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(10:16 a.m.)

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CHIEF JUSTICE ROBERTS: We'll hear argument first today in Case 06-937, Quanta Computer v. LG Electronics.

Ms. Mahoney.

ORAL ARGUMENT OF MAUREEN E. MAHONEY

ON BEHALF OF THE PETITIONERS

MS. MAHONEY: Mr. Chief Justice, and may it please the Court:

Under this Court's exhaustion cases, exhaustion has always been triggered when two criteria have been satisfied and the district court properly dismissed these claims because it found that they were satisfied here on the undisputed facts. The first is that there must be an authorized sale under the patent that was allegedly infringed. That's never been in dispute in this case. The Federal Circuit recognized that Intel was authorized to sell these components under the system and method patents at issue in the case that have been allegedly infringed.

And the second criteria is that the article sold must be one that falls within the protection of the patent that was allegedly infringed, here the system and method patents. But as *Univis* holds, that test doesn't

1 apply simply to articles that would directly infringe
2 the patent, because the law with contributory
3 infringement standards provides that protection to the
4 patent owner also to articles that would contributorily
5 infringe. In other words --

6 JUSTICE STEVENS: Ms. Mahoney, can I just
7 get one thing straight in my mind. Which transaction
8 triggered the exhaustion doctrine in your judgment, the
9 general license to Intel or the sale by Intel to Quanta?

10 MS. MAHONEY: I think they work in
11 combination here, Your Honor, because once the sale
12 was -- once the license was entered into with Intel and
13 once unrestricted rights were given to make, use and
14 sell components that would infringe -- otherwise infringe
15 these patents, there was really nothing else that could
16 happen --

17 JUSTICE STEVENS: Was the license
18 unrestricted? That's one of the reasons I asked the
19 question. Wasn't there a use restriction on the resale?

20 MS. MAHONEY: Well, there was -- what there
21 was, the sale was authorized. The sale was authorized.
22 What --

23 JUSTICE STEVENS: On the condition that it
24 be sold to someone who would not use it on non-Intel
25 products.

1 MS. MAHONEY: I don't think that's what the
2 lower courts found and I don't think that's what the
3 argument has ever been, Your Honor. I think this is
4 just like Bobbs-Merrill. There is a -- this Court has
5 recognized that there is a difference between actually
6 conditioning the seller's authority to sell to someone
7 who's going to use it for some prohibited purpose, and
8 that would be a case like General Talking Pictures,
9 where it says, you do not have authority to sell to
10 someone who's going to use it for the home market. But
11 Bobbs-Merrill said if what you do instead -- it was a
12 copyright case that was applied in Motion Picture
13 Patents -- if what you do instead is you give them
14 authority to sell, you don't say you'll be in breach if
15 you sell it to somebody who's going to sell books at
16 below the retail price I've specified, if instead what
17 you do is say, you have to agree you'll give them notice
18 that the -- that the owner of the invention, or in that
19 case the copyright, is not agreeing to your use of these
20 books or sale of these books at below a certain price,
21 that doesn't count. There's still an authorized sale,
22 that when -- that you can't -- that the patent owner
23 can't try to retain part of the monopoly right to sell.

24 CHIEF JUSTICE ROBERTS: Well, if that's true
25 then this case really isn't a big deal at all. It just

1 depends on exactly how you word the contract when the
2 patentee sells it to a purchaser. You can word it -- in
3 other words, you can word it in such a way that the
4 patentee's rights extend further downstream and you're
5 saying all this case turns on is whether the wording
6 here was correct or not.

7 MS. MAHONEY: Well, the wording hasn't been
8 in dispute, but a lot of important things turn on it,
9 because of course if Intel didn't have the authority to
10 make these sales, it would be liable for contributory
11 infringement. And undoubtedly when Intel decided how
12 much to pay for this license it cared deeply about
13 whether it was going to be exposed to that liability.

14 CHIEF JUSTICE ROBERTS: Well, I understand
15 your position to -- to acknowledge that they could have
16 structured the sale to Intel in such a way as to achieve
17 the same result that you're saying is so bad under the
18 patent laws.

19 MS. MAHONEY: I don't think so, Your Honor.
20 Once they have an authorized sale, then the results are
21 different, because if there has been an authorized sale
22 --

23 JUSTICE GINSBURG: Ms. Mahoney, may I give
24 you a specific example? I think the Chief has something
25 of this order in mind. Could the patentee say to the

1 licensee, to the Intel, that, I license you to sell only
2 to buyers who have a license from the patentee? Could --
3 could the licensee be limited in that way?

4 MS. MAHONEY: They could do that, and let me
5 explain the consequences of doing that. If Intel then
6 under those circumstances sold to a buyer who did not
7 have a license, Intel would be liable for contributory
8 infringement because it wouldn't be an authorized sale,
9 and the buyer would be liable for infringement because
10 it didn't acquire the goods through an authorized sale.
11 If the buyer instead has the license, has obtained the
12 license from the patent owner, then there has been an
13 authorized sale and any remedies that the owner of the
14 patent would have against the buyer would be those found
15 in contract, because the triggering line under this
16 Court's cases is has there been an authorized sale? And
17 this makes perfect sense because --

18 JUSTICE GINSBURG: But explain to me --
19 perhaps I should ask Mr. Phillips this question -- but
20 why isn't it done that way? The way -- if the patentee
21 wants to maintain control further down the line, why
22 doesn't the patentee just limit the licensee to selling
23 to people who are licensed?

24 MS. MAHONEY: Presumably because in this
25 circumstance -- it's not in the record -- but presumably

1 Intel wouldn't agree to these terms unless it in fact
2 was given authority to sell, no matter how it was going
3 to be used, because otherwise it would still be on the
4 hook for liability. And -- and presumably they could
5 have done something that would have required an
6 agreement with -- you know, between -- only sell to
7 someone with an agreement. But for whatever reason the
8 parties didn't negotiate that term. Perhaps Intel
9 wasn't willing to do it that way.

10 CHIEF JUSTICE ROBERTS: So the parties are
11 unwilling to spell out exactly how this is going to work
12 out in their contract, and each side, it prefers to take
13 their chances on how the Federal Circuit's going to
14 rule. It's easier to sell these things if they're not
15 encumbered by these additional license requirements and
16 the manufacturer presumably gets a lot more, but there's
17 a lot of uncertainty, uncertainty that could have been
18 cured by how the contract was drafted, and people prefer
19 to live with that uncertainty and litigate rather than
20 clear it up in the contract.

21 MS. MAHONEY: Well, I think that this
22 Court's ruling would certainly make things clear, but I
23 think that the language of the contract recognizes that
24 the -- specifically says that, notwithstanding anything
25 to the contrary, the ordinary operation of patent

1 exhaustion is supposed to apply here. In other words, I
2 think Intel knew --

3 CHIEF JUSTICE ROBERTS: Right, and the person
4 who wrote that provision knows that the question of how
5 the patent-exhaustion doctrine applies is the subject of
6 great confusion, so much confusion that the Supreme
7 Court's going to have to decide it, and yet they put
8 that in there rather than spelling out in the contract
9 exactly which they had in mind, whether or not you could
10 impose these further restrictions or couldn't.

11 MS. MAHONEY: But, Your Honor, I think that
12 under this Court's decision in *Univis Lens*, as the
13 district court recognized, the answer in this case is
14 actually quite clear what the patent-exhaustion doctrine
15 would require. And the reason it's clear --

16 CHIEF JUSTICE ROBERTS: Well, it wasn't
17 clear to the Federal Circuit, I guess.

18 MS. MAHONEY: It wasn't clear to the Federal
19 Circuit, but it was clear to the district court, showing
20 that the idea that somehow it was absolutely known to
21 everybody what the outcome of this issue would be is not
22 correct. The district court, I think correctly,
23 understood that *Univis Lens* was the controlling case.
24 Of course, the Federal Circuit didn't even cite it. But
25 the district court found that the *Univis Lens* standard

1 was satisfied because these components were necessarily
2 manufactured in a manner that satisfied, that included
3 the functionality of the system and method patents at
4 issue here. At 30a, the district court looks to LGE's
5 own claim charts and says that their own allegations
6 show that they were manufactured in a way that met many
7 of the limitations of the claims.

