
6 sale, the patent rights are exhausted. The Court said
7 in some cases, the -- the article falls out of the
8 patent laws and all that applies is State law.

9 And most importantly, the sole -- the
10 Court's sole decision upholding these sort of
11 restrictions, A.B. Dick was expressly overruled a few
12 years later in the motion picture patents case. So we
13 not only have the Court's consistent enunciation of the
14 doctrine, we have the fact that there was this deviation
15 and then an immediate correction. So --

16 JUSTICE SOTOMAYOR: So it's contributory
17 negligence. What other patent ideas were not codified?

18 MR. PINCUS: The misuse doctrine, I don't
19 believe, was -- was codified initially, although there
20 have been some subsequent amendments that have done
21 that. Other patent defenses, there were -- there were
22 years, for example, as the government points out in its
23 brief, between the -- the late 1800s and 1952, there was
24 no infringement; wasn't explicitly referenced in the
25 Patent Act. But everyone knew that the common law

1 rules, the rules that have been developed under prior
2 statutes, continue to apply and that there was a remedy
3 for infringement, and what its contours were were
4 specified by -- by the Court's prior decision.

5 So it's an area where there is a lot of --
6 the work has been done by adopting and incorporating
7 these prior decisions.

8 JUSTICE ALITO: Well, the Fed -- Federal
9 Circuit's rule on this is 25 years old. Has it caused a
10 lot of problems?

11 MR. PINCUS: Well, the Federal Circuit's
12 rule is old, but it's been subject to dispute, both when
13 this Court decided Quanta and then again when the Court
14 decided Bowman. Most commentators, as we discussed in
15 our brief, and some lower courts believed that the rule
16 had been displaced. Even at the time it was decided, as
17 some of the -- the amicus briefs point out, commentators
18 were skeptical that it could be reconciled with this
19 Court's rule. So the practice at industry, and this is
20 discussed in the Medical Device Reprocessor's brief, for
21 example, and the Intel brief -- were counseling their
22 clients not to abide by -- not to take action based on
23 this rule because it was quite suspect.

24 In recent years, as the Intel brief --
25 amicus brief points out, there have been efforts now to

1 take action based on the rule, and it is causing
2 problems in this global supply chain --

3 JUSTICE ALITO: Well, that's certainly a
4 rather risky strategy. It seems counterintuitive that
5 patentholders would pursue that. If the court that's
6 going to get every patent case has adopted a particular
7 rule and then just -- would you advise your client,
8 well, just disregard that?

9 MR. PINCUS: Well, I think what we --
10 what -- what people are advising their clients was don't
11 impose restrictions based on the idea that they can be
12 enforced because there's a good chance that they can't
13 be enforced. So many restrictions were not being
14 imposed; a few were. Of course, this is very similar to
15 the situation the Court confronted in Kirtsaeng where
16 the Court said -- there, there was a 30-year rule that
17 hadn't been questioned at all by decisions of this
18 Court. And the Court said the fact that people hadn't
19 acted obviously wasn't a predictor of what would happen
20 if the law was clarified by this Court.

21 And I think the -- the disruption that would
22 occur is amply demonstrated in the amicus briefs and
23 would indeed expand patent monopoly rights far beyond
24 anything that ever -- anyone has thought possible under
25 this Court's precedents.

1 Let me briefly talk about the -- the lower
2 court's decisions where it went astray. There were two
3 basic justifications. One was statutory. The Federal
4 Circuit assumed that the exhaustion doctrine was
5 grounded in the without-authority clause in Section
6 271(a) and that, therefore, Congress had given the
7 patentee a veto over the scope of the exhaustion rule.
8 We think that's not correct.

9 This Court's prior cases prior to 1952
10 didn't indicate at all that exhaustion was a question of
11 the patentee's authority, rather, a flat rule. And the
12 Court's exhaustion we think is best looked at in either
13 of two ways; either as a limit on the 152(a) rights, the
14 rights to exclude that are set forth, and what the Court
15 has indicated is that there are a limit on the -- the
16 scope of the patentee's right to exclude.

17 Also, the 1952 Act included in
18 Section 282(b) (1) a section called Defenses that set
19 forth defenses that could be pled. And one of those
20 defenses was absence of liability for infringement
21 thereto in obvious incorporation of the preexisting
22 exhaustion doctrine.

23 The Federal Circuit's second rationale
24 confused two concepts: The ability of a patentee to set
25 the terms for a first sale, and the ability to impose

1 post-sale restrictions. We think it's quite clear that
2 just as a patentee can decide for itself who it will
3 sell to, it can impose as a condition of licensing,
4 manufacturing and sales by others those same
5 restrictions. It can restrict who the licensee can sell
6 to just as who it can decide to sell to.

7 But in either case, whether the sale by the
8 patentee or the sale by the licensee, post-sale
9 restrictions are invalid as long as it's an authorized
10 sale. Any sale by the patentee is, of course,
11 authorized. In the licensee context, there's an
12 additional inquiry: Did the licensee abide by the terms
13 of the license? If it did, then the sale is authorized
14 and no post-sale restrictions can be enforced.

15 Let me turn, if I may, to the second
16 question, the question of international exhaustion
17 that -- that this case raises. We think that the
18 starting point here is, again, Congress's incorporation
19 of this Court's statements regarding the exhaustion
20 rule. In other words, the Patent Act should be read as
21 if there were provisions stating the initial authorized
22 sale of a patented item terminates all patent rights to
23 that item. There's certainly nothing in the Patent Act
24 that limits exhaustion to sales by U.S. patentees within
25 the United States.

1 JUSTICE ALITO: And it's somewhat surprising
2 to me that none of the briefs in this case talk about
3 our cases regarding extraterritoriality. In recent
4 years, we've been -- we have said very -- that a statute
5 does not apply outside the United States unless it says
6 that it applies outside the United States. I don't see
7 why that shouldn't be the same for a common-law rule
8 like the rule here. And if what's involved here is the
9 application of U.S. patent law abroad, where is the
10 clear statement that the exhaustion rule applies outside
11 of the borders of the United States? I -- I don't see
12 where that can be found.

13 MR. PINCUS: Your Honor, I don't think this
14 is a question of extraterritorial application
15 anything -- any more than the issue in Kirtsaeng was a
16 question of extraterritorial application of the
17 Copyright Act.

18 The question here is whether the patentee's
19 acts outside the United States have an impact on its
20 ability to enforce its rights within the United States.
21 So that -- no one is saying that the sales outside the
22 United States are governed by the U.S. patent law,
23 they're obviously not, just as the sales outside the
24 United States under the Copyright Act are not governed
25 by the Copyright Act.

1 But the question here is whether if there is
2 an authorized sale outside the United States authorized
3 by the U.S. patentee, whether that should have the same
4 exhaustion consequences as a sale within the United
5 States. And we think the rationale of Kirtsaeng and the
6 broad rule that the Court has enunciated dictate that
7 the conclusion here should be, yes, the same exhaustion
8 rule should apply.

