

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   SAMSUNG ELECTRONICS CO.,                   :

4   LTD., ET AL.,                               :

5                               Petitioners                   :   No. 15-777

6                   v.                                       :

7   APPLE, INC.,                               :

8                               Respondent.                   :

9   - - - - - x

10   Washington, D.C.

11   Tuesday, October 11, 2016

12

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

16   APPEARANCES:

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18       the Petitioners.

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20       General, Department of Justice, Washington, D.C.;

21       for United States, as amicus curiae, supporting

22       neither party.

23   SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of the

24       Respondent.

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

2 (10:05 a.m.)

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

6 Ms. Sullivan.

7 ORAL ARGUMENT OF KATHLEEN M. SULLIVAN

8 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

2 MS. SULLIVAN: Your Honor --

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

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

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

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

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

1 argument we gave as an alternative.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

14                  MS. SULLIVAN: Three ways, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 or apportionment?

2 MS. SULLIVAN: Yes, Justice Alito.

3 JUSTICE ALITO: What is the difference?

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

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

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

1 manufacture.

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

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

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

1 instructed here.

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

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

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

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

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

25 JUSTICE SOTOMAYOR: So besides the jury

1 instruction, what was the legal error?

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Fletcher.

20 ORAL ARGUMENT OF BRIAN H. FLETCHER

21 FOR UNITED STATES, AS AMICUS CURIAE,

22 SUPPORTING NEITHER PARTY

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

25 This case presents two related questions

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

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

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

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

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

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

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

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

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

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

25 The first is utility patent damages under

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

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

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

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

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

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

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

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

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

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

16 JUSTICE KENNEDY: In this case.

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

25 And then on the second question, the one



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 MR. FLETCHER: Correct.

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

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

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

13 JUSTICE SOTOMAYOR: Exactly.

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

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

25 MR. FLETCHER: Yes.

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

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

17 JUSTICE ALITO: But this hypothetical is --

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

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

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

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

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

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

22                  CHIEF JUSTICE ROBERTS: Thank you, counsel.

23                  MR. FLETCHER: Thank you, Chief Justice.

24                  CHIEF JUSTICE ROBERTS: Mr. Waxman.

25                  ORAL ARGUMENT OF SETH P. WAXMAN



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

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

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

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

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

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

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

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

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

19 MR. WAXMAN: Well --

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

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

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

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

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

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

21 MR. WAXMAN: Thank you.

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

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

6 MR. WAXMAN: I do.

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

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

25 MR. WAXMAN: Justice --

1 JUSTICE BREYER: Okay. Now, why not?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9                 MR. WAXMAN:  Here's --

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

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

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

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

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

11 MR. WAXMAN: That's right.

12 CHIEF JUSTICE ROBERTS: So --

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

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

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

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

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



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

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

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

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

1 applied.

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

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

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

25                   They suggest two things. Article of

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

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

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

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

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

14 MR. WAXMAN: Okay.

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

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

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

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

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

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

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

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

25 The -- the few courts that have addressed

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

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

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

15                    MR. WAXMAN: Okay.

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

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

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

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

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

24 Yes, Justice Kagan.

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

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

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

17 Do you agree with that?

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18                REBUTTAL ARGUMENT OF KATHLEEN M. SULLIVAN

19                ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

1 the right article of manufacture?

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

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

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

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

20 MS. SULLIVAN: Your Honor --

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

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

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

7 MS. SULLIVAN: Your Honor --

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

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

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

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

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

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

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

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

22 Thank you very much, Your Honor.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 The case is submitted.

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



1     above-entitled matter was submitted.)

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