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P R O C E E D I N G S

[10:14 a.m.]

JUSTICE STEVENS: We'll hear argument now in No. 05-1056, Microsoft against AT&T.

Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE PETITIONER

MR. OLSON: Thank you, Justice Stevens, may it please the Court:

The limited monopoly granted by U.S. patent laws protects against the making, using or selling a patented invention within the United States. Section 271(f) also makes it an infringement to make components of a patented invention within the United States and then simply ship them abroad for reassembly.

JUSTICE SCALIA: Mr. Olson, before you get into the merits I have a question, a preliminary question. I understand from AT&T's brief that there has been a stipulation entered into between the parties after the judgment below, which preserved Microsoft's right to appeal and prescribes different dollar amounts that Microsoft must pay AT&T depending on the outcome of the appeal. Does that raise any, any mootness problem? Can you sort of wager on the outcome of an appeal that way?

1 MR. OLSON: No, I don't believe so, Justice
2 Scalia.

3 JUSTICE SCALIA: Well, suppose two parties
4 just, you know, parties that otherwise do not have a
5 case or controversy, bet each other that the district
6 court will come out one way or the other way in, in a
7 trumped-up suit. Does that create a standing --

8 MR. OLSON: This is by no means a trumped-up
9 suit. It's a very serious suit. The outcome, the
10 judgment, the amount of damages that must be paid is not
11 a matter of wager. It depends upon the decision of a
12 matter of law of an interpretation of a statute of the
13 United States.

14 JUSTICE SCALIA: Well, you could say the
15 same thing in the hypothetical I gave. It is a matter
16 of wager, which way the Court will come out.

17 MR. OLSON: This is an entirely legitimate,
18 I submit, means by which parties may preserve a legal
19 issue depending upon how a legal question is decided.
20 The only thing that's been resolved is that the amount
21 that will be paid as damages depending upon the outcome
22 of the appeal.

23 JUSTICE SCALIA: Do you know of any, any
24 precedent for that?

25 MR. OLSON: It seems to me, Justice Scalia,

1 that it happens frequently, especially in criminal cases
2 where there is -- someone pleads guilty and preserving
3 a right to appeal a certain issue. I don't have a case
4 to cite to you but it strikes me as quite understandable
5 that the parties might agree if the outcome of the legal
6 question that the judge might decide is going to be X,
7 then the consequence will be a liability for Y. If
8 it's -- if it's of the opposite outcome, the outcome
9 will be different. That's --

10 JUSTICE KENNEDY: Suppose the amount were
11 trivial and you just wanted to get a resolution of this
12 question?

13 MR. OLSON: Well, I think that if the
14 amount --

15 JUSTICE KENNEDY: Then there would be a case
16 with a controversy problem, I should think.

17 MR. OLSON: I don't know what the Court
18 might mean by the word "trivial," Justice Kennedy, but
19 this is a very significant major amount involved in this
20 case. There is no question that the parties are very
21 serious. It's a very significant legal question with
22 respect to the interpretation.

23 JUSTICE SCALIA: That's so, but is there a
24 lot of money involved depending on whether you win or
25 lose?

1 MR. OLSON: Yes.

2 JUSTICE SCALIA: Okay.

3 MR. OLSON: In this case, notwithstanding
4 the limitation of in section 271(f) that the components,
5 there's liability if the components are created here,
6 and reassembled abroad. The Federal Circuit held that
7 foreign-made tangible reproductions of computer
8 operating code installed in foreign-made computers may
9 be components which are deemed, or essentially supplied
10 from the United States, because copying is part and
11 parcel of software distribution, and thus subsumed in
12 the act of supplying. Under this ruling, U.S. companies
13 may be held liable for patent infringement whenever
14 their products are copied or replicated abroad. This --
15 the court of appeals decision and the position of
16 Respondents requires reworking several words in the
17 statute.

18 The statute says supplied from the United
19 States. The court of appeals said, well, it might be
20 deemed supplied from the United States after it's copied
21 abroad. The Respondent takes the words "such
22 components" in the statute and reads them as not the
23 same components.

24 JUSTICE STEVENS: Mr. Olson, isn't one of
25 the questions whether the software is really being

1 copied when it's transferred from the golden disk to the
2 new manufacturer, or whether it's actually being
3 supplied?

4 MR. OLSON: It is being copied. There isn't
5 any question that it's being copied, Justice Stevens.
6 The stipulation which is in pages 44a through 47a of
7 the petition appendix contains the words -- this is
8 words to which Respondent stipulated -- "foreign-made
9 copies," "replicated object code," "foreign manufactured
10 copies," "foreign-replicated object code." What happens,
11 Justice Stevens, is that the golden master of the disk
12 which contains the physical manifestation of the object
13 code is read by a machine somewhere outside the United
14 States, looked at and then copied onto another physical
15 medium, either a hard drive or a disk. Many hard
16 drives, many disks. Those foreign-replicated physical
17 tangible copies are then installed in computers and they
18 become components of those computers.

19 JUSTICE KENNEDY: Is the master disk a
20 component?

21 MR. OLSON: The master -- well, AT&T has
22 taken two positions on that. We --

23 JUSTICE KENNEDY: What's your position?

24 MR. OLSON: Our position is that it's not a
25 component of the final product computers that are made

1 abroad. What is a component is a replication, a copy of
2 a new hard drive or a new disk that's made a part of
3 those computers which, without which --

4 JUSTICE KENNEDY: Just the disk but not the
5 information on the disk is the component?

6 MR. OLSON: The information on the disk is
7 of no use to a computer unless it's made into a
8 physical machine-readable document -- object.

9 JUSTICE GINSBURG: That -- Mr. Olson, that
10 is the position of AT&T as I understand it, that what
11 you call the object code appears in the -- in the
12 computer that it's -- that is what is sent, along with
13 the master disk, and the object code is the critical
14 component, according to AT&T. In fact, wasn't that the
15 first question that you raised, whether digital software
16 code, an intangible sequence of 1's and 0's may be
17 considered a component of a patent, patented invention?

18 MR. OLSON: If I understand your question,
19 Justice Ginsburg, let me answer it this way. AT&T has
20 taken two positions. The most recent position is that
21 it's the intangible object code, the series of 1's and
22 0's, or instructions to a computer switch to be on or
23 off, that is a component. They also took a position
24 earlier in the case and which is referred to in the
25 stipulation that it was the golden master, the physical

1 manifestation on the -- on a master disk that went
2 abroad that was the component.

3 JUSTICE KENNEDY: But I still would like to
4 know your position. The golden disk is or is not a
5 component?

6 MR. OLSON: It is not a component --

7 JUSTICE KENNEDY: But copies of the golden
8 disk are or are not components?

9 MR. OLSON: The copies, the physical
10 manifestation on a hard drive --

11 JUSTICE KENNEDY: The physical manifestation?

12 MR. OLSON: Are components of the foreign
13 manufactured computers. Those components are not
14 supplied from --

15 JUSTICE KENNEDY: I suppose if you could, if
16 you made 99 copies, those would be 99 components. Then
17 if you used -- if you're going to make 100 machines. If
18 you used for your disk the master disk for the last
19 copy, then that would have been -- that would -- then
20 the master disk would be a copy, a component of the last
21 machine.