9 In fact, it seems to us that the
10 consequences that the Court pointed to in Kirtsaeng, not
11 only do we have an enunciation of a nongeographic rule
12 and the support of the common-law nongeographic rule
13 that the Court identified in Kirtsaeng, but the adverse
14 consequences that the Court pointed to are even more
15 dramatic here because of the fact that patented articles
16 are often combined into other goods through a global
17 supply chain.

18 And as a number of the briefs talk about,
19 just think about a situation where a phone is assembled
20 in China with patented chips sold from Taiwan, a screen
21 from China, and hundreds of other patented components
22 from all over. All of the sales of those components
23 consummated outside the United States.

24 The consequence there would that -- would be
25 that if that final phone is sold into the United States,

1 all of the sellers, resellers, and users of that phone
2 would be subject to patent infringement liability if the
3 U.S. rights were not expressly licensed -- U.S. rights
4 for sale not expressly licensed for just one patent in
5 that huge conglomeration of patents that were embodied
6 in that object.

7 Same for a car assembled in Canada. The car
8 example that the Court used in its opinion in Kirtsaeng
9 applies equally here. An ignition from Germany, a brake
10 system from the United States, everything sold and put
11 together outside the United States, and then the car
12 brought into the United States, a risk of patent
13 liability.

14 And here, the risk is even greater because
15 there's no fair use doctrine to moderate the application
16 of the rule. Patent liability, as the Court knows, is a
17 strict liability offense with no exceptions. And we
18 have the additional problem in the patent context of
19 patent assertion entities that the Court has referred to
20 that are --

21 JUSTICE BREYER: The argument the other
22 side, which I think is the more difficult part, I
23 absolutely see your point. In both instances, whether
24 you or the other side wins, we're talking about
25 something that happened where there's a lawsuit in the

1 United States and there was a restriction that the
2 patentee imposed. He said anyone who buys my widget
3 cannot resell it to Smith or Jones. Or anyone who buys
4 my widget, if they resell it, has to put a big red sign
5 on it, some kind of restriction. If somebody fails to
6 do that, so they sue likely in the United States, but in
7 any case, they're suing under American law; right?
8 Either way.

9 MR. PINCUS: Yes.

10 JUSTICE BREYER: Either way, they're suing
11 under American law and this person has violated the
12 patent or he hasn't violated the American patent.

13 And when we start talking abroad, you are
14 quite right, I think, that Lord Coke and his great
15 principle of no alienation on chattels is being laughed
16 at. All right. That's your argument. But on the other
17 side, they have just received money for that first sale
18 under, let's say, a German patent, and they have not
19 received any money on this American patent. So they
20 say, well, how could you be subjecting us to a rule that
21 that first sale exhausted our right to money under the
22 American patent when we never received any money under
23 the American patent?

24 Now -- so there's one thing one way and
25 there's one important thing the other way. So how do

1 you react?

2 MR. PINCUS: Well, my reaction is that in --
3 in many of the contexts in which this issue arises, it's
4 really not quite right that the U.S. -- first of all,
5 Justice, to - to be sure we're on the same stage --

6 JUSTICE BREYER: Uh-huh.

7 MR. PINCUS: -- these are all sales that are
8 authorized by the U.S. patentee. So at the end of the
9 day, the U.S. patentee has control over whether --
10 whether or not --

11 JUSTICE BREYER: All sales were authorized.
12 In the one sale, it was sold in Bavaria under a German
13 patent. And not only was it authorized by the American,
14 but he said, I love it. And so what I want to you do is
15 whenever you use it, you put a big red sign with my name
16 on it. All right? There's a condition.

17 MR. PINCUS: And -- and so the -- the -- the
18 question here -- I -- I think what your question goes to
19 is, do sales in foreign countries under different laws
20 allow the U.S. patentee to recoup the value of his
21 patent --

22 JUSTICE BREYER: No. I'm saying do sales
23 under foreign laws in foreign countries -- that's the
24 question -- once there has been such a sale, does the
25 patentee still have the right under his American patent

1 to restrict the use of that widget, that particular
2 widget, bought by the buyer in Bavaria.

3 MR. PINCUS: And our submission is no.

4 JUSTICE BREYER: I know your submission is
5 no.

6 MR. PINCUS: And -- and -- but -- but --

7 JUSTICE BREYER: And I'm just trying to get
8 your answer to their argument --

9 MR. PINCUS: But -- but --

10 JUSTICE BREYER: -- in saying whatever you
11 think of the U.S., there's a big difference here. They
12 haven't gotten any money back on their --

13 MR. PINCUS: And -- and that's why I -- I --
14 I was talking about there, whether or not they had
15 gotten -- the argument on the other side I think is we
16 haven't gotten the value we would get if we sold our
17 product into the U.S. So there are a couple of answers
18 to that.

19 First of all, in the global supply chain
20 context, which is where most of these situations arise,
21 the fact is the sales may take place of the components
22 in a particular country, but they're part of a huge
23 supply chain that's flowing to produce finished goods
24 that are then going to be distributed to a large number
25 of companies.

1 Companies that sell -- that either license
2 their patents or sell components into that supply chain
3 know full well that this is a global chain and that
4 they -- they are not getting value that's country
5 specific. They are getting a value that is essentially
6 the average of the value in all the places where the
7 patent is going to be used, because that's what they
8 should demand because that's, in fact, the market into
9 which they are selling.

10 The end-use product is a different
11 situation. There certainly are products, just as the
12 books in -- in Kirtsaeng, that are being sold into a
13 particular market, and I think there are a couple of
14 answers to that.

15 One is, A, there are nonpatent constraints,
16 packaging, labeling, contract requirements that may
17 ameliorate the ability of those products to be
18 transshipped into the United States.

19 B, there are lots of different things that
20 go into whether or not someone gets -- how much value
21 one gets in the copyright context, for example.
22 Although the legal rules may be more even, the
23 enforcement of copyright vary -- principle varies
24 dramatically in different markets, as does the wealth in
25 different markets, and that affects how things can be

1 sold.

2 And lastly, as the Court pointed out, so I
3 think there are constraints that protect the U.S.
4 patentee in -- in being able to demand the value
5 attributable to the U.S. patent. But, lastly, as the
6 Court said in Kirtsaeng, price discrimination may not
7 necessarily be something that's guaranteed under the
8 patent laws --

9 JUSTICE SOTOMAYOR: Mr. Pincus.

10 MR. PINCUS: -- at least as they're
11 currently written. Congress could change that.

12 Sorry, Justice.

13 JUSTICE SOTOMAYOR: I've -- I've heard --
14 I've read and reread that argument, that the
15 patentholder is not receiving value for its German
16 patent. But the value that you receive I think is in
17 the embodiment of the patent. And the whole concept of
18 the first-sale doctrine, in my mind, is that the value
19 is whatever you get for that product. And whether you
20 have a U.S. patent or a German patent or a whatever
21 patent, you're still getting value for that idea, for
22 that discovery, for that whatever creative moment that
23 you have that results in this final product. So I'm not
24 quite sure I understand the -- the question of this, you
25 know, you haven't received value for the German patent.