8 In addition, at 67 of the petition appendix,
9 she says that by attaching the components, the Intel
10 chips, to the -- the other generic wires and memory, it
11 necessarily caused these products to infringe. And, at
12 46, she says, "Failure to follow Intel's design
13 specifications would render the computers inoperable."

14 So, this is a case where there's just no
15 question that if LGE's allegations are correct, these
16 products would have contributorily infringed. So Intel
17 knew that in order to avoid potential liability to -- to
18 LGE, that it had to get full authority to sell, and it
19 did. And there's never been any dispute about that.
20 Instead, there's simply the Federal Circuit's view that
21 even if you have an authorized sale, that the
22 patent owner is nevertheless allowed to say, okay, I
23 authorize the seller to sell it to anybody, but I want
24 to retain the right to control the use of the -- of the
25 buyer. And that's exactly what this Court's cases have

1 always said, with the exception of A.B. Dick, cannot be
2 done because the whole point of the exhaustion doctrine
3 is to demarcate the line between where the monopoly
4 power to control rights to use and sell end and where
5 any rights under contract must begin.

6 JUSTICE SOUTER: Well, there's one --
7 there's one more wrinkle that you don't expressly advert
8 to and that is the argument that what is in issue here
9 are the -- are the systems and methods patents, rather
10 than the -- the equipment component patents.

11 MS. MAHONEY: Yes.

12 JUSTICE SOUTER: And that with respect to
13 the equipment component patents nothing is being
14 retained, but with respect to the systems and method
15 patents nothing was being granted. What is your answer
16 to that answer to your argument?

17 MS. MAHONEY: It's completely inconsistent
18 with the way the case has been litigated from the outset
19 as well as the terms of the contract. At page 5 of the
20 petition appendix, the Federal Circuit acknowledges that
21 Intel had full authority to sell these components under
22 all of the patents, including the system and method
23 patents. If it didn't have authority to manufacture and
24 sell under the system and method patents, it would be
25 potentially liable for contributory infringement. And

1 in fact LGE has acknowledged in its brief in footnote 7
2 that Intel isn't potentially liable for contributory
3 infringement under the terms of this agreement.

4 JUSTICE SOUTER: So the answer simply is
5 that that the argument rests upon a mistake of fact
6 which has not been challenged in the record?

7 MS. MAHONEY: It absolutely has not.

8 JUSTICE SOUTER: Yes.

9 MS. MAHONEY: The component patents are not
10 at issue here at all. And the idea that you couldn't
11 have one patent on the component and another patent on a
12 system where the component would contributorily infringe
13 is nonsensical. These components had thousands of
14 patents on them. And certainly the argument isn't that
15 by authorizing the sale of the component all of the
16 owner's rights are released in that. If, instead, there
17 had been a sale of a component where a patent owner
18 says, I'll authorize you to sell my -- my -- that
19 component under my component patent, but if you sell it
20 under my system patent -- I'm not giving you authority
21 to sell it under my system patent, so if you sell it,
22 I'm going to sue you for infringement, that didn't
23 happen here, and it's never been litigated in that way.

24 Instead, that first criteria of the
25 authorized sale has plainly been satisfied, and the only

1 question in this case has been whether or not this
2 satisfied the contributory infringement standard that
3 Univis Lens uses to define what articles --

4 JUSTICE STEVENS: Ms. Mahoney, I understand
5 that's really the way it's been litigated, but I have to
6 confess I was puzzled by the court of appeals' statement
7 that the granting of the license constituted a sale for
8 exhaustion purposes, and they cited the Masonite case
9 for that proposition, but it doesn't seem to me to
10 support that proposition.

11 MS. MAHONEY: Your Honor, I think all that
12 that really is saying is that at a point when you enter
13 into -- a patent owner enters into an unrestricted
14 license to make, use, and sell with a manufacturer, then
15 at that point any articles that are manufactured under
16 that license, effectively the patent's been exhausted.
17 But I think it's easier to --

18 JUSTICE STEVENS: It's not exhausted by the
19 manufacturer, is it?

20 MS. MAHONEY: No. For contributorily
21 infringing --

22 JUSTICE STEVENS: It's exhausted under this
23 view by the licensee's sale of an article that it
24 manufactured pursuant to the license.

25 MS. MAHONEY: But -- right, manufactured

1 pursuant --

2 JUSTICE STEVENS: And it seems to think
3 there's no distinction between the sale itself and the
4 basic underlying license, whereas I had thought for
5 years that there was recognized a distinction between
6 those two transactions.

7 MS. MAHONEY: Well, I think that it just
8 means that once you have that transaction any sales that
9 occur for those articles under that license are going to
10 be exhausted by definition. But, you know, we have
11 certainly focused on the sale of the articles to Quanta
12 from Intel, and I think, you know, it makes sense to
13 look at it that way.

14 And, as indicated, there really is -- there
15 have been arguments that somehow this deprives the
16 patent owner of the right to collect its full royalty,
17 but that doesn't make any sense. Because if you -- if
18 you look at the rights that are afforded under
19 contributory infringement, what Congress has done in
20 section 271(c) and what this Court had done before was
21 to say that if you are the owner of a system patent or a
22 method patent, you can go ahead and collect your royalty
23 when someone sells a product that will contributorily
24 infringe.

25 In other words, your -- your product is

1 sufficiently -- your patent is sufficiently embodied in
2 those contributorily infringing products that it's
3 appropriate for you to collect your royalty there.
4 That's exactly what happened in this case. LGE did get
5 its royalty from Intel, did give them authority to sell
6 products which would otherwise contributorily infringe,
7 and now what it's seeking to do is to say, despite the
8 authorized sale, despite the fact it would
9 contributorily infringe, we want to collect another
10 royalty from the buyer of the product that can't use it
11 for any other purpose. Why? Well, because we have --
12 we had them sent a notice that said we wanted to do
13 that.

14 Under this Court's cases, that is completely
15 impermissible. In two cases in particular, Motion
16 Picture Patents, they tried to do the exact same thing.
17 And in the Millinger case the patent owner said that it
18 had never gotten paid for the extension rights under its
19 patent. And this Court said: Nope; once you've sold
20 the article, that's the royalty you get.

21 JUSTICE KENNEDY: I see your white light is
22 on. I have just one question. Are there cases where
23 some downstream restrictions on use might be necessary
24 to prevent the patent from becoming worthless, i.e., in
25 the biological area for replication of seeds in

1 agriculture and so forth?

2 MS. MAHONEY: Well, what we're -- exhaustion
3 is triggered when -- with respect to the rights to
4 control and use. Rights to make are treated
5 differently.

6 Univis, of course, though, holds that when
7 you're talking about the sale of a contributorily
8 infringing product, you're really talking about the
9 right to -- to make it, to use it, to complete the --
10 complete the article. But I think --

11 JUSTICE KENNEDY: I thought Univis was one
12 of your principal cases.

13 MS. MAHONEY: It is, absolutely. It holds
14 -- in other words, what Univis holds is that when you
15 have an article that is uncompleted -- it's not finished
16 -- as in this case, by the -- the sale will -- will
17 mean, by definition, that you can use it to complete the
18 article.