22 MR. OLSON: If -- well, I think, if I
23 understand your question, if you make -- and it depends
24 upon where you make it, where you transfer --

25 JUSTICE KENNEDY: You make them abroad.

1 MR. OLSON: If you make it abroad, that --
2 and it's -- that is where the component is supplied
3 from. Copies are made abroad. There's no question
4 about that and --

5 JUSTICE KENNEDY: But if the disk, if the
6 golden disk itself after they finish the copies, were
7 used --

8 MR. OLSON: If the physical --

9 JUSTICE KENNEDY: -- in a hardware, then
10 that would be a component.

11 MR. OLSON: If that physical golden disk
12 were actually put into a computer and used without more.

13 JUSTICE STEVENS: Well, I'm a little
14 confused, because I thought the golden disk was just one
15 method of getting the software into the new computers.
16 And I thought it was the software which was arguably the
17 component, not any physical manifestation.

18 MR. OLSON: Well, that's why I said AT&T has
19 taken two positions. Here's the position that they took
20 in their brief before the court of appeals. Three
21 decades of patent jurisprudence have authoritatively
22 recognized software to be a physical and structural
23 component of patented machines. The problem, Justice
24 Stevens --

25 JUSTICE STEVENS: But do you -- what is your

1 view on whether or not software is a component?

2 MR. OLSON: The -- if I may answer that by
3 saying that people use the word "software" in two
4 different ways. One of which, they use it as the
5 intangible series of 1's and 0's. We submit that the
6 correct way to understand the word "software" is the
7 physical manifestation of that what is called source
8 code, which is made into object code, which is made into
9 machine-readable code.

10 JUSTICE SCALIA: Or at least the correct way
11 to understand "component."

12 MR. OLSON: It is the correct way to
13 understand "component."

14 JUSTICE SOUTER: And the component then
15 would be either a disk which is put into the computer or
16 the portion of the hard drive to which the code is
17 transferred.

18 MR. OLSON: Yes. As I understand it,
19 Justice Souter, and I think the stipulations make this
20 clear, there's a reference in the stipulations to
21 encoded transmissions but there's a -- but the parties
22 also agree that's the same process as the golden disk.
23 The golden disk is sent abroad. That is read by a
24 machine and then the machine understands -- it's almost
25 as if you were to read physically any other type of

1 document, read it to a machine. The machine understands
2 what is said, puts it into a physical manifestation on a
3 disk or on a hard drive. Many copies are made in that
4 fashion. They are installed in computers made abroad,
5 sold to foreign purchasers.

6 JUSTICE KENNEDY: So are you saying that
7 neither the source code nor the compilation are a
8 component?

9 MR. OLSON: Of the foreign? The language of
10 the statute is the foreign manufactured product. Those
11 are the computers that are sold abroad. It is our
12 position that the only components that are in issue in
13 this case are the physical manifestations of the object
14 code on a hard drive or on a disk.

15 JUSTICE KENNEDY: So that neither the source
16 code nor the compilation are a component, save as, the
17 compilation is put on a disk?

18 MR. OLSON: That's correct. And the -- the
19 thing that's on the disk in the foreign --

20 JUSTICE KENNEDY: That seems odd. I mean,
21 Microsoft doesn't say please buy our disk, they're
22 the prettiest disks in the business.

23 MR. OLSON: Justice Kennedy --

24 JUSTICE KENNEDY: It says buy our program
25 because the program means something.

1 MR. OLSON: But the program is nothing until
2 made into a physical manifestation that can be made by
3 the computer.

4 JUSTICE STEVENS: What is patented? Is the
5 physical object patented or is the software patented?

6 MR. OLSON: The AT&T patent --

7 JUSTICE STEVENS: Right.

8 MR. OLSON: The '580 patent is a program, as
9 I understand it, that's married to a computer -- it has
10 to be married to a computer in order to be patented.

11 JUSTICE SCALIA: You can't patent, you know,
12 on-off, on-off code in the abstract, can you?

13 MR. OLSON: That's correct, Justice Scalia.

14 JUSTICE SCALIA: There needs to be a device.

15 MR. OLSON: An idea or a principle, two plus
16 two equals four cannot be patented. It has to be put
17 together with a machine and made into a usable device.
18 The bind that AT&T is in here is that the components
19 that make the machines run, that are produced abroad,
20 are not supplied from the United States. They are made
21 in Belgium or Frankfurt or something.

22 JUSTICE GINSBURG: That depends on what you
23 consider the "component." They define component as
24 including the, what you've been calling the abstract.

25 MR. OLSON: They have attempted, Justice

1 Ginsburg, with respect, to have it both ways. They've
2 said that it is a physical and structural thing,
3 something that's on the golden master disk. And then
4 they say it's just the binary code in the abstract, but
5 that in the abstract never becomes a part of the
6 computer.

7 JUSTICE GINSBURG: What did the Federal
8 Circuit say? And I read the opinion a couple of times
9 and it was, it seemed to me ambiguous whether the
10 Federal Circuit was identifying the component as the
11 object code itself or the master disk.

12 MR. OLSON: Yes. I agree with you. The
13 Federal Circuit was ambiguous, in part because there
14 were two separate decisions. The court considered the
15 component issue in the Eolas case and then when this
16 case came along, said we've already decided the
17 component portion of the statute; now we must decide the
18 "supplied from." So the language which the Federal
19 Circuit used is a bit confusing. Basically what it
20 said, though, is that the act of supplying embraces the
21 act of copying. That means that any, any company
22 sending a machine or a patented product abroad, that
23 that machine must be copied in order to be mass produced
24 abroad. It might be a pill. It might be a mousetrap.
25 It might be a Buick. That exact identical copy if

1 replicated abroad does not violate the statutes, the
2 patent laws, it doesn't constitute an infringement.

3 JUSTICE KENNEDY: Suppose you had a patent
4 on a biological organism and it was contained in a
5 little vial, and you shipped it abroad. Just by doing
6 nothing at all, it grew, and it had -- it grew into 100
7 different parts.

8 MR. OLSON: If it reproduces itself, Justice
9 Kennedy, somewhere outside the United States --

10 JUSTICE KENNEDY: Right.

11 MR. OLSON: What you're suggesting is that
12 there is a pattern or a recipe or a template or a mold.
13 It could be the same thing. If it's reproduced outside
14 the United States in some laboratory outside the United
15 States, then the components are not being sent from the
16 United States for reassembly abroad.

17 JUSTICE ALITO: Isn't this an artificial
18 distinction in -- when you're talking about the making
19 of a tangible part, there's at least some cost involved
20 in doing it here or doing it abroad, and some time
21 involved. But with, with software, the Federal
22 Circuit's point was that it is so easy and inexpensive
23 and fast to copy it that -- simply sending the
24 information abroad, sending the object code abroad in
25 the form of the golden disk, is tantamount to

1 manufacturing copies overseas.