1 MR. PINCUS: I agree with Your Honor. I --
2 I think you have received value, and because we're
3 hypothesizing a situation where the U.S. patentee is
4 authorizing the sale, ultimately, the U.S. patentee can
5 decide it's not worth my while to sell my product in
6 Germany if the risk of transshipment outweighs the
7 benefit. That's an economic --

8 JUSTICE SOTOMAYOR: Now, I will say --

9 MR. PINCUS: -- calculation for the
10 patentee.

11 JUSTICE SOTOMAYOR: -- that -- that there are
12 counter arguments on policy questions here of -- on both
13 sides. I mean, there are serious issues about this rule
14 and its consequences.

15 How do you address all the negative
16 consequences that your rule appears to be creating?

17 MR. PINCUS: Well, I think the principal
18 negative consequence that -- that -- that my friends on
19 the other side and their amici point to is this question
20 of price discrimination, and I think we've talked about
21 that.

22 Another issue that's raised in some of the
23 briefs is safety: Food, drug -- drugs, and medical
24 devices. As -- as the briefs discuss, the -- the FDA
25 has full authority to prevent imports under 21 U.S.C.

1 381 of devices and to regulate reuses of devices and
2 drugs. So broad authority where there are those risks
3 in the safety areas.

4 Another argument that's made on the other
5 side is that there will be a disruption of settled
6 expectations for the reasons -- I don't think they're --
7 that those expectations are -- are legitimate. But if
8 they are -- because I don't think the rule has been
9 settled under national exhaustion, but this Court --
10 unless this Court is going to not be able to overturn
11 decisions of the Federal Circuit, the fact that the
12 Federal Circuit has decided something can't be
13 sufficient to tie this Court's hands in doing that.

14 If you look at the Alice case, for example,
15 that obviously had tremendous implications for both the
16 patentees and for people who had entered into license
17 agreements and were paying money for patents that turned
18 out to be invalid. But that was just a consequence of
19 this Court getting the law right.

20 So I -- I don't think on the policy level
21 there's a lot on their side, and I think Congress can
22 address those issues if -- if there are specific
23 problems.

24 I'd like to reserve the balance of my time,
25 if I may.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 Mr. Stewart.

3 ORAL ARGUMENT OF MALCOLM L. STEWART

4 FOR THE UNITED STATES, AS AMICUS CURIAE,

5 SUPPORTING REVERSAL IN PART AND VACATUR IN PART

6 MR. STEWART: Mr. Chief Justice, and may it
7 please the Court:

8 I'd like to address the domestic exhaustion
9 issue first, and I'd like to begin by responding to
10 Justice Kennedy's question about why hasn't the
11 exhaustion doctrine been codified.

12 The Court's historic cases in the domestic
13 exhaustion field have located the exhaustion principle
14 in the language of the predecessors of what is now 35
15 U.S.C. 154(a)(1). That is the provision of the Patent
16 Act that says the patent owner has the right to exclude
17 others from making, using, selling, offering for sale,
18 or importing the patented invention. And in addressing
19 predecessor versions of that language, this Court said
20 those exclusive rights in essence don't encompass the
21 right to control resale or use of a lawfully sold
22 article.

23 For example, in *Bauer & Cie v. O'Donnell*,
24 the Court said -- addressed the proper interpretation of
25 the exclusive right to vend, and it said the right to

1 vend was exercised when the first authorized sale was
2 made. The right to vend does not encompass the right to
3 set resale prices.

4 In motion picture patents, the Court said
5 that its task was to determine the meaning of Congress
6 enacting the predecessor version of 154(a)(1).

7 In -- in order -- other cases, the Court has
8 referred to lawfully sold articles as being no longer
9 under the protection of the act of Congress, or that the
10 exhaustion rule delimits the scope of the patent grant.
11 So it's true that the Patent Act doesn't contain an
12 analogue to 17 U.S.C. 109(a), which is the Copyright Act
13 provision that specifically addresses the scope of
14 exhaustion, but the exhaustion doctrine has historically
15 been understood by this Court as a gloss on the
16 exclusive rights conferred by 154(a)(1) and its
17 predecessors, and unless Congress wanted to change the
18 exhaustion rule, either to get -- get rid of it entirely
19 or to substitute some different triggering event, there
20 was no need for it to amend -- to -- to codify an
21 explicit exhaustion provision by continuing in effect
22 and by tweaking the exclusive rights conferred by the
23 grant of a patent, Congress should be understood to have
24 manifested its intention that historic conceptions of
25 domestic -- domestic exhaustion would continue to have

1 sway.

2 Now, the second point I make about domestic
3 exhaustion is that the court of appeals' err, in our
4 view, stem to a large extent from its misreading of
5 general talking pictures. General talking pictures
6 dealt not with a -- not with simply a restriction on the
7 use that purchasers could make after an article had been
8 lawfully sold. It dealt with the conditions on which
9 its patentee's licensee could sell the article in the
10 first place. And the -- the exhaustion doctrine is
11 also -- often referred to colloquially as the first-sale
12 doctrine, and I think that's a reason -- there's a
13 reason for that. It's that the presence or absence of
14 exhaustion turns on whether there has been a lawful
15 first sale, and if the licensee departs from the
16 instruction of the patentee and sells the article in a
17 way that is not authorized, there's no lawful first
18 sale, and therefore, no patent exhaustion. But once the
19 article has been lawfully sold, any restrictions on
20 resale or use that the patentee purports to impose
21 downstream can be enforceable only under contract law or
22 commercial law, not under patent law.

23 And that brings me to my third point about
24 domestic exhaustion, which is one of the arguments on
25 the other side is -- on the Respondent's side is that

1 application of domestic exhaustion principles here would
2 prevent parties from reaching agreements that might be
3 economically advantageous to both of them.

4 And so the Respondent says, well, if I have
5 had particular buyer who only wants to use the cartridge
6 once and doesn't want to pay extra for the privilege of
7 reusing it, if he never intends to do that, why
8 shouldn't we be able to negotiate a deal under which I
9 charge him less in return for his commitment to only use
10 it once? And the answer is nothing in the exhaustion
11 doctrine prevents parties from reaching those agreements
12 and enforcing them as a matter of contract law, if they
13 are enforceable under the -- the law of the relevant
14 jurisdiction.