19 I'd like to reserve the remainder of my
20 time. Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Ms. Mahoney.

23 Mr. Hungar.

24 ORAL ARGUMENT OF THOMAS G. HUNGAR
25 ON BEHALF OF THE UNITED STATES,

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AS AMICUS CURIAE,

SUPPORTING THE PETITIONERS

MR. HUNGAR: Thank you, Mr. Chief Justice,
and may it please the Court:

For 150 years this Court has held that an authorized sale removes the particular item sold from the protection of the patent laws. The court below erroneously transformed that patent-exhaustion doctrine from a definitional principle that delimits the scope of the patent grant into an optional default assumption that can be discarded at the whim of the patentee. If the rationale of the court of appeals were correct, this Court's decisions in cases like *Univis*, *Motion Picture Patents*, *Straus*, *Bauer* and *Boston Store* would have to have gone the other way, because in each of those cases this Court held that the exhaustion principle overrode express restrictions that the patentee had attempted to impose on after-sale use or resale by an authorized purchaser.

This Court should follow its precedents and reaffirm the principle that the patent-exhaustion doctrine precludes a patentee from employing the patent law to enforce post-sale restrictions on use or resale by authorized purchasers, that is --

JUSTICE GINSBURG: Mr. Hungar, is there a

1 reason why Congress codified this doctrine in the
2 Copyright Act, but not in the Patent Act?

3 MR. HUNGAR: We -- there's nothing in the
4 legislative record that would explain that, Your Honor.
5 Presumably it's because Congress wanted to specify
6 particular limits, which section 109 of the Copyright
7 Act does. It wanted to specify particular limits to
8 define the scope of the doctrine in the copyright
9 context in a way that it has not sought -- found it
10 necessary to do in the patent area.

11 But there's no legislative history about
12 this. I mean, this Court has said that the 1952 Act
13 codified, recodified, and readopted, reaffirmed, the
14 principles of the Court's cases on infringement
15 generally. Obviously --

16 JUSTICE GINSBURG: And the PTO didn't take
17 any position on whether it should be codified?

18 MR. HUNGAR: I'm not aware of anything in
19 the legislative history of the 1952 codification on the
20 subject of the patent-exhaustion doctrine one way or the
21 other; but, obviously, Congress did not express any
22 dissatisfaction with it.

23 It did change certain aspects of patent law,
24 but it did not attempt in any way to override or change
25 the effect of the first-sale doctrine, which under this

1 Court's cases has been perfectly clear for well over a
2 century and has the effect we've suggested.

3 And we submit that, although the Respondent
4 essentially ignores or runs away from the rationale of
5 the court of appeals, we submit it's important for this
6 Court to explicitly address and explicitly reject the
7 Federal Circuit's misunderstanding of the
8 patent-exhaustion doctrine, its view that a patentee can
9 essentially override it simply by attaching a notice to
10 the article that has been sold in an authorized sale.

11 CHIEF JUSTICE ROBERTS: Although you think
12 it can be overridden simply by providing in the contract
13 that the same rights and remedies would be available?

14 MR. HUNGAR: No, Your Honor. I mean, it
15 depends a little bit on what contract we're talking
16 about and what it says. It is true, as Justice Stevens
17 indicated, it has always been true, that this Court has
18 deemed a license under a patent to be different from a
19 sale of a particular article under a patent. It is the
20 sale of the article that exhausts. The license does not
21 -- exhaustion doesn't -- isn't relevant at the mere
22 licensing stage.

23 CHIEF JUSTICE ROBERTS: A mere license can
24 prevent the application of the patent-exhaustion
25 doctrine?

1 MR. HUNGAR: Well, only at the -- only at
2 the level of the licensee. That is, if it is true, as
3 Ms. Mahoney said, if the -- if LG here had given a
4 restricted license that restricted the right to sell,
5 that said you can only sell in these instances, and if
6 Intel then sold outside those permitted instances, that
7 would be patent infringement.

8 CHIEF JUSTICE ROBERTS: And it would be
9 patent infringement by the use of the product by the
10 people that Intel sold to?

11 MR. HUNGAR: Yes, because it was an
12 unauthorized sale.

13 CHIEF JUSTICE ROBERTS: That would sound
14 like your friend on the other side, the Respondent, had
15 actually won in this case.

16 MR. HUNGAR: Well, that's right. If this
17 had been an authorized sale -- I mean an unauthorized
18 sale, they would win. But, of course, it's been
19 accepted throughout the case, and the court of appeals
20 explicitly said at page 5a, and it's been undisputed,
21 that Intel had the right to sell these items to these
22 Petitioners.

23 They had the right to sell. It was not
24 infringing. And if it's not "infringing," by
25 definition, it's an "authorized" sale. It's authorized

1 under the patent explicitly by the license agreement.

2 JUSTICE BREYER: But you couldn't put in --
3 you are authorized to sell the bicycle pedals that I
4 have patented only if you impose a restriction that will
5 tell the bicycle user that he must send me a check for
6 \$15 in addition to whatever he pays you. That sounds
7 unlawful under contract law.

8 MR. HUNGAR: Well, it might be lawful. You
9 could certainly do what, in fact, I think some of the
10 seed companies --

11 JUSTICE BREYER: Or you are going to have --
12 I mean, there's a doctrine that you cannot impose
13 equitable servitudes upon chattel.

14 MR. HUNGAR: Yes.

15 JUSTICE BREYER: That's a contract-law
16 doctrine.

17 MR. HUNGAR: It would not be enforceable as
18 a matter of patent law against the authorized purchaser.
19 If -- if the licensee does what the licensee is
20 obligated to do, it imposes the -- it attaches the
21 notice or it requires the --

22 JUSTICE BREYER: My thought is that the
23 reason that these things are important and you can't
24 just draft your way around them is because there are
25 antitrust doctrines, there are contract-law doctrines,

1 that also limit in significant ways what you can and
2 cannot write into a contract.

3 MR. HUNGAR: That's exactly right.

4 CHIEF JUSTICE ROBERTS: Well, I think that's
5 an important question. I understood the argument at
6 page 16 of your brief to say that the patent-exhaustion
7 doctrine doesn't apply in that situation and that you,
8 therefore, can have the rights and remedies under
9 patent law.

10 You told me earlier that if the person to
11 whom Intel sells the product uses it contrary to the
12 license stipulation, they would be liable for patent
13 infringement.

14 Your answer to Justice Breyer suggests to me
15 that you're saying only that they're liable to -- for
16 contract infringement, and that's a very big difference.

17 MR. HUNGAR: Well -- but, Your Honor, it all
18 goes back to the question: Was there an authorized sale
19 of the article at issue? If the sale is authorized, if
20 what the licensee --

21 CHIEF JUSTICE ROBERTS: Sale from whom to
22 whom?

23 MR. HUNGAR: The sale from the licensee to
24 the purchaser. The license is not a sale -- is not a
25 sale for purposes of the patent exhaustion. I think

1 that the Federal Circuit was just wrong in saying that,
2 because what the patent-exhaustion doctrine talks about
3 is the sale of an article. All the cases say the sale
4 of the particular article removes that article from the
5 -- from the patent monopoly.

6 CHIEF JUSTICE ROBERTS: But what you --
7 well, but what you say in your brief is that in the
8 situation we're talking about the licensee stands in the
9 shoes of the patentee. Now, if that's right it seems to
10 me that you're telling me that the patent remedies are
11 available and not simply contractual remedies.

12 MR. HUNGAR: No. What we're saying is this.
13 If -- if the licensee has a restricted license, that is
14 its right to sell is restricted, it can only sell on
15 Mondays and not on Tuesdays --

16 CHIEF JUSTICE ROBERTS: Well --

17 MR. HUNGAR: -- and it sells on a Tuesday.

18 CHIEF JUSTICE ROBERTS: Well, or, more
19 pertinently, it can only sell if the person they sell to
20 agrees not to use the product in a certain way.

