

No. 05-1056

In the
Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,

v.

AT&T CORP.,
Respondent.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Federal Circuit**

SUPPLEMENTAL BRIEF OF RESPONDENT

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SUPPLEMENTAL BRIEF OF RESPONDENT

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In its reply brief, Petitioner Microsoft Corporation incorrectly reports the record relating to 35 U.S.C. § 271(f)(2). Reply Br. at 4-5. Because section 271(f)(2) is an alternate ground for the judgment below, and because Petitioner's statements about section 271(f)(2) constitute new matter that could mislead the Court, Respondent AT&T Corp. respectfully submits this supplemental brief pursuant to Supreme Court Rule 15.8.

Petitioner's reply asserts that Respondent "*never*" alleged liability under section 271(f)(2) and that the courts below "*never*" found liability thereunder. Reply Br. at 5 (emphasis in original). As to the requirement in section 271(f)(2) that the "component" "supplied" from the United States be "especially made or especially adapted for use in the invention," Petitioner asserts that:

The notion that Microsoft Windows—which has literally hundreds of uses beyond speech processing—was "especially made or especially adapted for use" in respondent's speech codec invention fails even the straight-face test. ... Not surprisingly, then, respondent did not allege, the district court did not find, and Microsoft did not stipulate that Windows was "especially made" for use in respondent's patented invention.

Id. Petitioner's reply brief contradicts the record in numerous respects.

First, AT&T alleged that Microsoft infringed under section 271(f)(1) and (f)(2), and Microsoft moved for partial summary judgment under section 271(f)(1) and (f)(2).¹ AT&T alleged that certain Microsoft products contain infringing speech "codexes" (software programs that are capable of converting speech signals into compact code and back again). Pet. App. 21a & n.1 (quoting Am. Compl. ¶ 14). In particular, AT&T alleged that the "golden master" copies of Microsoft Windows software contained those infringing software codexes, and that the supply of those software components from the United States for assembly of the invention abroad infringes under section 271(f). Pet. App. 24a. AT&T did not limit its allegations to section 271(f)(1), but alleged infringement under section 271(f) as a whole. See, e.g., Pet. App. 21a-22a, 24a.

Indeed, when Petitioner moved for partial summary judgment, it invoked both section 271(f)(1) and 271(f)(2):

Microsoft's exportation of "golden master" disks upon which Windows operating system software information is stored is not an act of infringement under 35 U.S.C. §§ 271(f)(1) *or* (2). Consequently, AT&T should be precluded from advancing an infringement claim *under these statutory sections*.

Supp. Br. App. 3b (emphasis added). Further contradicting Petitioner's assertion that Respondent's briefs below "*never* once ... suggested that Microsoft was liable under Section

¹ Microsoft originally styled its motion as a motion in limine to exclude evidence of foreign sales, but the parties later stipulated to convert it to a motion for partial summary judgment. Pet. App. at 21a-22a n.3.

271(f)(2)” (Reply Br. at 5, emphasis in original), AT&T explicitly quoted from section 271(f)(2) and analyzed cases that applied the “especially made or especially adapted” standard set forth in that section but not in section 271(f)(1). Supp. Br. App. 22b, 28b-29b. AT&T also quoted and analyzed the language of section 271(f)(2) in its brief to the Federal Circuit. AT&T App. Br. at 11, 47-48.

The record also contradicts Petitioner’s statement that “the district court did not find ... that Windows was ‘especially made’ for use in respondent’s patented invention.” Reply Br. at 5. To the contrary, the district court explicitly quoted section 271(f)(2), analyzed the infringement standard in that section, and determined that section 271(f)(2) applied to the Windows codec software components at issue:

[U]nder paragraph (2) the components must be especially made or adapted for use in the invention. ... Additionally, paragraph (2) requires the infringer to have an intent that a component “will be combined outside of the United States in a manner that would infringe if the combination occurred within the United States.” 35 U.S.C. § 271(f)(2). ... *Here, it is undisputed that Microsoft’s object code is especially made and supplied from the United States* for use in its Windows operating system, that Microsoft intended the components to be combined outside of the United States, and that Microsoft intended that the infringing object code be directly incorporated as an essential part of the foreign-manufactured computers.

Pet. App. 27a-28a (emphasis added, citing the stipulated facts at Pet. App. 44a-47a).² The Stipulated Statement of Facts also provides that “[t]he District Court ruled in favor of AT&T on all 271(f) issues in [the summary judgment opinion].” Pet. App. 47a ¶ 11. Moreover, the district court explicitly adopted its “determinations” from that summary judgment opinion into the Stipulated Judgment. Pet App. 42a-43a ¶¶ 4-6. Finally, in affirming this judgment, the Federal Circuit also expressly referred to and relied on section 271(f)(2). Pet. App. 4a-5a.