15 The policy judgment that this Court has
16 historically attributed to Congress is not a judgment
17 that these sorts of restrictions are bad or should be
18 unenforceable. It's simply a judgment that possession
19 of a patent doesn't give the patentee any greater rights
20 to make or enforce restrictions like this than a seller
21 of similar unpatented property would have under the
22 rules of -- of general contract law.

23 And so, in several of the exhaustion
24 decisions, the Court has distinguished between the
25 limits on patent remedies and the alternative remedies

1 that might be available under what the Court has often
2 referred to as the general law, the body of contract and
3 commercial law that applies to -- to all sellers.

4 I'd like to turn now, if I may, to the
5 question of international exhaustion. And the position
6 of the United States on -- on this issue is between that
7 of the two parties, it's our view that a patent -- a
8 U.S. patent owner who sells goods -- patented goods
9 abroad should be able to reserve its U.S. rights but
10 need -- needs to do so expressly.

11 And I'd like to start --

12 JUSTICE KENNEDY: Can -- can they put a
13 sticker on -- on the -- on the products --

14 MR. STEWART: Well --

15 JUSTICE KENNEDY: -- "Do not sell"? This
16 would be a great boom to the sticker business, right?

17 (Laughter.)

18 MR. STEWART: I -- I do want to be careful
19 to -- to -- to limit the -- to make clear the limits on
20 the principle that we're advocating; that is, we're not
21 advocating a rule under which simply by manufacturing
22 and selling overseas, the patentee could impose
23 continuing downstream restrictions on the use of the
24 good once it has been legally imported and sold into the
25 United States. That is, under our view, if -- if

1 Lexmark had said, we'll sell you these cartridges in
2 Canada and you are authorized to import them into the
3 United States and sell them in the United States, but
4 they are still for one use only and you need to put
5 labeling on the package warning your consumers "one use
6 only," in our view, that restriction would be no good
7 because there would be authorized importation into the
8 United States, authorized sale in the United States.
9 And at that point, the Court's domestic exhaustion cases
10 would kick in. And so the patentee's choice, in our
11 view of international exhaustion, is all or nothing. He
12 can say I don't consent to importation into the --

13 JUSTICE BREYER: What about
14 Justice Kennedy's question? I mean, Lord Coke had that
15 very question in mind, I think, that -- that one of the
16 problems with restraints in alienation of chattel is
17 that the buyer may not know, and -- and moreover, it
18 stops competition among buyers. Those are the basic two
19 things that have led that as a kind of underlying
20 principle. Well, what about it?

21 MR. STEWART: Well, he have --

22 JUSTICE BREYER: Does he have to put a
23 sticker on every toy? Does he have to put a sticker --
24 how? How does it work?

25 MR. STEWART: Again, as -- as I say, if what

1 we're talking about is a sticker that warns -- if the
2 product is sold in Germany and the patentee wants to
3 warn consumers in Germany they can only use the product
4 in the following way, he can put the sticker on. And
5 whether it's enforceable, and if so, by what means is a
6 matter of --

7 JUSTICE BREYER: So in other words, the
8 answer is yes. Every widget has to have a sticker.

9 MR. STEWART: No. The answer is, as a
10 matter of U.S. law, the legality of the import -- the
11 original act of importation will be governed, on our
12 view, by whether the patentee has explicitly reserved
13 its right to -- with the --

14 JUSTICE BREYER: You mean you don't have
15 to -- I didn't understand. Where does he reserve this
16 right? It's a right that he wants to enforce against
17 Joe Smith, the consumer, who bought from a German
18 grocery store 14 patented bouncing fountain pens. Okay?

19 Now, that's who he wants to enforce it
20 against. That person comes back from Germany into the
21 United States, and that person says, I do not know what
22 you're talking about. You say, don't worry, there had
23 to be an express reservation. So the question I thought
24 was, where? Is it a sticker or not?

25 MR. STEWART: Typically, I think it -- it

1 would be an express reservation in the sense of a ban on
2 importation. And so the express reservation would be
3 communicated to the buyer. You could additionally
4 require that --

5 JUSTICE BREYER: Where and how would it be
6 communicated to the buyer?

7 MR. STEWART: Well, the -- the initial buyer
8 from the U.S. patentee would enter into a contract with
9 the U.S. patentee, and presumably --

10 JUSTICE BREYER: And that -- and you agree
11 you're for that, but that is very much contrary to what
12 300 years of restraints on alienation had in mind.

13 One of the problems was that people who buy
14 these things, namely, those who go into grocery store or
15 whatever, don't know that they can't bring it back to
16 the U.S., or they don't know that they can't do this or
17 they can't do that or have to have the red sign or
18 whatever. And you don't have an answer to that, I take
19 it.

20 MR. STEWART: Well, if you wanted -- first,
21 at a certain level, anyone who buys patented products
22 takes the chance that the person who sold those to him
23 has no authority to do so or has transgressed the limits
24 of his authority. And so, if the patentee's buyer, the
25 direct purchaser was told no importation, and that

1 business in Germany then conveyed the goods to a
2 consumer and failed to pass along to the consumer the
3 restriction on importation, then that's not different in
4 kind from the chance that the -- the consumers take
5 regularly that there is something wrong with the chain
6 of patent title that the initial authorization was not
7 good.

8 JUSTICE ALITO: What is the basis for this
9 compromised position? Is this just a balancing of the
10 policy considerations on both sides?

11 MR. STEWART: I mean, it's partly policy
12 based, but it has -- to -- to the extent that there has
13 been a rule in the lower courts, this has been the rule
14 for the last hundred years. Patentees have the capacity
15 to reserve U.S. rights, but must do so expressly.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 I'm sorry. I do -- thank you.

19 Mr. Trela.

20 ORAL ARGUMENT OF CONSTANTINE L. TRELA, JR.

21 ON BEHALF OF THE RESPONDENT

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

24 We agree with the government, at least in
25 one sense, and that is that Judge Taranto's opinion for

1 the Federal Circuit properly looked to the statute to
2 find the origins and limits on the exhaustion doctrine.

3 The Patent Act defines how patent rights can
4 be acquired, what they cover, and how they are
5 infringed. And as to infringement, the statute provides
6 that infringement occurs when someone makes, sells,
7 uses, offers to sell, or imports into this country an --
8 a patented article without authority from the patent
9 owner.

10 Now there's been a lot of talk about
11 authorized sales exhausting patent rights, but -- but
12 you have to ask yourself, an authorized sale of what?
13 When a patentee sells a product without saying anything
14 about it, normally the -- the normal understanding is,
15 well, you're selling everything you have. But there's
16 no -- there's no decision of this Court that says that a
17 patentee necessarily has to sell everything he has.

18 The -- going back as far as the Mitchell
19 case in the 19th century, it's clear that there can be
20 conditional transactions, and -- and conditional in the
21 sense of restrictions on use. The restriction there was
22 a temporal one. You -- you can have this machine and
23 you have the right to use it until the original patent
24 term expires and then somebody else has the right and
25 you're an infringer after that.