21 MR. HUNGAR: Fine. If they have that
22 restriction and they sell and they do not -- they do not
23 obtain the contractual promise of the party that they
24 are obligated to obtain, they're violating the terms of
25 their right to sell. It's patent infringement by the

1 seller, and if the buyer uses it it's patent
2 infringement by them as well.

3 CHIEF JUSTICE ROBERTS: Exactly. That's the
4 critical point. You're telling me that if the buyer, in
5 other words, the kind of third person in this chain,
6 uses the patented article in a way that is contrary to
7 the license that was given to the second person in the
8 chain, then he is liable for contributory infringement
9 under the patent laws and not, as I understood you to
10 answer to Justice Breyer, only under contract law.

11 MR. HUNGAR: Yes, because again --

12 CHIEF JUSTICE ROBERTS: Yes -- what? Do you
13 sue under patent law or just contract law?

14 MR. HUNGAR: If -- in your hypothetical, as
15 I understand it, it's an unauthorized sale. The
16 licensee does not have the right to sell under the
17 patent in those circumstances, and therefore the
18 exhaustion principle does not apply.

19 JUSTICE SOUTER: But not every infringement
20 of the license is necessarily an unauthorized sale.

21 MR. HUNGAR: That's correct.

22 JUSTICE SOUTER: So there could be a
23 restriction in the license which is not a restriction on
24 sale and that could be violated. And the exhaustion
25 doctrine would still apply, and you might have remedies

1 in some another theory, i.e., contract.

2 MR. HUNGAR: That's correct. That's
3 correct. Likewise, what happens in the real world is
4 the patentee, if the patentee wants to restrict what
5 people can do downstream, they say to the licensee, you
6 can only sell if you obtain a contractual promise from
7 the purchaser.

8 JUSTICE STEVENS: Are you saying that this
9 case would come out differently if instead of just
10 requiring a notice that the -- the item should only be
11 used on Intel products, that had been a condition of the
12 license? If the license itself said you may manufacture
13 and sell to only people who agree to use the product
14 exclusively with Intel products?

15 MR. HUNGAR: Yes. And if in those
16 circumstances, if Quanta had -- if that -- if that
17 license condition --

18 JUSTICE STEVENS: So the key fact in this
19 case is it was just a requirement of giving notice
20 rather than a condition in the license?

21 MR. HUNGAR: But let me be clear. The key
22 distinction is between an authorized sale and an
23 unauthorized sale. So if there is an authorized sale,
24 that is, Intel --

25 JUSTICE STEVENS: I understand that.

1 MR. HUNGAR: Well, I think I haven't been
2 clear, because I want to make sure that that the
3 consequences are clear, because this is --

4 JUSTICE STEVENS: The big key is what is an
5 authorized sale? And I'm asking you if the -- if the
6 license agreement to the -- to Intel had said you may
7 only sell to people who agree to use the products on the
8 patentee's products, that then would -- and they did
9 otherwise, they didn't get -- then it would not have
10 been an authorized sale?

11 MR. HUNGAR: Correct, and it would be patent
12 infringement. But if they sold and the purchaser did
13 agree, they did enforce that requirement, they did
14 require the purchaser to sign a promise -- may I finish,
15 Your Honor -- to promise to limit the use and the
16 purchaser then violated that promise, the point is that
17 would be a breach of contract but it would not be patent
18 infringement because the sale was authorized, the patent
19 monopoly ends and only contract principles control
20 thereafter.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Hungar.

23 Mr. Phillips.

24 ORAL ARGUMENT OF CARTER G. PHILLIPS

25 ON BEHALF OF THE RESPONDENT

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

3 Justice Souter, I want to go to your
4 question, because, frankly, I think it is the key to the
5 entirety of this case. And that is, what is the "it"
6 that we are talking about? And what's absolutely
7 critical here is, yes, there was -- you know, this is
8 the first-sale doctrine. It's easy to call it
9 patent exhaustion, but the truth is it's the first-sale
10 doctrine.

11 And the question is, what was sold here?
12 And the only sale that was involved here was the
13 chipsets. And there is a completely separate patent
14 that deals with the rest of the system and that deals
15 with the methods. And nothing -- and this is the key
16 point of this. The exhaustion doctrine only goes as far
17 as the sale.

18 CHIEF JUSTICE ROBERTS: Well, but there's
19 nothing to do with these chipsets other than use them in
20 the computers. I mean, you don't put them on your
21 shelf. They're not good for anything other than using
22 in the computer. So saying there's a separate patent
23 for how you use them with the other systems doesn't seem
24 to me very significant.

25 MR. PHILLIPS: It would be -- and that's why

1 you would ordinarily -- you don't deal with this as an
2 exhaustion issue. That's why you would deal with this
3 as an implied licensing issue.

4 The assumption would be, in the absence of
5 clear evidence to the contrary, that if I'm selling you
6 something that only has a single use and that's in a
7 separate patent, that you in fact are being licensed to
8 go and use it that way. But what's absolutely critical
9 in this case is that both the district court and the
10 court of appeals specifically rejected the notion that
11 there was any implied license. And it's important to
12 realize this.

13 Even as we approach this case, we didn't sue
14 for any of the activities that predated when the other
15 side received its notice. We sued only for the
16 activities post notice. Why? Because at that stage it
17 was absolutely clear that there was no implied license
18 any longer and there's no basis for expanding the
19 exhaustion doctrine to try to fill that void.

20 The exhaustion doctrine ought to be retained
21 as a very narrow first-sale doctrine, because it doesn't
22 have any congressional support or approval at this
23 point. It is a logical way of proceeding. It protects
24 people against being surprised when they purchase a
25 particular product. But to go beyond that and to say

1 that simply because that sale, that particular product
2 is, quote, an "essential feature" of a separate patent
3 and therefore you have now exhausted the rights to that
4 second patent seems to me a stretch that --

5 JUSTICE BREYER: Well, there's a reason, I
6 guess, that would be so. Imagine that I want to buy
7 some bicycle pedals, so I go to the bicycle shop. These
8 are fabulous pedals. The inventor has licensed somebody
9 to make them, and he sold them to the shop, make and
10 sell them. He sold them to the shop. I go buy the
11 pedals. I put it in my bicycle. I start pedaling down
12 the road.

13 Now, we don't want 19 patent inspectors
14 chasing me or all of the other companies and there are
15 many doctrines in the law designed to stop that. One is
16 the equitable servitudes on chattel. Another is the
17 exhaustion of a patent. And now you talk about implied
18 license.

19 I would say, why does it make that much
20 difference? What we're talking about here is whether
21 after those pedals are sold to me under an agreement
22 that the patent -- you know, you have a right to sell
23 them to me -- why can't I look at this as saying that
24 patent is exhausted, the patent on the pedals and the
25 patent for those bicycles insofar as that patent for the

1 bicycles says I have a patent on inserting the pedal
2 into a bicycle.

3 Call it exhaustion, call it implied license.
4 Who cares?

5 MR. PHILLIPS: I don't have any problem with
6 your hypothetical because it's not this case. Your
7 hypothetical deals with the situation of what would have
8 happened if you had bought the chip. Would we be in a
9 position to say, even though you bought the chip, we
10 nevertheless want to retain some right to come out -- to
11 come after you claiming we still have a patent in that
12 chip? And the answer is no. We exhausted -- that was
13 exhausted by the sale of the chip.