2 MR. OLSON: I think there are three answers
3 to that. Surely the patent laws cannot be determined
4 according to whether it's easy or fast or efficient to
5 replicate something. There has to be a line that makes
6 some sense. Number two, it may be fast and efficient
7 but there are certainly costs involved in taking the
8 machines to do it. Number three, where would that take
9 us? A design -- every product contains its own
10 manifestation of its design. That would take us
11 everywhere, because any product can be copied abroad.
12 However -- and maybe there are going to be fast ways to
13 produce other things. These are replicas,
14 reproductions, copies. These are not such components
15 that are supplied from the United States. If I may
16 reserve the balance of my time? Thank you.

17 JUSTICE STEVENS: Mr. Joseffer.

18 ORAL ARGUMENT OF DARYL JOSEFFER

19 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

20 SUPPORTING THE PETITIONER

21 MR. JOSEFFER: Justice Stevens, and may it
22 please the Court:

23 It might help if I could start by putting
24 this case into its context in both the United States and
25 international patent law. Section 271(f) is a limited

1 extension of normal territoriality principles that is
2 designed to shore up the prohibition against actually
3 making a patented invention in the United States, but it
4 does not take the further and extraordinary step of
5 applying United States law to the conduct of copying
6 parts abroad; for assembly and sale abroad, conduct is
7 properly the subject of foreign law.

8 As a result, in the context of traditional
9 manufacturing, for example, it has always been
10 understood pursuant to the statute's text, that while
11 companies cannot make parts in the United States for
12 final assembly abroad -- that's too close to making it
13 here -- they may make copies in a foreign country by,
14 for example, sending the design to the foreign country
15 or sending a specific part to the foreign country that
16 can be copied there.

17 That distinction between copying in the
18 United States and copying in the foreign country has two
19 critical dimensions. The first is that it protects the
20 foreign government's sovereign prerogative to establish
21 the rules of competition that will govern companies that
22 wish to compete in that foreign country's markets by
23 copying their products abroad, assembling them there and
24 selling them there.

25 The second, which is the flip side of

1 that point, is that it enables United States companies
2 to compete on an even playing field abroad against their
3 foreign competitors by manufacturing, assembling, and
4 selling parts abroad, subject --

5 JUSTICE GINSBURG: Mr. Joseffer, to the, to
6 the extent that you are claiming that there are foreign
7 nations that would have an interest in this, usually
8 when that is so, we hear from them and in this case
9 there is a strange silence in that regard.

10 MR. JOSEFFER: I think that -- I can say --
11 a couple points I can make. One is, this case has, has
12 been viewed because of the Federal Circuit's attempt to
13 tie this to software on the grounds that software can
14 easily be copied abroad, I think this case has been
15 viewed somewhat narrowly as a software case. But in
16 truth, there's no basis for distinguishing software from
17 anything else, and if the Federal Circuit's decision was
18 actually taken to its logical conclusion I have no doubt
19 that other nations would be quite concerned, like in --
20 in two ways.

21 One is we have looked, not exhaustively but
22 we have looked, and we have not been able to find a
23 single other country that would apply its law in the
24 circumstances if they were reversed. In other words if
25 a German company wanted to compete in the United

1 States, subject to German law, by making copies here,
2 assembling them here, selling them here, Germany would
3 stay out of that because it's the United States'
4 prerogative. Also there are significant differences
5 between the nations' patent laws. For software in
6 particular, the United States is much more bullish on
7 the patentability of software-related inventions than
8 many other countries. But even for more mundane
9 reasons, if we were talking about anything -- it could
10 be that the foreign government doesn't think that an
11 invention is particularly novel, it just disagrees with
12 us about that, or it doesn't think it is a sufficient
13 advance on a prior art sufficiently inventive to
14 warrant patent protection. And if a foreign country
15 is going to make that determination regarding
16 competition policy in its own borders, it's entitled to
17 make that determination.

18 JUSTICE GINSBURG: Let me ask you about a
19 domestic law question. One side is telling us it's the
20 component that's supplied, whether it's the master disk
21 or the object code. And the other side says this is
22 just like a blueprint, like a mold, like a template.
23 Can a blueprint be patented? Can a mold be patented?

24 MR. JOSEFFER: Not ordinarily. I mean --
25 I'm sorry.

1 JUSTICE BREYER: Copyright. Copyright. You
2 normally copyright.

3 MR. JOSEFFER: You can certainly copyright
4 something like that.

5 JUSTICE GINSBURG: Yes, but patent --

6 MR. JOSEFFER: Well the -- no, but the -- I
7 think the most important point here is that the
8 components of patented inventions do not themselves have
9 to be patentable. Many patented inventions are comprised
10 of a bunch of parts where the parts themselves would not
11 be patentable because say they were standard off the
12 shelf parts.

13 JUSTICE KENNEDY: Well, there can be a
14 process patent.

15 MR. JOSEFFER: Yes, and we don't -- I mean,
16 process patents, a process patent is a series of steps
17 or acts for performing a certain function, such as
18 turning rubber into a tire. We don't think process
19 patents are relevant -- are, are covered by this statute
20 for a couple of reasons. And it's not --

21 JUSTICE STEVENS: What, what is your view of
22 what the component is in this case?

23 MR. JOSEFFER: The component is the, is the
24 actual machine-readable copy of software that is
25 inserted in --

1 JUSTICE STEVENS: The software is the
2 component?

3 MR. JOSEFFER: Well, but the, the -- but
4 like with anything, you could say a computer is also the
5 component, but it's the actual computer, not you know,
6 any copy of the same computer.

7 JUSTICE SOUTER: But in this case, you're --
8 but Mr. Olson said the component is either the disk or
9 the portion of the hard drive to which the, the coded
10 instructions are transferred.

11 MR. JOSEFFER: Right.

12 JUSTICE SOUTER: Do you accept that?

13 MR. JOSEFFER: The United States view -- I'm
14 not sure exactly how much we disagree on this -- but the
15 United States view is that, for example, a blank disk is
16 not a component of this invention because you don't need
17 a blank disk to practice this invention. The -- the
18 actual component is the physical substantiation, the
19 physical copy of the software that's inserted into a
20 computer and if you get a disk --

21 JUSTICE SOUTER: In other words, the disk
22 plus the -- plus the coded instructions.

23 MR. JOSEFFER: Yes. And again the coded --
24 the software could be on a disk or it could be on some
25 other technology. It doesn't matter how it --

1 JUSTICE SOUTER: It could be on the hard
2 drive.

3 MR. JOSEFFER: And once it's copied on to
4 the hard drive, then the copy on the hard drive is
5 itself a component.

6 JUSTICE BREYER: I take it that we are
7 operating on an assumption that software is
8 patentable? We have never held that in this Court, have
9 we?

10 MR. JOSEFFER: No, but as I was saying
11 before --

12 JUSTICE BREYER: So what should we do here?
13 Should, if we are writing this, since it's never been
14 held that it's patentable in this Court --

15 MR. JOSEFFER: I think if --

16 JUSTICE BREYER: If I were writing
17 something, should I say on the assumption that it's
18 patentable? Since the issue isn't raised?