1 There was a mention of General Talking
2 Pictures, and I think that's a good starting off point.
3 There are different ways that patentees can convey their
4 -- their exclusivity rights or authority to do what they
5 have the exclusive right to do. And -- and the two most
6 prominent ways are, of course, licenses and sales.

7 Now, it's undisputed that when a patentee
8 conveys patent rights without an associated product,
9 that is, in a licensing transaction, the parties are
10 free to agree to buy as much or as little of those
11 rights as they want. They can -- they can divide it up
12 geographically, they can divide it up by field of use,
13 that's General Talking Pictures. They can divide it up
14 temporally, that's Mitchell. But when -- when patent
15 rights are conveyed with a product, we're told, the
16 parties lose that freedom. They have to -- they have to
17 sell all or nothing.

18 Now, the government adopts that position
19 domestically, but not on -- on -- for foreign sales, and
20 I'll turn to that in a moment. But I want to -- want to
21 highlight why this matters at a policy level.

22 Conditional or limited sales in licenses
23 play an important role in furthering the Patent Act
24 objectives of fostering innovation and disseminating
25 innovations to the public. And a good starting point

1 for that is in January, the Department of Justice and
2 FTC issued new licensing guidelines, and those
3 guidelines say this: Field of use, territorial, and
4 other limitations on intellectual property licenses may
5 serve procompetitive ends by allowing the licensor to
6 exploit its property as efficiently and effectively as
7 possible.

8 Now, the amici gives some examples of why
9 this is so. The law and economics professors, for
10 example, give the example of a microchip that has a
11 variety of potential uses. It could be used in powerful
12 computer. It could be used in a video camera, could be
13 used in -- in other -- other applications.

14 Now, the result most consistent with the
15 goals of the Patent Act is for that new technology to be
16 used wherever it's useful, wherever the -- it would
17 increase consumer welfare. But if you cannot have use
18 restrictions that are enforceable downstream, that's not
19 going to happen.

20 CHIEF JUSTICE ROBERTS: Why -- why is normal
21 contract law and normal State law inadequate, for your
22 purposes?

23 MR. TRELA: Well, here's why, and -- and,
24 actually, I was just getting to that, Mr. Chief Justice.

25 In the -- in the -- the microchip example,

1 the -- the logical or the economically rational outcome,
2 if you can enforce these restrictions, is to sell at a
3 price that makes sense for the video camera maker, at a
4 higher price that will make sense for the computer
5 maker, because they're using more of the capabilities
6 of -- of the new technology. But if you can't -- if
7 your only remedy is contract and you can't enforce these
8 limitations downstream, well, then what happens is the
9 video camera-marketed chips are going to be -- you know,
10 there's going to be an arbitrage, and they're going to
11 be -- flow into the computer market --

12 JUSTICE BREYER: Why can't you enforce the
13 contract downstream?

14 MR. TRELA: Well, because you -- you don't
15 have privity, Justice Breyer. That's --

16 JUSTICE BREYER: Then why don't you require
17 the person who sells it to just resell it with the
18 requirement that they promise not to, you know, whatever
19 it is?

20 MR. TRELA: Well, and that's, in effect,
21 what -- what happens here. But then you're talking
22 about down -- downstream who knows how long --

23 JUSTICE BREYER: Sure. And one of the
24 reasons that it's hard to get away with that is the
25 antitrust laws in the contract area. And another reason

1 is because Lord Coke said 300 years ago, you know,
2 it's -- you get into a lot of trouble when you start
3 trying to restrict this buyer who's got the widget and
4 he would like to use it as he wishes. Now, that's been
5 the kind of basic legal principle for an awfully long
6 time.

7 MR. TRELA: Well, let me -- let me comment
8 on that, because it's certainly true that that's what
9 Lord Coke said in the 17th century, but there are a
10 couple of points I'd like to make about that.

11 One is what Lord Coke said in the quote
12 that's in the Kirtsaeng opinion, for example, is that
13 when someone sells his whole interest, he can impose no
14 restraints because his whole interest is out of him.
15 What we're talking about here is not selling your whole
16 interest. The whole interest --

17 JUSTICE BREYER: This is the reserved
18 question. I see your point there. If you want to
19 continue to make it for others, go ahead. Go ahead.
20 Finish, because I -- I think I interrupted you.

21 MR. TRELA: Well, that's your prerogative,
22 of course.

23 (Laughter.)

24 MR. TRELA: What we're talking about here,
25 of course, is not selling the whole interest. The whole

1 interest in a patented article is both the -- the title,
2 so to speak, to the physical material, and the bundle of
3 rights that go with it.

4 The other thing I would say on the Lord Coke
5 issue and the 300 years of common law, Justice Breyer,
6 is that the common law changed a lot after Lord Coke.
7 In Kirtsaeng, the important issue was, was there a
8 geographic restraint that Congress should be assumed to
9 have adopted or -- or have rejected, and they'd be --
10 the common law in the -- in the 17th century was fine
11 for that purpose.

12 But as Judge Taranto's opinion for the
13 Federal Circuit points out, as a number of the amici
14 point out, common law evolved quite a bit after the
15 17th century, both in this country and in England, in
16 particular with respect to restraints on -- on
17 alienation of chattel, both patented and nonpatented.

18 JUSTICE BREYER: There -- there -- there are
19 quite -- I mean, I agree that there are all kinds of
20 exceptions.

21 But to go back to your basic point
22 underlying this, of course, any monopolist, including a
23 patent monopolist, would love to be able to go to each
24 buyer separately and extract from each buyer and user
25 the maximum amount he would pay for that particular

1 item. Dentists would pay more for gold perhaps than
2 someone who wants to use gold for some other thing.
3 Okay? They'd like that. But by and large, that's
4 forbidden under many laws, even though it does mean
5 slightly restricted output, and it also means a lower
6 profit for the monopolist.

7 All right. Now, it's against that
8 background that I think the law and economics
9 professors, who are telling what is correct, that -- and
10 the argument that you're making has to be evaluated.
11 That's what I think on the first part. All this
12 precedent is very hard for you to get around. And I'm
13 not talking about just Lord Coke; I'm talking about the
14 Supreme Court precedent.

15 MR. TRELA: Well, and -- and on the Supreme
16 Court precedent, let me go back to General Talking
17 Pictures, which I started to talk about a few minutes
18 ago.

19 It's clear that a patent owner can limit the
20 licenses it grants. For example, there, it was the
21 patent owner granted a license -- basically said to
22 the -- the licensee, you can have the home market; I'm
23 reserving the commercial theater market for myself.