14 The question is if you buy a pedal, can you
15 then take that pedal that was designed for a bicycle,
16 put it into a Stair Master --

17 JUSTICE BREYER: Ah, but I thought --

18 MR. PHILLIPS: -- where I have a separate
19 patent in the Stair Master --

20 JUSTICE BREYER: Yes. Of course, I think
21 the answer to that is no, probably no, but, but, but,
22 but. Now you can clarify this because I may be off on a
23 wrong track. I thought we're talking about using the
24 sold item in those mechanisms which account for
25 virtually almost the only logical use of the sold item.

1 Thus, if you took the bicycle blanks -- not the bicycle
2 blanks; they are eyeglass blanks. I'm mixed up between
3 bicycles and eyeglasses, there we are.

4 But if you took the eyeglass blanks and you
5 use them for the purpose of growing plants instead of
6 inserting them into eyeglasses, I guess we'd have had a
7 different case.

8 MR. PHILLIPS: Right.

9 JUSTICE BREYER: And I take it here they are
10 using those chips in those mechanisms that the chips are
11 almost exclusively designed for and there isn't much
12 else to use them for. Am I right or wrong?

13 MR. PHILLIPS: That is true. But the -- but
14 the point here is that that's not the relevant
15 distinction. It's not whether or not this is in some
16 sense an essential use. What this Court said in *Univis*
17 is that this would be a very -- that would have been a
18 very different case if there had been a separate patent
19 on the grinding and finishing of those lenses. And that
20 is precisely our case. There is a separate patent when
21 you take those components and you then put them into our
22 separate system.

23 And from my perspective, Your Honor, the
24 better way to analyze this is not as a question of
25 exhaustion. Let's keep the exhaustion doctrine where it

1 fits. It's a first-sale component. You buy it, you
2 exhaust. Let's use the implied licensing as the
3 mechanism for dealing with related patents.

4 But the beauty of that in this case,
5 obviously, is that -- is that the implied license in
6 this case the courts below have flatly said doesn't
7 exist. And it goes to the point that you made, Justice
8 Breyer, as well when you said, you know, I buy this and
9 I sort of assume that I'm going to be able to use it in
10 a particular way. These -- this is a \$10 billion
11 company that at the time they bought these components,
12 these chips, received explicit and specific notice that
13 the one thing they could not do was use these chips to
14 build new systems and then sell those systems,
15 obviously, beyond -- you know, under a completely
16 separate patent.

17 CHIEF JUSTICE ROBERTS: Mr. Phillips?

18 MR. PHILLIPS: So it's not as though they
19 didn't know what they were getting when they bought it.
20 They bought cheap chips and turned them into \$2,000
21 laptops because they didn't --

22 CHIEF JUSTICE ROBERTS: Mr. Phillips?

23 MR. PHILLIPS: Yes, Your Honor.

24 CHIEF JUSTICE ROBERTS: What in the world
25 does clause 3.8 of the license mean? It says,

1 "notwithstanding anything to the contrary in this
2 agreement, the parties agree that nothing herein shall
3 in any way limit or alter the effect of patent
4 exhaustion that would otherwise apply when a party
5 hereto sells any of its licensed products."

6 In other words, the patent-exhaustion
7 doctrine may not apply for all the reasons that we've
8 been talking about, but it applies in the way it would
9 apply if we just sold these licensed products. That
10 seems to me to give away everything you're talking
11 about.

12 MR. PHILLIPS: No. Because that -- that
13 depends on the scope of the patent-exhaustion doctrine.
14 If the patent-exhaustion doctrine is limited to the sale
15 of the specific product -- let's for instance assume for
16 a moment that what in fact happened was that Intel sold
17 the system, rather than the chips. Then that would --
18 that would exhaust the patent doctrine.

19 Now, you know, the question is -- and here
20 there is a disconnect in some respects between the
21 Mallinckrodt decision in the Federal Circuit and some of
22 this Court's previous decisions on the extent to
23 which you can condition a sale, and I think in some
24 ways that language may have given up what rights we
25 might have been able to assert under Mallinckrodt on a

1 somewhat broader basis. But I don't think it can be
2 read any further than that, and it certainly -- and the
3 key to this is it certainly doesn't in any way waive our
4 rights, you know, as an implied license matter, because
5 that's -- specifically what both the district court and
6 the court of appeals held is there is no implied license
7 in this particular context, and so therefore for them to
8 prevail they have to expand the patent-exhaustion
9 doctrine or the first-sale doctrine beyond the first
10 sale; and that I submit to you is something that's
11 simply not appropriate.

12 JUSTICE STEVENS: Am I correct in
13 understanding that you do not defend the Mallinckrodt
14 decision?

15 MR. PHILLIPS: I do not defend the
16 Mallinckrodt decision, Justice Stevens, and clearly I
17 don't believe I have to. All I need to do is have this
18 Court recognize that the central limiting feature of
19 Univis was the fact that it was all one patent and that
20 all you were doing was fulfilling the rights that had
21 been provided for you in that single patent, and that
22 that that's fundamentally -- and that the Court
23 recognized that if there were a separate patent involved
24 and you were trying to enforce those rights, that would
25 be a completely different matter.

1 JUSTICE STEVENS: I understand you also do
2 not challenge the proposition that the sale by the
3 licensee in this case should be treated as a first sale.

4 MR. PHILLIPS: Right, the chip.

5 JUSTICE STEVENS: Yes.

6 MR. PHILLIPS: Absolutely. There's no
7 question about that. We have never challenged that, and
8 I think the point I made earlier is also valid. We
9 didn't challenge their use, their otherwise infringement
10 of our system until we gave them notice; and at that
11 point we said there is no implied license, because I do
12 think, Mr. Chief Justice, it's a fair point, and it's
13 the same point Justice Breyer made, which is, look, if
14 you buy something and you think this is your normal
15 assumption that you're going to use it in a particular
16 way, that ought to be protected. I think that's
17 ordinary kind of contract expectation rules. But the
18 point here is that the language of this notice could not
19 have been plainer to anyone --

20 JUSTICE BREYER: All right, now if it should
21 be protected -- and here I'm not sure I'm understanding
22 it, so correct me. Let's suppose we have this contract.
23 So everything is identical except we've got my bicycle
24 example in here because I'm more comfortable with that.
25 I know how to ride a bicycle and I don't know how to

1 work the chips. So what I do --

2 MR. PHILLIPS: Me too.

3 JUSTICE BREYER: But you see the analogy I'm
4 making.

5 MR. PHILLIPS: Right.

6 JUSTICE BREYER: So what I do I go to the
7 shop and I buy this, this mechanism with the pedals on
8 it, and then I insert it in my bicycle. Now, actually I
9 need help in doing that, but I do it. Okay. Now I
10 start pedaling off, and now what is it for all these
11 things here that would stop that original inventor from
12 catching me and hauling me into court, and say, what
13 you've done, Breyer, is you've put my -- my mechanism
14 here in this bicycle and I happen to have a patent on
15 the system. And now you start talking to me about,
16 well, the patent was exhausted on the bicycle --

17 MR. PHILLIPS: Pedal.

18 JUSTICE BREYER: -- pedals, but not on the
19 system.

20 MR. PHILLIPS: Right.

21 JUSTICE BREYER: And you agree that
22 shouldn't happen.

23 MR. PHILLIPS: Right.

24 JUSTICE BREYER: But if I follow you and I
25 write an opinion just for you, what stops it from

1 happening?

2 MR. PHILLIPS: Well, in that -- in that
3 particular context, in the absence of relatively clear
4 notice, I think it would be quite reasonable to
5 potentially find that there was an implied license to
6 use it under those circumstances.