19 MR. JOSEFFER: No. I think, I think the
20 reason that's not relevant here is that the patented
21 invention in this case is not software. It's computer
22 that has software loaded into it. And the components of
23 a patented invention do not themselves have to be
24 patented.

25 JUSTICE KENNEDY: Can have you have a

1 copyright on a program?

2 MR. JOSEFFER: Ah, if you wrote it out, yes.
3 If I wrote out a string of 1's and 0's I could copyright
4 the strings of 1's and 0's that was -- that was written
5 out on a piece of paper. But the -- in terms of what
6 the component is here, the other things --

7 JUSTICE SCALIA: Can I ask you, the point I
8 don't understand when you say the -- the component is
9 the disk that contains material, I understand that
10 because here is a separate piece; it's a disk. You plug
11 it in; it has the information on it. But then you say,
12 if you put it on the hard drive it becomes the
13 component. But the hard drive is not a separate thing
14 like a disk. And when you say you put it on the hard
15 drive you have nothing there but -- but -- but ones and
16 offs. You have nothing there but the -- but the
17 thought.

18 MR. JOSEFFER: Well --

19 JUSTICE SCALIA: How can you call, you know,
20 what? Is it a separate section of the hard drive? No.

21 MR. JOSEFFER: Well, you could go later in
22 and delete that software off the hard drive which
23 confirms that the software does have a separate physical
24 existence in there. But the main point is that the --
25 the component is the, is the physical substantiation of

1 a software. The actual copy of the software. It
2 doesn't matter if it's on a hard disk; doesn't mean if
3 it's on a disk; it doesn't matter if it's in the air in
4 wireless transmission. It's just the physical copy of
5 the software. And you could have a situation where
6 there are multiple copies of that same component in a
7 computer. One --

8 JUSTICE ALITO: If these -- if these
9 computers are built abroad and are sold with Windows
10 installed, the component is the electrons on the hard
11 drive? Is that what, that's your position?

12 MR. JOSEFFER: It's the physical embodiment
13 of the software which in some instances is manifested by
14 -- by those electrons. Now AT&T's contrary view is that
15 the abstract code in the abstract is the component. The
16 reason that can't be is that object code in the abstract
17 is just a series of 1's and 0's. In theory I could
18 memorize in my head or write on this piece of paper.
19 But that's not going to combine with other, with other
20 parts to make a patented invention.

21 And if I could illustrate that with a simple
22 lock and key example, a key has a series of ridges on it
23 that enable it to open a lock. And that series of
24 ridges can be denoted by a sequence of numbers, bigger
25 numbers for deeper ridges. But the component is the key

1 that actually turns the lock, not the abstract sequence
2 of ridges on the key. And you can then say that about
3 anything; you can always say that any physical product,
4 any physical part, is a physical manifestation of its
5 abstract design.

6 JUSTICE KENNEDY: Is that analogous to the
7 source and the compilation, the source being the design,
8 the compilation being the key?

9 MR. JOSEFFER: No. The source code and
10 object code are just different computer languages for
11 expressing the same thing. There is no -- there's no
12 difference between them. One is words and one is
13 numbers, but they mean the same thing. There is no
14 reason to treat them differently.

15 The point is just that if you treat the --
16 either the source code or the object code as the
17 component, that's just the design of the actual physical
18 software that goes into the computer. If you did that
19 you'd have a vastly different statute because any
20 physical part has a design, but the whole point of the
21 statute is to prohibit copying of parts in the United
22 States while permitting copying of parts abroad for sale
23 abroad.

24 But if the design itself was a component
25 then you could never copy parts abroad when something

1 was designed in the United States, because sending the
2 design abroad would always infringe because the
3 sending the design abroad would itself be the component,
4 and that would be a vastly different statute there's no
5 reason to think Congress intended here, especially
6 because of the extraterritorial consequences.

7 JUSTICE GINSBURG: Windows wasn't around
8 when this statute was passed.

9 MR. JOSEFFER: Well, the statute was enacted
10 in 1984 when software was certainly present. It's fair
11 to say that Congress was not thinking of software, but
12 that's further caution for not expanding the statute
13 beyond traditional territorial reaches. Because first,
14 this Court has cautioned, has said that it should be
15 cautious in applying existing intellectual property
16 statutes to new technologies. And in addition it's
17 emphasized in *Deepsouth* that the caution against
18 extraterritoriality applies in this very context. So
19 when Congress is writing against the backdrop of normal
20 territorial principles, which are the making, using or
21 selling inventions of foreign countries subject only to
22 foreign law, and against the backdrop of *Deepsouth*,
23 which has specifically held that Congress has to speak
24 clearly to enact of statute like this.

25 JUSTICE GINSBURG: I thought that it was the

1 position of the Federal Circuit that Deepsouth has to be
2 brought into an electronic era, and so the -- the
3 Federal Circuit was taking a statute that had a shrimp
4 deveiner in mind and saying well, this is how that
5 notion should apply to an electronic world.

6 MR. JOSEFFER: Right. And the reason that
7 doesn't work under the statutory text and policies is
8 that the component that we are talking about here is the
9 specific part that goes in the machine. And if -- and
10 if -- and under the statute you have to let the company
11 send the design abroad to manufacture it abroad, both to
12 protect the company's ability to compete abroad and to
13 protect the foreign government's prerogatives.
14 Otherwise it's just a vastly different statute than the
15 one that Congress enacted textually, or in terms of
16 the policies.

17 JUSTICE STEVENS: Your time is up, but I
18 want to ask you one yes or no question. In your view is
19 software patentable?

20 MR. JOSEFFER: Standing alone in and of
21 itself, no.

22 JUSTICE STEVENS: Thank you.
23 Mr. Waxman.

24 ORAL ARGUMENT OF SETH P. WAXMAN,
25 ON BEHALF OF RESPONDENT

1 MR. WAXMAN: Mr. Justice Stevens, and may it
2 please the Court:

3 There is no question that Microsoft supplies
4 the Windows object code, that is the precise, machine-
5 readable sequence of commands that instructs a
6 computer's processor. From the United States, that is
7 paragraph 7 of the stipulation.

8 There is likewise no question that it does
9 so with the intent that precisely the same sequence,
10 which runs to millions of lines of binary digits, will
11 be installed and stored -- those are Microsoft's
12 words -- in foreign computers precisely so that they may
13 practice AT&T's invention.

14 Those facts resolve this case because it is
15 thus entirely consistent with the ordinary meaning of
16 the words of the statute to say that Microsoft has
17 quote, "supplied" a quote, "component" that when quote,
18 "combined with hardware" enables the practice of AT&T's
19 invention. Now let's look at --

20 JUSTICE BREYER: Suppose I send someone to
21 the Patent Office --

22 MR. WAXMAN: Excuse me?

23 JUSTICE BREYER: Suppose I send someone to
24 the Patent Office, goes there, picks up the patent, and
25 this patent is written very, very, very concretely and

1 specifically. Gets on the phone, phones somebody in
2 Germany and reads it to him. And that person, having an
3 excellent memory, takes everything in and now he has the
4 precise instruction necessary to change the machine
5 around or put various things into it. So now it is a
6 precise copy of the machine in the United States.