24 And now -- now, the -- the government's and
25 Impression's position is, well, as long as the licensee

1 sold to somebody who said he was going to use it in the
2 home market, that's an authorized sale. And then if --
3 if some -- if that person or somebody further down uses
4 it in the commercial market, that's -- that's not a
5 problem.

6 But the question is -- and now -- and -- and
7 this goes back now to Mitchell, Mitchell said nobody can
8 convey more than they have. That's why in Mitchell the
9 licensee could not convey the right to continue to use
10 the patented machine after the expiration of that first
11 period, because it's not a right that he had. The same
12 is true of the licensee in the General Talking Pictures
13 scenario.

14 He could -- he could convey the right -- he
15 could basically convey authority to use it in the home
16 market, and that's what the patentee was compensated for
17 in that sale, but he could not convey a right he didn't
18 have, which is to use it in the commercial market. So
19 that -- and that right was retained by the patentee. He
20 was not compensated for it. And yet, supposedly,
21 because there was an authorized sale, there's no
22 infringement. And that -- that's why I say you have to
23 ask, an authorized sale of what? It's -- it's the
24 physical product along with the particular rights that
25 may -- that the patentee has agreed to release with

1 respect to that particular article.

2 Now, the -- there's a concern -- and -- and,
3 Justice Breyer, you expressed it, I think other members
4 of the Court have expressed it, about sort of the -- the
5 unwitting consumer who doesn't know that they're --
6 they're buying a -- a product that, you know, that --
7 well, perhaps some of this authority was withheld.
8 That's really -- that has actually nothing to do with
9 exhaustion doctrine one way or the other. That is --
10 and I think Mr. Stewart made the point -- that's really
11 a consequence of strict liability for patent
12 infringement.

13 Anytime anyone buys a product, when you buy
14 a -- you buy a Samsung smartphone, to take a recent
15 example, you know, you are -- you are assuming maybe, to
16 the extent anybody outside of this room actually thinks
17 about whether patent rights might or might not apply to
18 an article, maybe you're assuming that it -- to the
19 extent there are patents, nobody -- you know, everybody
20 has authority to do what they are doing, but it's only
21 an assumption. You have no reason to -- to know that
22 you are not infringing a patent. And, frankly, I think
23 most consumers don't care, because those claims are not
24 brought against consumers. And unlike the copyright
25 area where there's at least a theoretical possibility of

1 criminal liability, there's no counterpart under the
2 Patent Act.

3 So -- and that's particularly true here,
4 because here, somebody who gets a cartridge from
5 Impression, a remanufactured Lexmark cartridge from
6 Impression, has no reason to think it started with
7 Lexmark. So to the extent that their exhaustion would
8 enter into anybody's thinking, they have no reason to
9 think, well, I'm -- I'm good because this -- there was a
10 first sale of this cartridge by -- by Lexmark. It's got
11 an Impression sticker on it. And to the -- to the
12 extent they're thinking about it, they should be
13 thinking the same as anybody who buys a knockoff product
14 thinks: I -- I may be infringing, but it's cheap, so
15 I'm not going to worry about it.

16 So this -- the downstream concern, I think,
17 is not a practical concern because it doesn't happen.
18 Patent litigation is too expensive, and most commercial
19 enterprises don't go -- want to go around suing
20 consumers, and it's not a function of exhaustion law, in
21 any event. The -- the risk is there and it's not
22 avoidable.

23 The -- let me turn to the foreign issue.
24 And -- and here we agree with a lot of the premises of
25 the government's argument. And -- and the government

1 said one thing in their brief -- this is at page 27 of
2 their brief. And it's -- it's -- I think really sums it
3 up. It said that U.S. patentee is entitled to one
4 premium for forfeiting his exclusive right under U.S.
5 law to prevent the sale of his patented article in the
6 United States. And that's really been the premise of
7 the exhaustion doctrine.

8 The notion is that the authorized sale of a
9 patented article, putting to one side what authorized
10 sale means, lifts the legal restraints that otherwise
11 would limit what the owner of the article could do with
12 it, causing the article to no longer be within the
13 bounds of the patent monopoly, a phrase that we hear
14 a -- in a lot of the cases. And the proceeds of that
15 sale are the patentee's reward for lifting those
16 restraints.

17 That reasoning doesn't work for sales
18 outside the United States. The sale doesn't lift any
19 legal restraints that otherwise would have limited what
20 the buyer could do, because the U.S. patent has no force
21 overseas. And it's not -- the article is not coming out
22 from under the monopoly of the U.S. patent, because it
23 wasn't in it to begin with, again, because the U.S.
24 patent has no force overseas.

25 And so it's in that sense -- Justice

1 Sotomayor, you asked about why isn't the patentee
2 receiving his reward -- that's why, because there are
3 two -- if you're assuming patents in the two countries,
4 first of all, they may or may not cover exactly the same
5 thing. Unlike copyright, there's a lot of variation.
6 But there are two bundles of rights, and the patentee is
7 giving up one in -- in Germany I think was the example,
8 and being compensated for that, but not giving up the
9 other one, because the other bundle of rights really has
10 nothing to do with that transaction.

11 CHIEF JUSTICE ROBERTS: What about the
12 argument on the other side about the complexity of the,
13 you know, products with literally thousands of different
14 patents, and if you're allowed to impose restraints down
15 the line, it just gets too complicated and the consumer
16 will be violating patents all the time without knowing
17 it.

18 MR. TRELA: Mr. Chief Justice, I think,
19 first of all, again, to the extent we're talking about
20 consumers, it -- it --

21 CHIEF JUSTICE ROBERTS: Yeah.

22 MR. TRELA: -- the -- the comments I made
23 before I think apply no matter where the product
24 started. But this -- this notion of concern about
25 tracing the provenance of these -- of all these

1 components, it exists under -- under anybody's rule
2 because under -- under the government's rule, of course,
3 you -- you'd have to have an express reservation, so
4 you've got to figure out whether there was an express
5 reservation.

6 Under Impression's rule, everything hinges
7 on an authorized first sale somewhere of each and every
8 one of these components. An authorized -- a sale
9 authorized by each and every one of these supposedly
10 thousands of patentees. So if you're -- let's not use
11 say consumer, but let's say you're a U.S. producer of
12 some sort of a product that has all these components and
13 you really are concerned about patent -- potential
14 patent infringement liability, well, you have to go
15 through this tracing exercise anyway and -- and figure
16 out whether you have to, you know, find out whether
17 everybody was licensed or what the terms of the license
18 might be or not.

19 JUSTICE BREYER: Well, there's a -- there
20 a -- Nike, two things. When they say well, people have
21 authorized dealers, and anyone who's in business knows
22 you want to be safe, buy it from an authorized dealer.
23 That isn't a big problem.