7 JUSTICE SOUTER: What --

8 JUSTICE BREYER: Then why isn't it in your
9 case?

10 JUSTICE SOUTER: I'm sorry. No. I didn't
11 mean to interrupt you. It's your --

12 JUSTICE BREYER: Why doesn't it mean that?
13 Why isn't it in your case equally?

14 MR. PHILLIPS: Because the courts below
15 specifically analyzed whether there was an implied --

16 JUSTICE BREYER: You mean that they just got
17 it all wrong? You mean it should be that they got it
18 wrong?

19 MR. PHILLIPS: No, no. They got it right
20 because there was very specific and explicit notice
21 provided to the purchaser at the time of the purchase
22 that, while this clearly gives you the right to use this
23 particular product, what it doesn't give you the right
24 --

25 JUSTICE BREYER: Oh, so if I go in the

1 bicycle shop, I go in the bicycle shop and I buy the
2 pedals and then they give me, you know, one of these
3 pieces of paper that has all of the 42,000 words on it
4 and there in these 42,000 words it says, and now you are
5 put on notice that once you put it in your bicycle and
6 you pedal away, they're going to get you and you're
7 going to be hauled into Patent Court, then -- then
8 that's okay?

9 MR. PHILLIPS: Well, Justice Breyer, we can
10 quarrel about sort of the nature of the notice and what
11 notice is adequate to do that, but the basic point here,
12 which I think is indisputable, is that, one, the notice
13 here is quite clear. It's one page. It's very
14 specific. These are very sophisticated parties and they
15 understood that they were not obtaining an implied
16 license by purchasing the chips rather than going out
17 and purchasing the systems.

18 JUSTICE SOUTER: Okay. But assuming a
19 simple notice, the answer to his bicycle hypo is yes,
20 they can chase me down the road.

21 MR. PHILLIPS: Oh, to be sure. If I have
22 separate patent on the bicycle, I'm entitled to stop
23 people from using that particular bicycle. Now,
24 generally speaking, to be sure, you don't go after the
25 consumers because most people who are in the business of

1 manufacturing don't develop a really good following by
2 suing their ultimate consumers. So what you do is you
3 find the people who are in the middle, the middle spot,
4 who are actually doing the manufacturing and who are in
5 fact violating the patent, and that's who you go after.
6 And in this context --

7 JUSTICE STEVENS: Mr. Phillips, may I ask
8 this other --

9 MR. PHILLIPS: Precisely -- I'm sorry.

10 JUSTICE STEVENS: Is the reason that there's
11 no implied license here, one, because you got the
12 notice, or two, because the component has uses in other
13 kinds of methods than the patented method?

14 MR. PHILLIPS: I think the better answer is
15 one, because they had clear notice.

16 JUSTICE STEVENS: You think the notice on
17 that to defeat the implied --

18 MR. PHILLIPS: Right. I think there is an
19 argument as to whether there might be non-infringing
20 uses. We disagree about that. But I think the better
21 argument is one.

22 JUSTICE STEVENS: The court below did not
23 rely on the fact that there might be non-infringing
24 uses, did it?

25 MR. PHILLIPS: No. The court below did not

1 rely on that.

2 JUSTICE STEVENS: It relied on the notice.

3 MR. PHILLIPS: Right, right. Well, I mean,
4 the court of appeals had it -- it was a much easier
5 case, frankly --

6 JUSTICE STEVENS: It seems to be kind of an
7 unusual answer to the implied license argument, because
8 normally it doesn't depend on what the patentee decides
9 to say somewhere down -- down the line. That's kind of
10 an unusual reason for not finding an implied license, I
11 think.

12 MR. PHILLIPS: Well, I mean I think the
13 district court just said, look, that -- you know,
14 ordinarily you would say, if you're buying something
15 with the understanding that you're going to -- that its
16 primary or maybe exclusive use will be in a particular
17 way, that that would be a reasonable implied -- you
18 could imply a license by those facts alone. Then the
19 question is whether or not that implication has in some
20 sense been clearly overridden by the conduct of the
21 parties under the circumstances.

22 JUSTICE SCALIA: But it's subsequent
23 conduct. If the implied license occurred, it didn't
24 occur at the time of the sale; and it couldn't be -- it
25 couldn't be negated at the time of the sale. If it

1 occurred, it occurred at the time of the license, right,
2 from the patentee to the license.

3 MR. PHILLIPS: Right. And once he received
4 -- and once the --

5 JUSTICE SCALIA: And there was no such
6 notice there. There was no such statement there that
7 this does not -- you don't have the right to sell this
8 for its normal uses?

9 MR. PHILLIPS: No, but every -- every sale
10 after --

11 JUSTICE SCALIA: Yes, but that's too late.
12 The horse is out of the barn.

13 MR. PHILLIPS: No, no, but that just means
14 that for the patent --

15 JUSTICE SCALIA: That -- I mean if both
16 parties -- if both parties agree to that notice, I guess
17 that would be something else. Did both parties agree to
18 that notice?

19 MR. PHILLIPS: Well, you mean both Intel and
20 --

21 JUSTICE SCALIA: Yes.

22 MR. PHILLIPS: Oh, yes. Both Intel and --
23 and Quanta clearly agreed -- I mean, both Intel and -- and
24 LG clearly agreed to that, if that's what you're asking
25 about. But the -- but the point here is that the notice

1 was prior to the sale.

2 JUSTICE SCALIA: Yes, but that -- that
3 doesn't matter to me. What matters to me is whether it
4 was prior to the license. If there was an implied
5 license here, it occurred at the time that the --

6 MR. PHILLIPS: Of the sale.

7 JUSTICE SCALIA: No. No.

8 MR. PHILLIPS: Well, when else -- an implied
9 license clearly can't extend to the ultimate purchaser
10 until the ultimate purchaser gives something.

11 JUSTICE SCALIA: You give the licensee --
12 you implicitly give the licensee the right to permit the
13 people to whom he sells the product to use the license.

14 MR. PHILLIPS: Right.

15 JUSTICE SCALIA: But it's given to the
16 licensee surely.

17 MR. PHILLIPS: But we clearly didn't do
18 that. That -- I mean that -- the two court rulings
19 clearly resolved that.

20 JUSTICE SCALIA: Unless it's implicit,
21 unless it's implicit when you sell a -- a bicycle pedal
22 that can only be used in bicycles.

23 MR. PHILLIPS: Right. But if I say at the
24 time, but you cannot use it in a bicycle because it has
25 a separate patent, and therefore --

1 JUSTICE SCALIA: Did you say that?

2 MR. PHILLIPS: Yes, that's exactly what the
3 notice says.

4 CHIEF JUSTICE ROBERTS: That's what the
5 notice says.

6 JUSTICE SCALIA: That's the notice. That's
7 later. That's downstream. That's after the license.
8 That's at the time of the sale.

9 MR. PHILLIPS: But that goes to clear -- I
10 mean, but that goes to the clear understanding -- I mean
11 the question is -- if the question is did Intel have the
12 right to sell the system as a system, the answer is yes.
13 It was licensed to do that. But it didn't sell the
14 system as a system. It sold the components of the
15 system. And then the question is, does it have as a
16 consequence of that some kind of an implied license to
17 do this? And the courts below both specifically held
18 no.

19 And I think the other thing about this,
20 Justice Scalia, is that this was not an issue in this
21 case. Both courts below held that that's not the
22 question presented. In order for the Petitioner in this
23 case to prevail, they have to demonstrate that this is
24 an exhaustion concept.