7 MR. WAXMAN: That's not the --

8 JUSTICE BREYER: Is that -- how is that
9 different from this? How is it different?

10 MR. WAXMAN: That is very different than
11 this case because what -- first of all, we all agree
12 that software code in and of itself, removed from a
13 physical structure, cannot be patentable and when
14 software -- when some -- when an invention that is
15 practiced with software is patented, at the most what
16 you will see is preferred embodiments of the source code
17 which is language that humans understand and which
18 computers do not.

19 A lot of work has to be done in terms of
20 debugging and testing and compiling to create what is,
21 by stipulation, at issue in this case, which is the
22 precise, machine-readable sequence that commands a
23 computer's CPU millions of times a second. Source code
24 would do nothing. Source code has to be worked on
25 overseas.

1 JUSTICE BREYER: No, no. We have a genius
2 -- we have a genius, as they used to have to get all the
3 stuff that we stole from England, with the -- with the --
4 remember the weaving machines and the cotton spinners
5 and so forth? This genius comes over here; he looks at
6 a really complex machine; it is now stored in his head,
7 the precise details that nobody else could do. He runs
8 back to Germany, and he builds it. Well, he has
9 absolutely stolen the precise, incredibly complex
10 details of this machine.

11 MR. WAXMAN: Well --

12 JUSTICE BREYER: Now, does it matter, if
13 instead of sending the individual, we send the machine
14 to Germany. This genius looks at it in Germany and
15 there he makes the copy. Are they any different?

16 MR. WAXMAN: When you're talking -- when
17 you're talking about sending designs over or blueprints
18 or management instructions or a high-level version of,
19 gee let's have a code that will perform the following
20 functions, and you have people design and make and
21 compile and test and debug that code overseas, of course
22 that component, the component is the object code, the
23 precise commands that reside in the computer and
24 continually interact with the hardware of the computer
25 in a way I'm going to describe and is not disputed,

1 millions of times a second.

2 Let's take this case. Okay. Is it -- the
3 question is, is it a component and whether what was
4 supplied was in fact combined. That's, that's -- that's
5 what this case boils down to. As to the component.

6 We have something, software program, the
7 NetMeeting and sound recorded program that can in its
8 object, its machine-readable command form, is developed,
9 bought and sold entirely separately from any hardware
10 that it commands.

11 JUSTICE SOUTER: And that is what is on
12 master disk.

13 MR. WAXMAN: And that is what is either on
14 the master disk or, although the other side obscures
15 this, that is what is represented in the electric --
16 electronic transmission, that is another means by which
17 the code is supplied.

18 And in paragraph 7 of the stipulation
19 Microsoft acknowledges that it supplies the Windows
20 object code by transmitting it to manufacturers
21 overseas. And the way that happens is the code, the
22 machine language, is resident in Redmond, either in the
23 pits and lands of a CD or on the varying magnetic
24 orientations of a hard drive, and a, some engineer from
25 Microsoft presses a button and it is essentially, it is

1 taken and converted into photons which stream whatever
2 it is, 7,000 miles, under the land and under the
3 Atlantic Ocean and emerges into a machine -- a computer,
4 a bit of otherwise inanimate parts that are sitting
5 there in Dusseldorf, where, if it is loaded onto the
6 hard drive, it's converted from photons to a series of
7 electrical pulses.

8 JUSTICE STEVENS: Is that really what
9 happens? As I understand it there is an intermediate
10 step. They don't send it directly from the United
11 States to each of the individual computers in Germany.
12 They send it to a central point which then redistributes
13 it. Is that not right?

14 MR. WAXMAN: Well, I think that paragraph 7
15 of the stipulation, it doesn't specify one way or the
16 other, but their case, Justice Stevens, depends upon the
17 following. Because if I --

18 JUSTICE STEVENS: If you're correct that
19 they're just sending it from New York direct to the 500
20 different machines all on one transmission from New
21 York, there's no lawsuit here.

22 MR. WAXMAN: Let me give you two examples --

23 JUSTICE STEVENS: Is that what you're trying
24 to tell us, that they do send it directly from New York
25 to 500 different recipients in Germany?

1 MR. WAXMAN: No, no, no. And it wouldn't --
2 what I'm saying is there is at least one violation of
3 271(f) here. 271(f) looks exclusively at what is done
4 in the United States. It is entirely irrelevant to
5 271(f) what, if anything, is done overseas. The Federal
6 Circuit has made this clear in the Waymark case and it's
7 consistent with the language.

8 JUSTICE STEVENS: Would it be a violation if
9 they sent, if they sent the golden disk abroad and
10 nobody ever copied anything off the golden disk?

11 MR. WAXMAN: If they sent the golden disk
12 abroad or if the Microsoft engineer pressed the button --

13 JUSTICE STEVENS: Would you answer my
14 question?

15 MR. WAXMAN: I think I am. The answer is --

16 JUSTICE STEVENS: If they send the golden
17 disk abroad and never use it, would that be a violation?

18 MR. WAXMAN: If they had the necessary
19 intent and purpose. They have had to have had the
20 specific intent and purpose that it be combined in order
21 to create a device that wouldn't --

22 JUSTICE STEVENS: Suppose it is never, it is
23 never combined?

24 MR. WAXMAN: It wouldn't matter.

25 JUSTICE SOUTER: But your -- and the reason it

1 wouldn't matter on your view is that the component is
2 the object code on the disk, not the disk itself?

3 MR. WAXMAN: That's right.

4 JUSTICE SOUTER: All right. Then why
5 doesn't that get you --

6 MR. WAXMAN: It could be --

7 JUSTICE SOUTER: Why doesn't that get you
8 right back to the point that Justice Breyer was making?
9 You are saying, I think, in essence if you send a
10 blueprint -- this is like a blueprint. It tells, it
11 tells a machine which may be in Europe how to put the
12 object code on other disks or on hard drives. The
13 machine in Europe is following instructions just the way
14 an artisan would follow a blueprint.

15 MR. WAXMAN: Here's the difference.

16 JUSTICE SOUTER: What is the difference?

17 MR. WAXMAN: And it's nicely embodied in
18 Microsoft's reply brief's repeated use of the word
19 "antecedent." A blueprint or a design is a precursor to
20 the actual device. It is the instructions about how to
21 make something. It's not the thing itself. And here
22 what we have is the object code that is the precise
23 commands that, unlike design information, interact
24 continuously with the hard drive and with the processor
25 in order to make physical changes on an ongoing basis.

1 JUSTICE SOUTER: Yes, but the "continuously"
2 does not describe the process of going from the master
3 disk to what you claim to be the infringing computer
4 sold in Europe. There is no continuous process there.
5 As I understand it, what happens is -- let's just take
6 the master disk and forget the photon for the moment.
7 The master disk functions like a blueprint. They send,
8 from the United States they send the blueprint to
9 Europe. The blueprint is put in some kind of a machine
10 in Europe. And by the use of the blueprint the machine
11 puts electrical charges on a disk or on a hard drive,
12 and that it seems to me does bear out the blueprint
13 analogy. And if it does, then any export of a blueprint
14 or indeed the simple export, the simple sending of the
15 '820, if that's the right number, patent in this case
16 would be a violation.