24 On the other hand, if you are a consumer
25 enured to do, it isn't -- I don't think I followed quite

1 what you're saying. If there is a first sale rule,
2 no -- you know, first sale, no problem. The only
3 problem is you bought it from a guy who didn't have a
4 patent in the first place. So go buy it from GE, or buy
5 it from Amazon, or buy it from somebody you know, you
6 trust, and that's the end of that.

7 But if there is no first-sale rule, there we
8 are, got to have the red sign, got to have -- can't sell
9 it here, can't sell it there, can't sell it some other
10 place. Who knows what the -- now -- now, that's the
11 kind of confusion, and of course there is no sticker,
12 that's the kind of confusion that they're afraid of.

13 MR. TRELA: Justice Breyer, I don't -- I --
14 I don't think that that is the real problem. If you're
15 -- you're buying from an authorized dealer, sure. I --
16 you know, I buy an Apple iPhone from an Apple Store.
17 What I know is, well, Apple is not going to sue me for
18 infringing Apple's patents, and because I trust Apple, I
19 trust that they've gotten authority from the thousands
20 of other folks, but -- but it's only an assumption. And
21 so -- so you may have -- you may have some peace of
22 mind, but to truly have certainty, you've got to do
23 this -- this tracing exercise anyway. And that -- and
24 that actually brings up another point, and this is a
25 point the government made, and this applies both to

1 consumers and to commercial operators.

2 Of course there are a lot of protections
3 against this -- this concern about infringement
4 liability. The UCC 2-312 basically is a -- any time a
5 merchant sells something, he is warranting to his
6 customers that it does -- it does not infringe. So
7 there's a warranty remedy there, and then also, you
8 know, the authorized dealer presumably will stand behind
9 that.

10 In addition, as the court of appeals
11 noted -- and I should take a step back. This case does
12 not involve any unknowing parties. The stipulated facts
13 here are that every one of Lexmark's counterparties knew
14 the terms and agreed to the terms in a valid and
15 enforceable contract, and that Impression knew that
16 these cartridges were licensed for single-use only, and
17 that that use had -- had already occurred.

18 So on the facts of this case, you don't have
19 that. And as Judge Taranto noted for the Federal
20 Circuit, to the extent that you're worried about
21 downstream -- so-called innocent consumers or merchants,
22 you also have issues, you know, besides the UCC, there
23 are bona fide purchaser doctrines and other protections,
24 even if you engage in the -- the unlikely assumption
25 that claims would actually be -- be --

1 JUSTICE SOTOMAYOR: How about the point
2 raised by your adversaries that having different rules
3 with respect to copyright and patents will make -- will
4 complicate the checking because many products have both
5 copyright and patent.

6 MR. TRELA: There -- there is -- there's no
7 question that there are different -- there -- there are
8 a host of different rules for copyright and patent.
9 And -- and one point I would start with, Justice
10 Sotomayor, is that the -- the scope of copyright
11 protection -- although the remedies may vary from
12 country to country -- the scope of the protection is
13 virtually identical to -- on -- in all the countries of
14 the Berne Convention, which is virtually all of them.
15 That is if -- you -- you don't have to guess about what
16 is or is not subject to the copyright. You know.

17 Patent protection is very different. There
18 are inventions -- software inventions, for example,
19 can't be patented in some countries, they can in others.
20 The -- the scope of patent protection is very different
21 from country to country. So the -- there are already
22 a -- a host of differences.

23 The duration, you know, copyright duration
24 is -- well, I think it's 70 years plus the -- the --
25 after the death of the author, for example. Patent

1 protection, of course, is much more limited in time.
2 It's also easier to identify because you have
3 examination requirements, the -- you know, registration
4 requirements. You don't have any of that with
5 copyright. So there already are -- are a host of -- of
6 differences.

7 And in the marketplace, they -- they're
8 dealt with in the same way. What we know from the amici
9 on both sides here, particularly the -- the ones with
10 the global supply chains, Intel and SanDisk on the
11 Impression side, IBM and Qualcomm on the -- on our side,
12 they do -- they get global licenses to protect their --
13 themselves, their -- their counterparties, consumers,
14 that's the way it's done. It's done that way for
15 copyright, it's done that way for patent, and -- and I
16 think IBM made this point particularly clear in -- with
17 respect to the international area, Qualcomm addressed
18 both international and domestic, you would be upsetting
19 settled expectations, particularly in the international
20 area, if you adopt either Impression's rule of automatic
21 mandatory exhaustion that you can't even contract out
22 of, or the government's rule that has the express
23 exhaustion requirement. Because -- I think IBM put
24 it -- there are hundreds of thousands of contracts that
25 have been entered into based on the Federal Circuit's

1 ruling in JS Photo, which was -- which was unquestioned
2 since 2001, and -- and even Intel and SanDisk say yes,
3 we -- our -- our contracts reflect this.

4 So I think that this is a particular area to
5 move cautiously because what you're talking about here
6 are, you know, international trade matters where the
7 Impression rule would essentially put the United
8 States -- basically, the United States would be saying
9 unilaterally, blanket international exhaustion is great.
10 Let's do it. Do we care if other countries reciprocate?
11 Apparently, we don't because we're just willing to do it
12 because we're good guys. That's not the way
13 international trade issues like that should be decided.

14 On the domestic side, Qualcomm and others
15 make the case that, in fact, parties have been relying
16 on this. The -- in the -- the biopharmaceutical and --
17 and Pharma briefs, they point out that they rely on this
18 in terms of providing research quantities of new
19 compounds to universities and others. There -- there
20 is -- there can be a difference between the human and
21 veterinary markets for certain compounds, and allowing
22 conditional sales and conditional licenses to -- to be
23 enforceable via patent law facilitates that sort of
24 dispersion of the technology which in turn fosters
25 innovation beyond that first level of innovation.

1 So I think the -- this notion that nobody
2 was -- was doing these sorts of things because they
3 weren't sure this was the law, it -- it's -- it's not
4 factually true. We -- we know that from the amici. And
5 also as a matter of common sense, you -- you really -- I
6 think if you're a -- a patent owner and you really want
7 to exploit your invention and you've got Federal Circuit
8 precedence saying you can do it, the fact that
9 somebody -- the -- the fact that maybe later down the
10 road, even if you thought there was some doubt, that
11 later down the road that this Court might say well, no,
12 you can't do that, it -- that's not going to dissuade
13 you from doing it because it's not going to make it
14 illegal. It's just going to say, well, we thought it
15 would work and it didn't work. So this notion that
16 nobody was doing this because of uncertainty about
17 the -- the Federal Circuit precedent in this area, I
18 think, is implausible.

19 Now, let me talk a little bit more about the
20 government's position on express reservations of U.S.
21 patent rights in the -- in the foreign area.

22 Now, besides disruption of settled
23 expectations, what that would do is it would basically
24 insert U.S. patent law into every transaction involving
25 any sort of product that might be covered by U.S. patent

1 rights.