25 JUSTICE SOUTER: Yes, because they're saying

1 --

2 MR. PHILLIPS: That's the question presented
3 in the petition.

4 JUSTICE SOUTER: They're saying the reason
5 they have done so is that the following distinction is
6 significant. There's a distinction between a license
7 that says you can't sell this unless certain conditions
8 are satisfied and, on the other hand, a license that
9 says you can sell this, but if you sell it to a buyer
10 who is described by conditions A and B, you've got to
11 tell the buyer that we're going to make a claim against
12 A and B. And the ones -- in the first example, there is
13 a limit to the right to sell. In the second example,
14 there is no limit on the right to sell, but there's a
15 warning about what we're going to do if you do sell
16 under certain conditions. And I think they're saying
17 that unless you have a contract of the former sort which
18 limits your right to sell, then when you do sell,
19 exhaustion applies and whatever you may do against the
20 ultimate buyer is -- is a contract problem or what-not,
21 but it's not -- it's not a matter of patent.

22 MR. PHILLIPS: Right, and the problem --

23 JUSTICE SOUTER: Number one, do you think I
24 am being correct in characterizing, describing the
25 distinction they make?

1 MR. PHILLIPS: I think so.

2 JUSTICE SOUTER: And B, if I am, why isn't
3 that distinction an answer to your argument?

4 MR. PHILLIPS: Because, because it ignores
5 the fact that there are separate patents involved in
6 this case. There is no question that -- there is an
7 issue. I mean I don't think there's a question that --
8 you know, as to how far you can go down the road in
9 trying to condition a particular sale. I thought this
10 Court may have resolved that already. Mallinckrodt
11 leaves that issue open, but that's not -- that's not the
12 question.

13 The issue here is if I sell to you, Justice
14 Souter, a particular chip, whether I condition it or
15 not, I think that's -- to me that's unenforceable. But
16 the question is, can you then take that chip and use it
17 to violate a separate patent? And the reason you know
18 that it's not exhaustion --

19 JUSTICE SOUTER: No. I understand where
20 you're going. So then what you're saying, I guess, is
21 that the real issue does not involve this distinction
22 between a --

23 MR. PHILLIPS: Right.

24 JUSTICE SOUTER: -- a limited right and a
25 right --

1 MR. PHILLIPS: Exactly.

2 JUSTICE SOUTER: -- to go after people
3 later.

4 MR. PHILLIPS: That's not the issue in this
5 case.

6 JUSTICE SOUTER: What it -- what it involves
7 is the statement that they make that if you license the
8 manufacture, use, and sale of a particular component and
9 that particular component has only one reasonable use --

10 MR. PHILLIPS: Right.

11 JUSTICE SOUTER: -- then you have
12 necessarily licensed them to sell with that ultimate use
13 in mind, and when you do -- when you license them to
14 sell, the patent-exhaustion doctrine attaches to any
15 patent right that you may have, whether you call it
16 system --

17 MR. PHILLIPS: Right.

18 JUSTICE SOUTER: -- or whether you call it
19 component.

20 MR. PHILLIPS: Right.

21 JUSTICE SOUTER: And you are saying that
22 argument is no good because that, in fact, is an implied
23 license argument, and there were findings that there was
24 no implied license.

25 MR. PHILLIPS: That's --

1 JUSTICE SOUTER: So I understand your
2 position.

3 MR. PHILLIPS: That is correct, Justice
4 Souter.

5 JUSTICE SOUTER: Okay.

6 MR. PHILLIPS: And let me further --

7 JUSTICE BREYER: Then explain -- now this
8 you might know because it's just following up on what
9 Justice Souter says better than I do. I think from
10 these briefs I've gotten the impression that at least
11 some people think that where you invent a component,
12 say, like the bicycle pedals, and it really has only one
13 use, which is to go into a bicycle, it's the easiest
14 thing in the world to get a patent not just on that
15 component but to also get a patent on the system, which
16 is called handlebars, body, and pedals.

17 And since that's just a drafting question,
18 all that we would do by finding in your favor is to
19 destroy the exhaustion doctrine, because all that would
20 happen, if it hasn't happened already, is these
21 brilliant patent lawyers, and they don't even -- they
22 can be great patent lawyers, not just fine lawyers, and
23 just draft it the way I said and that's the end of the
24 exhaustion doctrine. And that's why it is preferable to
25 say it is exhausted. What is exhausted? One, the

1 patent on this component and, two, the patent on any
2 system involving this component where that system is the
3 only reasonable use of the component, rather than using
4 the terminology "implied license."

5 Now, I think that's an argument that's being
6 made in some of these briefs, and if so I'd like to you
7 reply.

8 MR. PHILLIPS: Well, I think that clearly
9 understates the role of the PTO in granting a separate
10 patent. I mean, this is not -- these are not things you
11 pick up at the corner drugstore. You have to justify
12 them. And if you look at section 282, "A patent shall
13 be presumed valid. Each claim shall be presumed valid
14 independently of the validity of other claims." And
15 there's an independence that's embedded in this entire
16 scheme. If it's true that the PTO has in fact granted
17 patent rights on something that's fundamentally not
18 different from the other -- from some other patent, the
19 solution to that is a validity challenge. And candidly,
20 I think that's exactly what all of those arguments are
21 --

22 CHIEF JUSTICE ROBERTS: Well, then --

23 MR. PHILLIPS: -- is patent validity
24 challenges.

25 CHIEF JUSTICE ROBERTS: That argument didn't

1 prevail last year in the KSR case, right? I mean, we're
2 -- we've had experience with the Patent Office where it
3 tends to grant patents a lot more liberally than we
4 would enforce under the patent law.

5 MR. PHILLIPS: Right, but all -- I'm not --
6 I'm not particularly criticizing the PTO. What I'm
7 saying is that the statutory scheme presumes that there
8 is a separateness when a patent is issued and, therefore
9 -- and which is why -- again, the first -- there's no
10 reason to go to an expansion of the first-sale doctrine
11 in order to deal with the kinds of problems you have
12 here because in general -- in general you can deal with
13 it as a matter of implied license, but that issue has
14 been resolved adverse to the other side in this case,
15 and there's no reason to sort of fill in that void.

16 JUSTICE SCALIA: Mr. Phillips, when you say
17 that was resolved adversely, you say there was a finding
18 of no implied license.

19 MR. PHILLIPS: That's correct.

20 JUSTICE SCALIA: Was that a finding of no
21 implied license from LGE to Intel or no implied license
22 from Intel to the buyers?

23 MR. PHILLIPS: From Intel to the buyers.

24 CHIEF JUSTICE ROBERTS: Mr. Phillips --

25 JUSTICE SCALIA: Is that the crucial -- is

1 that the crucial step?

2 MR. PHILLIPS: Yes. That's -- that's the
3 critical component of this case.

4 JUSTICE SCALIA: If that --

5 MR. PHILLIPS: The buyer would have to
6 assert exhaustion.

7 JUSTICE SCALIA: If there was an implied
8 license from LGE to Intel, then Intel would have
9 authority to sell -- to sell these things for their --
10 for their use.

11 MR. PHILLIPS: To be sure, Intel has the
12 authority to sell these things, and it has the authority
13 to sell -- it depends on what the things are. It has
14 the authority to sell the chips. It has the authority
15 to sell the systems, but what it doesn't have the
16 authority to do is to allow somebody downstream to take
17 the chips and put them into the separately patented
18 systems, and the -- and the people downstream know that
19 they don't have that entitlement.

20 Justice Souter, to me the patent-exhaustion
21 doctrine is --

22 JUSTICE SCALIA: I think the exhaustion, if
23 Intel got -- if Intel got -- I'm sorry. Yes, if Intel
24 got an implied license to the system from LGE when it
25 sold those products, it seems to me the exhaustion

1 doctrine would take hold and would -- would apply to
2 that implied license just as it applied to the -- to the
3 license of the chips.

4 MR. PHILLIPS: I think the answer to that is
5 it shouldn't, that the exhaustion doctrine should be
6 retained as a first-sale doctrine alone. That's the way
7 it's always been understood for 150 years. And to
8 expand it this way is to undermine the rights of -- in
9 the separate patents.