17 MR. WAXMAN: I have to disagree, Justice
18 Souter, because the blueprint -- the patent is not the
19 actual series of commands that runs the machine and
20 neither is the blueprint. The blueprint is
21 instructions, to be sure, and it can be reflected in
22 intangible code, but it's instructions about how to make
23 something and once it's made it's done. You can say, as
24 Mr. Olson did, that the design is embodied in the thing
25 that is made. The blueprint for a semiconductor chip in

1 some sense is always reflected in that chip. But if you
2 don't like the chip you have to get rid of it. Software
3 can be -- if you don't like Microsoft Word, you can
4 download it and you can delete it and download
5 WordPerfect and use that. And what happens in the
6 computer -- and I think this does bear on what the
7 nature of the component is and why in the ordinary sense
8 of the word "component" and the ordinary sense of the
9 words "supply" and "combine," they apply naturally to
10 what Microsoft does.

11 I mean, is a disk, is a typewriter, is a
12 screen, is a hard drive, is a CPU a component? Are they
13 components when they have the code embedded in it? Of
14 course. But that doesn't -- a tire doesn't become not a
15 component of a car just because a tire with a wheel
16 attached to it is also a component. The question is --

17 JUSTICE KENNEDY: But suppose, suppose you
18 had a machine that makes another machine, and if you
19 ship that machine to Europe -- and there's a patent for
20 the machine that makes it. If you ship it to Europe and
21 it starts making another machine, the statute is not
22 violated; and isn't that just what's happening here?

23 MR. WAXMAN: No, no, no. This is not a
24 machine tool. The thing that was violated, the machine-
25 readable object code, is precisely what is installed on

1 the computer and precisely what is moved from one part
2 of the computer to another in different forms as the
3 computer operates and it continually instructs. This is
4 dynamic. It's not --

5 JUSTICE BREYER: How would you, how would
6 you -- go back for a second, please, because, if you're
7 finished with that, because I don't see how to decide
8 for you without at the same time permitting a person to
9 walk over to the Patent Office, to read that application
10 and the description, which after all at least can be a
11 very highly detailed set of instructions of how to make
12 a machine, getting on the phone, explaining that just
13 like the blueprint which it is just like to somebody in
14 Europe. They then make it. And that, on your reading,
15 would violate the statute. It can't be right that that
16 would and you don't even think it would.

17 MR. WAXMAN: I don't because --

18 JUSTICE SOUTER: And so what's the
19 difference between that and this case for you?

20 MR. WAXMAN: Justice Breyer, there is a
21 long, long spectrum with respect to software that goes,
22 goes from high-level system architecture to all the way
23 down through component architecture, pseudo code, source
24 code, which is, which is a description that humans
25 understand, and the actual machine language that a

1 computer will understand. Invention -- patents do not
2 specify machine language. The machine code is totally
3 dependent on what type of processor it's relating to and
4 somebody who takes source code -- I could make an
5 argument that if you take, steal the Microsoft source
6 code, which is the crown jewel, it is the greatest trade
7 secret of this country, it will not be sent overseas,
8 but if somebody took it with a bunch of smart engineers
9 and said, you know, convert this into, convert this into
10 something a computer will understand that will combine
11 with a computer, that involves a question of whether
12 what's going on overseas is manufacture as opposed to
13 assembly.

14 Look at it from the perspective -- maybe
15 this helps. Let's look at the question from the
16 perspective of Microsoft, the OEM, and the user
17 overseas. Object code is the end of Microsoft's
18 manufacturing process. That is what they make. They
19 don't make hard drives, they don't make disks, they
20 don't make computers. They fully finish their product,
21 the Windows operating code, and then send it overseas.
22 The OEM is --

23 JUSTICE SCALIA: That, that code is not
24 patentable, you've said.

25 MR. WAXMAN: The code is not patentable.

1 The expression is copyrightable. AT&T has not sought to
2 get a patent on the code. AT&T has a patent on a system
3 that can be practiced, among other ways, through the use
4 of software.

5 JUSTICE SOUTER: But what is it that they
6 export and send overseas?

7 MR. WAXMAN: They export in a variety of
8 different physical forms --

9 JUSTICE SOUTER: Right, it's a thing. It's
10 an object of some sort, isn't it?

11 MR. WAXMAN: It is an intangible sequence of
12 commands that is carrying --

13 JUSTICE SOUTER: It is an object that has
14 coded onto it, transferred to it in a readable way,
15 those commands. But it's an object, isn't it?

16 MR. WAXMAN: Well, it's not necessarily an
17 object. I don't know whether you would call a stream of
18 photons that is constantly repeated under the Atlantic
19 Ocean an object.

20 JUSTICE GINSBURG: Mr. Waxman, this may,
21 this may help focus that question. Suppose the master
22 disks were made abroad. You would be taking the same
23 position, would you not?

24 MR. WAXMAN: If -- that depends how it were
25 made. If it were --

1 JUSTICE SCALIA: I hope we can continue
2 calling it the golden disk. It has a certain
3 Scheherazade quality that really adds a lot of interest
4 to this case.

5 (Laughter.)

6 MR. WAXMAN: Justice Ginsburg, the question
7 is what is made. If making it means somehow creating,
8 reconfiguring the precise sequence of commands --

9 JUSTICE GINSBURG: No. That's given by
10 Microsoft to one of its offices in Europe. But the
11 golden disk itself is made abroad.

12 MR. WAXMAN: If the, if the object code
13 itself, the very precise sequence that can't be changed,
14 is supplied from the United States --

15 JUSTICE GINSBURG: Yes.

16 MR. WAXMAN: -- the act is implicated.

17 JUSTICE GINSBURG: So the only thing --

18 MR. WAXMAN: Regardless of --

19 JUSTICE GINSBURG: The only thing supplied
20 is this, one side calls it abstract, one side calls it
21 something else. But anyway, it is the series of 0's and
22 1's; that's the only thing that's supplied from the
23 United States?

24 MR. WAXMAN: That's right.

25 JUSTICE GINSBURG: Any physical

1 manifestation of it is done abroad. You would still be
2 taking the position that you're taking, is that not so?

3 MR. WAXMAN: Well, yes, except that the
4 intangible sequence of commands can only be carried in
5 the form of, by attaching it to a physical platform or a
6 bucket.

7 JUSTICE STEVENS: Yes, but it doesn't have
8 to be --

9 MR. WAXMAN: Even a radio wave. Microsoft
10 has patent claims for software.

11 JUSTICE STEVENS: The physical object does
12 not have to originate in the United States. Can they
13 not transmit the commands to a physical object in
14 Germany and have that be the substitute for the golden
15 disk?

16 MR. WAXMAN: Well, of course, and they do
17 that.

18 JUSTICE STEVENS: Yes.

19 MR. WAXMAN: They press a button and they
20 have an electronic transmission that sends a stream of
21 photons under the Atlantic Ocean and are changed into
22 electrical impulses that are used to inscribe the
23 precise code onto a hard drive in the form of
24 electromagnetic pulses.