2 Under that express reservation rule, if BMW,
3 a German company that has U.S. patents, wants to sell a
4 load of cars to a distributor in Slovakia, well, they
5 need to negotiate about and include in that contract,
6 apparently, a reservation of U.S. rights, because
7 otherwise, if those cars somehow make their way into the
8 U.S., they are unprotected. Even if they wanted to sell
9 one car to a buyer in Munich, they presumably would have
10 to do that, because otherwise they would be exposed if
11 that car makes its way to the U.S.

12 So that doesn't -- there's no reason why
13 U.S. patent law or U.S. patent rights should even enter
14 into the thinking of parties who are entering into
15 arrangements overseas with -- with no intention or
16 expectation that they are going to find their way to the
17 U.S. And that approach would also make the
18 enforceability of U.S. patent rights dependent on --
19 really, on the whims of foreign governments and on the
20 details of foreign law.

21 If the reservation of rights is a -- a term
22 of a foreign agreement, then I think that's -- that's
23 where Mr. Stewart ended up, Justice Breyer, in response
24 to your questions. Well, it's going to be governed by
25 foreign law. And for all we know, it may or may not be

1 enforceable as a matter of a law in that particular
2 foreign country.

3 And we know that certain countries, and
4 India is an example that's been given, will do things
5 like impose mandatory licensing requirements on
6 patent -- foreign patent owners, or require that foreign
7 companies partner with local companies. If -- if a new
8 express reservation requirement is announced, there's
9 every reason to think other countries may take steps
10 that -- that undermine or make it very difficult for
11 U.S. patentees to in fact protect their rights in this
12 country.

13 So the -- and, as I think some of the amici
14 point out, if you announce such a rule, sophisticated
15 U.S. companies, to the extent they can, consistent
16 with -- with foreign law, will -- will reflexively
17 probably include it in their contracts, leaving only
18 unsophisticated smaller U.S. companies exposed, the ones
19 that perhaps don't have expensive lawyers and detailed
20 global sales operations.

21 Let me finally turn to the -- return to the
22 question of why contract remedies aren't -- aren't
23 suitable or aren't adequate.

24 And let me say, first of all, that in a
25 couple of this Court's cases -- and it goes back to

1 Keeler and Hobby in the 19th century, and then picked up
2 in some other cases -- those -- the Court makes the
3 comment, after finding that a particular sale was
4 unrestricted, Court says: If -- if the patentee wanted
5 to protect its distributors -- because these -- those
6 cases involved exclusive geographic distributors -- they
7 could have done so by special contract, but not as a
8 matter of the inherent meaning and effect of the patent
9 laws, or words to that effect.

10 Now as Judge Taranto explained, the point
11 there was not that you could only do it by contract, and
12 if you did it, you would have only a contract remedy.
13 The point was that patent rights are conveyed by means
14 of contract. And that doesn't mean that if that
15 contract is breached, it's only a contract remedy. A
16 license agreement is a contract that conveys U.S. patent
17 rights. And as this Court held in Mitchell and General
18 Talking Pictures and other cases, a violation of a
19 license term, a contract term does give rise to an
20 infringement remedy.

21 So they're not mutually exclusive, and I
22 don't think that's what the Court meant in those
23 passages. I think what the Court was saying is: If you
24 want to have restrictions, you have got to make them
25 express, then they can be enforceable as a matter of

1 patent law.

2 But in those cases, there were no
3 restrictions.

4 Now, the -- the -- besides the privity
5 problem with the contract remedy, you also can't get an
6 injunction. And an injunction is particularly important
7 when you're dealing with large scale infringers, like
8 infringement here that gathers up the -- the used
9 cartridges, remanufactures them, and then sells them on
10 a commercial scale.

11 A contract remedy -- first of all, we
12 don't -- wouldn't have a contract remedy against
13 infringement. We -- we never had any contact with
14 infringement other -- with -- I'm sorry -- with
15 Impression other than in this lawsuit. And the -- so we
16 don't have privity. We're not going to go suing our
17 individual customers. Not only is it bad business, but
18 it's not a particularly efficient use of resources.

19 The effective remedy, the remedy we got
20 here, as to the foreign-sold cartridges at least, was an
21 injunction, and that's the kind of remedy a patent owner
22 needs to protect its rights.

23 If the Court has no further questions.

24 Thank you very much.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Pincus, you have four minutes remaining.

2 REBUTTAL ARGUMENT OF ANDREW J. PINCUS

3 ON BEHALF OF THE PETITIONER

4 MR. PINCUS: Thank you, Mr. Chief Justice.

5 Just -- just a couple of -- of -- of quick
6 points.

7 I think it's clear that what the Court was
8 saying in the cases my friend averted to was the only
9 remedy available is a -- is a contract remedy in Keeler
10 and these other cases.

11 CHIEF JUSTICE ROBERTS: The Hobby case.

12 MR. PINCUS: In those -- in those cases.
13 Exactly, Your Honor.

14 And in fact, in -- in the Strauss case, the
15 Court talked in particular about refusing to enforce
16 these kinds of restrictions because they have been
17 obnoxious from Lord Coke's day to our -- to our own.

18 I wanted to talk about this -- this question
19 of the -- the risk to the downstream resellers and
20 buyers, because it's true, in patent law there always is
21 some risk that the initial sale won't be authorized.
22 But I think the difference between the two positions
23 here is once there is an initial authorized sale, that's
24 the end of the inquiry under the test that -- that we
25 propose.

1 Under my friend's test, even if there is an
2 authorized sale, if there are these other restrictions,
3 they continue to flow down, and therefore, the -- the
4 group of downstream users and buyers who are subject to
5 risk becomes much, much greater.

6 On -- on the question of -- of patent and
7 copyright, I think the critical point here is not that
8 the laws differ from place to place, but with respect to
9 an authorized first sale, it would be very sensible to
10 have the same rule apply for authorized -- sales
11 authorized by the U.S. rights holder overseas, for both
12 patent and copyright, because then there would be
13 certainty that once there was an authorized sale, both
14 the patent and the copyright rights were exhausted. So
15 I think that's the -- with respect to -- to U.S. rights,
16 and I think that's -- that's the critical point there.

17 And I think the other thing that's important
18 to recognize in patents that is a difference is, while
19 Lexmark is a -- is a well known company that has brand
20 issues to contend with in terms of the suits it might
21 bring against its customers and downstream users, the
22 Court has recognized, as I said before, that in the
23 patent context, unlike copyright, we do have patent
24 assertion activities that are under no constraint. And
25 the Intel brief identifies a number of lawsuits that

1 have been brought recently by those entities against
2 downstream resellers and users under just this kind of
3 theory. And that's -- that's the evil that -- that
4 we're worried about.

5 If the Court has no further questions.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 The case is submitted.

9 (Whereupon, at 12:23 p.m., the case in the
10 above-entitled matter was submitted.)

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