10 And now I'll try to make the point I wanted
11 to make to Justice Souter. Read the reply brief: A
12 sale authorized by one patentee does not exhaust patents
13 held by a different patentee. So we wouldn't even be in
14 this case if it turned out that we didn't just -- we
15 didn't happen to have all of these rights in the first
16 place. I mean, if they bought the chips and if Wang had
17 held on to some portion of the system patent in this
18 case, there is no question that Wang would have the full
19 opportunity -- that sale didn't exhaust their rights in
20 that patent.

21 CHIEF JUSTICE ROBERTS: And the way you
22 achieve that result is to condition the sale. What
23 you're trying to do is expand what you get under a
24 condition to what you get under a notice. And the
25 reason that troubles me is because if you had imposed a

1 condition on the sale, Intel wouldn't have paid you as
2 much for it. But you say, all right, we'll take the
3 money because -- additional money because there's no
4 condition, but we want to try to achieve the same result
5 because of the notice.

6 MR. PHILLIPS: I mean there can't -- there's
7 no serious basis for doubting what Intel knew precisely
8 what it was getting in this. It was getting peace on
9 both sides of the aisle in terms of litigation, and it
10 knew that there were separate patents here and that when
11 it sold the chips it would certainly be entitled to
12 assume that there would be exhaustion. That's the
13 provision you read. But when it sells the chips, it
14 didn't know and it specifically gave notice that it
15 recognized that that doesn't remotely say what the right
16 answer is with respect to the systems and with respect
17 to the methods. And that to me, Mr. Chief Justice, is
18 the fundamental distinction.

19 CHIEF JUSTICE ROBERTS: Well, they're happy
20 with that because the notice says you can't -- you can
21 only use this with Intel products. So they're happy
22 with that solution as well.

23 MR. PHILLIPS: Well, that's part of the
24 reason why it was negotiated in that way. But I mean
25 that is -- so far as I know, there is no particular

1 issue by reference to that particular limitation.

2 The reality is if we entered into the same
3 agreement with AMD, which is one of the other
4 chipmakers, I am sure they would ask for the same
5 restriction on it: That you could only do it with AMD
6 products, as well. I mean that doesn't have anything to
7 do with the nature of the underlying problem that we are
8 confronting in this particular context.

9 It seems to me the fundamental issue here is
10 they have a limited right when they purchase that
11 product. They didn't get the right to make other
12 products. They didn't get the right to breach or
13 infringe a completely separate patent. And that is the
14 basis on which the judgment of the court of appeals,
15 which is all that is before the Court, should be
16 affirmed.

17 JUSTICE STEVENS: Before you sit down, to
18 what extent do you think the court of appeals has
19 already adopted your theory of the case?

20 MR. PHILLIPS: Well, I mean they recognized
21 specifically that these are completely separate. That
22 the claims that are at issue here are different from the
23 amounts that were -- from the products that were, in
24 fact, purchased. So the elements, the constituent
25 elements, they have clearly embraced. The conclusion,

1 they have clearly not embraced.

2 JUSTICE STEVENS: I did not get your
3 theory of the case out of my reading of their opinion.

4 MR. PHILLIPS: Well, my --

5 JUSTICE SOUTER: Isn't the difference
6 between "conditional sale" and "limited sale" -- you are
7 saying they used the word "conditional." You are saying
8 it was a "limited sale" that only -- a "limited
9 license." It only licensed Patents A and B and not
10 Patents C and D.

11 MR. PHILLIPS: Well, what I was actually
12 saying is that if you read the language in 4a and 5a
13 where it says: "The patents asserted by LGE do not cover
14 the products licensed to or sold by Intel." They have
15 to be combined with additional components. And then in
16 5a they say: "Notably, the sale involved a component of
17 the asserted, patented invention, not the entire
18 patented system."

19 So they recognize, to my mind, what are the
20 predicate factual bases from which I say the "exhaustion
21 doctrine" shouldn't have been -- shouldn't have been
22 triggered. But, to be sure, they -- they -- it was a
23 much easier task for them because they -- as far as they
24 are concerned, all kinds of conditions are permissible.
25 And we don't need that in order to win this case. I'm

1 not asking the Court to embrace that particular
2 approach.

3 If there are no other questions, I would ask
4 you to affirm, Your Honors.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Phillips. Ms. Mahoney, you have four minutes
7 remaining.

8 REBUTTAL ARGUMENT OF MAUREEN E. MAHONEY
9 ON BEHALF OF THE PETITIONERS

10 MS. MAHONEY: I'd like to start by
11 emphasizing what counsel did not say. He never said
12 that Intel lacked the authority under the system and
13 method patents to sell these components. He never said
14 that. In fact, he said that Intel was released. Why
15 were they released? This would have been contributory
16 infringement, otherwise.

17 The reason they were released was because
18 they had the authority under this license to sell these
19 components under the system patent. And that's what the
20 Federal Circuit acknowledged, and that's what the
21 district court recognized, and it's never been in
22 dispute.

23 Their position is simply that, despite that,
24 despite express authority to sell these under that
25 patent -- not just under some other patent, under the

1 patents at issue here -- that they can enforce
2 conditions on post-sale use. And that's what this Court
3 has never allowed.

4 Univis is on all fours. They say, well,
5 that just involved a single patent. Well, as far as
6 this case is concerned, it just involves a single
7 patent, too. The whole issue here is whether or not
8 Quanta's taking of the components and combining them
9 with some generic things like wires and memory
10 necessarily infringed under LGE's allegations.

11 And the district court found that they
12 would, and that's not in dispute. And what that means
13 is that, just as in Univis where you had -- the Court
14 finds there were really two products there. It finds
15 there were two different commodities, the lens blank and
16 the finished lens.

17 It says under Miller -- the Miller-Tydings --
18 Act, these are two different commodities, and the patent
19 was only on the finished lens. But, in order to make
20 that finished lens, you had to -- you had to make a lens
21 blank that would embody many of the limitations of the
22 claim. That's exactly what the district court found
23 happened here.

24 For this, when Intel manufactured these
25 chips, the microprocessors and the chipsets, it

1 manufactured them in a way that embodied many of the
2 limitations of the system and method patents that are at
3 issue here. So, as in the language of Univis, there
4 they said, well, we are dealing with a product that is
5 being manufactured in multiple stages.

6 And during that first stage, while it's true
7 it wasn't -- it didn't directly infringe because the
8 lens blank wasn't the patented product, they,
9 nevertheless, practiced the patent in part. Why?
10 Because they -- they -- some of the -- while
11 manufacturing it, they have met some of the limitations
12 of the claim.

13 And they said when that lens blank was sold,
14 that it exhausted the rights of the patent owner to
15 enforce any conditions, any type of conditions on use or
16 resale after that sale. And it didn't have to rely on
17 implied license because of the exhaustion doctrine.
18 Once there is an authorized sale of a product that is
19 protected by the patent that covered that final finished
20 product, exhaustion is triggered.

21 That's exactly what we have here. And they
22 said, oh, but you could disclaim that with an agreement.

23 Well, in Univis there was an agreement. The
24 purchaser of that lens blank specifically agreed by
25 contract that it would only use it in certain ways and

1 only charge certain prices. So they expressly
2 disclaimed, you know, the idea that they were -- that
3 they couldn't use it in those ways. And, nevertheless,
4 this Court found exhaustion.

5 When the district court found no "implied
6 license," all the court was saying was, well, under the
7 Federal Circuit precedent "implied license" is an
8 "equitable doctrine."

9 I see my time is finished. Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you, Ms.
11 Mahoney. The case is submitted.

12 (Whereupon, at 11:16 a.m., the case in the
13 above-entitled matter was submitted.)

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