25 JUSTICE STEVENS: But that they now send to

1 some central point which redistributes them. They send
2 one copy to, say, the wholesaler, who then makes 500
3 copies that are sent to the retail customers, isn't that
4 correct?

5 MR. WAXMAN: That may be. We don't --

6 JUSTICE STEVENS: Which is exactly what
7 happens in this case?

8 MR. WAXMAN: It's one of the things that
9 happens in this case. We have a stipulated record that
10 is not very detailed, but in that instance there is only
11 one violation.

12 JUSTICE STEVENS: My question is if that is
13 what happens, when the retransmission takes place when
14 one copy is converted into 500 how can those 500 all be
15 components rather than copies of the single component?

16 MR. WAXMAN: Well, the only -- I have two
17 answers for that question, both of them I think directly
18 answering your question. First of all, the statute is
19 violated only when the precise object code is
20 expatriated from the United States, when it is supplied
21 from the United States. That's the violation. The
22 other issues are damages, what damages are you entitled
23 to. What is combined with the computer is the precise
24 thing that is supplied because it is the precise
25 sequence of commands.

1 JUSTICE BREYER: But is there any precedent
2 for that sort of thing? That is, I understand your
3 point now, I think, but however you put it, it has to
4 come down to the fact that this very, very complex and
5 detailed thing that is being supplied is an abstract set
6 of numbers. And I can understand how the patent
7 application does not itself contain that set of numbers,
8 but rather contains an instruction as to how to generate
9 that set of numbers.

10 But I then would be quite frightened of
11 deciding for you and discovering that all over the world
12 there are vast numbers of inventions that really can be
13 thought of in the same way that you're thinking of this
14 one, and suddenly all kinds of transmissions of
15 information themselves and alone become components. So
16 I'm asking you, is there any outside-the-computer field
17 analogous instance where the transmission of information
18 has itself been viewed as the transmission of a
19 component?

20 MR. WAXMAN: I'm not aware of any. In the
21 lower courts, Microsoft was arguing that the biotech
22 industry was an analogy, but there is some very obvious
23 differences between what is supplied in terms of object
24 code that instructs a machine and a, you know, a
25 sequence of nucleotides, the abstract sequence of

1 nucleotides. But I think we need to be quite precise
2 here. We are not claiming that the component is an
3 idea. We're not complaining -- we're not arguing that a
4 component is some form of information. What we're
5 saying here is -- I mean, nobody is paying billions of
6 dollars from an idea. When the commands are loaded onto
7 the hard drive of a computer in the form of
8 electromagnetic orientations and when you press a button
9 saying give me NetMeeting, and the processor says -- and
10 this is what electrical engineers say -- fetch the
11 instructions, fetch the commands to the random access
12 memory where it's -- where it is there reflected in a --
13 in a form of patterns of electrical charges. And when
14 the code then moves back and forth, the instructions
15 move back and forth from the CPU and RAM, they --
16 they -- millions of times a second they are replicating
17 themselves.

18 JUSTICE KENNEDY: Well, is it an answer to
19 Justice Breyer, or maybe it isn't, that we have no
20 conceptual problem saying that there would be liability
21 if this happened within the territorial limits of the
22 United States?

23 MR. WAXMAN: Absolutely not.

24 JUSTICE KENNEDY: And so there shouldn't be
25 a greater conceptual problem if you prevail, in applying

1 it abroad.

2 MR. WAXMAN: That's --

3 JUSTICE BREYER: Well, sure, there is. It's
4 a bigger --

5 MR. WAXMAN: If I can, I just want to make
6 sure I answer your question.

7 JUSTICE BREYER: But it's totally different
8 in that of course it violates the patent in the United
9 States. The whole question here is whether or not the
10 person has to go get a patent in Germany, which he can
11 do or not do. And the -- the concern that I'm worried
12 about is in the future it might be outside your field,
13 it might be in biology, but if you suddenly say that the
14 transmission purely of information is the transmission
15 of a component, no matter how detailed, I can easily see
16 in biology or medicine where a patent has an instruction
17 and indeed, that instruction is an instruction to create
18 other detailed procedures, processes, dishes, Petri
19 dishes, I don't know what it is, and we transmit that
20 detailed information abroad, then suddenly it's our
21 patent law and not the foreign patent law that would
22 govern. That's why I asked for precedent.

23 MR. WAXMAN: Okay. First of all, this
24 statute does not reach anything that is done overseas.
25 It doesn't reach what the German OEM does. It doesn't

1 reach what anybody does overseas. It -- it makes liable
2 as an infringer somebody who supplies -- who is in the
3 United States who supplies from the United States a
4 component with the intent, with the express intent that
5 that component be combined in a way to create a device
6 that would practice a U.S. patent. Now I don't believe
7 -- I firmly am confident that if you look at what's at
8 issue in this case, there may be all sorts of questions
9 about what is or isn't a component. I might think that
10 a design is a component or it isn't a component, but
11 think of these three features: One, this is something
12 that is totally modular. It is developed, bought and
13 sold entirely independent of any of the hardware to
14 which it is, with which it is combined, and between
15 which it moves continuously as it operates. Number two,
16 it can be removed or updated entirely independently of
17 the other components. And it is dynamic, unlike
18 designs, unlike molds, unlike instructions about how to
19 make something, all of which are exhausted. They have
20 done their work when the thing is made. That's why
21 those things are called hardware.

22 JUSTICE SOUTER: All right. But --

23 MR. WAXMAN: These are instructions not
24 about how to make something. They are instructions
25 about what the other things that are made should do and

1 how they do it.

2 JUSTICE SOUTER: You can perfectly well say
3 that in this case. You can say that the instruction is
4 exhausted once the golden disk has sent its information
5 through an intermediary machine onto the new disk that
6 is made.

7 MR. WAXMAN: You could not say that because
8 if you take the information from a golden master or a
9 stream of photons and put it on a hard drive, unless
10 that continues to move and change in form, the computer
11 will not work. The computer operates by having you
12 press a button saying do this function. The central
13 processing unit then says where are my instructions on
14 how to do it. It says find them and put them in random
15 access memory, where it is then replicated in the form
16 of patterns of electrical charges, quite a different
17 physical form than it exists on the hard drive. And the
18 program counter --

19 JUSTICE SOUTER: That simply means that
20 after the -- the -- the -- the idea as you put it, has
21 been placed on the hard drive, certain other processes
22 must take place too before we get the result that people
23 are buying computers to -- to obtain. But it's still
24 the case that the -- that the code on the golden disk is
25 exhausted once that has been transferred from the disk

1 through an intermediary machine on its way ultimately to
2 a working computer just -- and my only point is -- just
3 the way you can say that the blueprint in effect is
4 exhausted once the house has been built.

5 MR. WAXMAN: It's not because the blueprint
6 has no further work to do. It was something that --

7 JUSTICE SOUTER: Sure. You can use it
8 again.

9 MR. WAXMAN: Something that teach you -- has
10 no further work to do with respect to the infringing
11 device, but the object code works continuously and gives
12 continuous instructions to the various hardware
13 components completely unlike. But let me go to --

14 JUSTICE SOUTER: The object code has several
15 jobs. One job when embodied on the golden disk is tell
16 a -- is to tell a machine how to make disks or how to
17 put a message on a hard drive. Another job that the
18 object code has is when the object code gets on the
19 resulting disk or the hard drive. But in fact, the
20 manifestation of the object code on the golden disk and
21 the manifestation of the object code on the resulting
22 disk are separable, just as the blueprint is separable
23 from what is constructed.

24 MR. WAXMAN: Justice Souter, just taking
25 your -- taking that as -- that as the case, the United

1 States in footnote 2 of its brief repeats what Microsoft
2 argued in the court of appeals and the district court,
3 which is that if it took instead of one golden master,
4 but 100,000 CDs, which is what a golden master is, one
5 for each computer, that would be a 271(f) infringement.
6 But that also requires copying and transforming the code
7 that is on the CD-ROM which is in the form of physical
8 pits and lands and indentations, and downloading it into
9 the hard drive where the same exact sequence is
10 manifested as varying orientations of electronic,
11 electromagnetic fields, and that is no different
12 whatsoever than this case.

13 If you say, well, what destroys you in this
14 case is that the code has to be copied, replication,
15 precise instantaneous replication is simply how software
16 works. It's not just how it's supplied. It's not just
17 how it's combined. It's how it interacts dynamically
18 within the computer. And that's why we say it's a
19 component.

20 Let me just be clear about what the
21 statutory interpretation question here is. It's not as
22 whether our conception of the component as the code --
23 as the -- as the commands is better than their conception
24 of the component as a CD or a light wave or a telephone
25 wire that contains that.

1 The question is, there may very -- it may
2 very well be both things. The question is whether the
3 word "component" naturally applies to what we do. And our
4 -- we have given dozens of references to the use of
5 intangible software, program software as components. We
6 have given you the dictionary definition with an example
7 from Webster's. They have not responded with one
8 counter-example. The only dictionary example they
9 provide you relates to the word "such", and it's in
10 their reply brief on page 5. But they have given you
11 not the first definition of "such" under Black, in Black's
12 Eighth, they have given you the second one. The first
13 one is, of this or that kind, she collects a variety of
14 things. And that definition, under that definition it
15 wouldn't matter whether you said, well, the component
16 has to be physical or, you know, it could be either.
17 Because even if it has to be physical --

18 JUSTICE ALITO: Can you think of any
19 machine -- can you think of any machine other than a
20 computer that has a component that is not a physical
21 thing?

22 MR. WAXMAN: I can't. And that's why it
23 seems to me, I mean -- and there are -- there are
24 machines that have nonphysical things in them but not
25 that operate in the sort of same dynamic way. We gave

1 the example of the intangible text of Moby Dick in a
2 book. And they give the example of, you know, an
3 incredibly complicated series of circuits on a -- on a
4 chip. But those don't continue to operate and interact
5 in the way that this paradigmatic component does. Thank
6 you.

7 JUSTICE STEVENS: Thank you, Mr. Waxman.
8 Mr. Olson, you have, let's see, four minutes.

9 REBUTTAL ARGUMENT OF THEODORE B. OLSON
10 ON BEHALF OF THE PETITIONER

11 MR. OLSON: Thank you, Justice Scalia. I
12 mean Justice Stevens.

13 (Laughter.)

14 I was about to address Justice Scalia and
15 recite the case -- cite the case Nixon versus
16 Fitzgerald, which is directly responsive to the question
17 Justice Scalia raised at the very beginning of the
18 audience, that a stipulation with respect to damages
19 does not make a case moot. And also with respect to a
20 question raised by Justice Scalia, or a comment made by
21 him, it doesn't have to be gold. It's a master disk.

22 JUSTICE SCALIA: I'm sorry.

23 MR. OLSON: What this essentially comes down
24 to is something that Mr. Waxman repeatedly said. It is
25 the commands that are a component. The commands to the

1 individual foreign-made computers. Those are -- those
2 commands cannot be understood and cannot be used by that
3 computer unless they are in a physical medium that is
4 created as a copy of the master disk that sends abroad
5 -- that's sent abroad.

6 As I said at the beginning, the stipulation
7 is full of the word "copies", foreign-replicated copies.
8 That's what we're talking about here, something that is
9 re-created. And Justice Breyer, your question about
10 someone who's got a really good memory and can go abroad
11 and recite the 1's and 0's, pictures can be taken,
12 copies can be made in lots of different ways.

13 And in response to Justice --

14 JUSTICE BREYER: His answer to me is that --
15 that -- it's sort of misleading to think of this as if
16 it's just information, because it's really a method that
17 switches things at a level of detail that is impossible
18 to put in a patent application. It's taking the
19 information in a patent application, it's transforming
20 it into what we think of as 1's and 0's, but they're not
21 really even 1's and 0's. What they are is things that
22 happen with electricity.

23 MR. OLSON: That's right.

24 JUSTICE BREYER: And it's putting that on
25 the disk and then it makes other things happen.

1 MR. OLSON: I agree. I agree. It's putting
2 something physical on a disk, pits and lands,
3 instructions that are copied from the master disk and
4 then put into either a hard drive or a disk, it's the
5 same thing. It's something that is into the computer
6 that will make the computer operate.

7 You're right, Justice Ginsburg, that the
8 Court of Appeals for the Federal Circuit thought it was
9 bringing this statute up to date and it even said so.
10 We are making an extension of the statute to keep up to
11 date with the technology. That is not for courts to do.
12 This Court is --

13 JUSTICE KENNEDY: Are you saying that the
14 infringement act that happened in the United States
15 involved no components?

16 MR. OLSON: The infringement that happened
17 in the United States which was under section (b), which
18 provides section (b) inducement liability for making
19 copies domestically of -- the same thing that happened
20 here. Copies of the object code were put on physical
21 mediums and sent to domestic manufacturers. Domestic
22 reproduction constitutes infringement under section
23 271(b) but foreign reproduction is not a violation of
24 section 271(a) or 271(b). Hence, we're talking about
25 the two sections where --

1 JUSTICE BREYER: So they had a license to do
2 that, because if they didn't have a license to make the
3 master disk here in the United States, the making of it
4 would have violated the patent; is that right?

5 MR. OLSON: The making of the master disk if
6 actually used in a computer with a microphone and a
7 speaker, and that's the liability that existed in the
8 stipulation under 271(a). Making copies is liability
9 domestically under section 271(b). If it's going to be
10 liable for foreign-made replications, then it must be
11 under 271(f). The language of the statute, we submit,
12 is clear. Physical things must be components under
13 271(f) because they must be supplied from somewhere.
14 Ideas have no physical form. They're in the air. The
15 words used, "supplied from" tells us that it must be a
16 physical thing combined with. Ideas don't combine with
17 physical things to make a patented invention. Physical
18 things do. Thank you, Your Honor.

19 JUSTICE STEVENS: Thank you, Mr. Olson. The
20 case is submitted.

21 [Whereupon, at 11:15 a.m., the case in the
22 above-entitled matter was submitted.]

23

24

25

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