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CONCLUSION

Petitioner’s misstatement of the record exceeds legitimate advocacy. The text, operation, and effect of section 271(f)(2) are materially different from section 271(f)(1). Microsoft expressly moved for partial summary judgment under section 271(f)(2). The district court denied Microsoft’s motion, made a specific determination under section 271(f)(2), and entered judgment against Microsoft, in part based on section 271(f)(2). The Federal Circuit affirmed. Petitioner did not ask this Court to review that portion of the judgment based on section 271(f)(2). Petitioner presents either an incomplete

² Petitioner’s contention that there was no allegation, finding, or stipulation that “Windows was ‘especially made’ for use in respondent’s patented invention” is misleading in a further sense. It sets up the spurious issue of whether Windows as a whole has any non-infringing uses, when the actual issue below was whether Petitioner’s speech codec components of Windows infringe. *See, e.g.*, Pet. App. 24a-25a. Based on the Stipulated Facts, the district court concluded that those accused codecs had no other purpose or use except to practice the patented invention. Pet. App. 27a-28a.

case for review or a request for an advisory opinion. Either way, the petition is flawed and advances no persuasive reason to review the lower courts' correct decision.

Respectfully submitted,

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APPENDIX

APPENDIX A

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

_____)	
AT&T CORP.)	
)	
Plaintiff,)	Civil Action No.
)	
v.)	01 Civ. 4872 (WHP)
)	
MICROSOFT CORPORATION)	
Defendant.)	
_____)	

**MICROSOFT'S MEMORANDUM IN SUPPORT OF
ITS MOTION IN LIMINE BARRING EVIDENCE AS
TO SUPPOSED LIABILITY UNDER 35 U.S.C. § 271(f)**

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I. INTRODUCTION

Microsoft's exportation of "golden master" disks upon which Windows operating system software information is stored is not an act of infringement under 35 U.S.C. §§ 271(f)(1) or (2). Consequently, AT&T should be precluded from advancing an infringement claim under these statutory sections.

Section 271(f) proscribes the supply from the United States, i.e., exportation, of "components" of a patented product for assembly abroad under certain circumstances. A "component" is a constituent part of a patented product. Thus, section 271(f) proscribes the export of the parts to be combined abroad to form the patented product. Software that is replicated abroad, however, cannot be a part supplied from the United States. In this manner, the foreign replicated copies of Microsoft's Windows operating system software cannot be the statutory "components" supplied from the United States to form foreign computer systems.

Section 271(f) also does *not* proscribe exportation of intangible information. The Windows operating system software stored on golden master disks is intangible information. The golden master disk is simply a medium for the transmission of the software information. Transmission of information, whether it be object code laser etched in the form of pits and lands upon a compact disk (CD), in the form of source code written upon sheets of paper, or an algorithm committed to the memory of a person, cannot be subject to infringement liability under section 271(f). Thus, the exportation of intangible software information stored on the medium of golden master disks is not within the scope of section 271(f).

II. FACTUAL BACKGROUND

Microsoft makes a limited number of golden master disks in the United States on which Windows operating system software is stored. Some golden master disks are shipped abroad and the software information stored on them is replicated *outside* the United States. The replicated software is then installed abroad onto computer hardware to form computer systems.

Microsoft exports golden master disks to two different types of entities. First, Microsoft exports golden master disks to foreign computer manufacturers. Those manufacturers replicate abroad the Windows software stored on the disks, and then install that replicated software onto computer hardware for sale. Second, Microsoft also exports golden master disks to authorized foreign "replicators." The replicators make copies of the Windows software and supply the replicated copies to foreign computer manufacturers. In either case, the golden master disk itself is never incorporated into a computer system.¹

Windows operating system software is intangible information that is the product of Microsoft's intellectual processes. Golden master disks are simply a tangible medium upon which the intangible Windows software is stored for transmission to others. By agreement, Microsoft has granted

¹ Microsoft also supplies its Windows operating system software from the U.S. to certain foreign contractors by encrypted electronic transmission of the software code. The foreign contractors decrypt the software code and replicate the code for foreign distribution. The electronically transmitted code is not incorporated into foreign computer systems. Rather, the replicated copies of the Windows software code are incorporated into foreign computers.

foreign computer manufacturers and replicators the right to replicate Windows software. Pursuant to those agreements, Microsoft must deliver the software abroad. Golden disks represent a medium for doing so. The foreign computer manufacturers and replicators use the golden master disks as a mold or pattern to produce new copies of Windows software that are actually installed onto foreign computers. The Windows software stored on the golden master disks remains on the master, much like the words and ink on this page remain on this page even after a copy is made.

III. NEITHER GOLDEN MASTER DISKS, NOR INTANGIBLE INFORMATION STORED ON THEM, ARE "COMPONENTS" WITHIN THE MEANING OF 35 U.S.C. § 271(f)

A. The Plain Meaning Of The Term "Component" Is "A Constituent Part" of A Patented Product

Section 271(f) precludes exportation of certain "components" of patented inventions (Ex. 1). The copied units of the Windows operating system software replicated abroad cannot be the proscribed statutory "components" combined abroad because those units are not supplied from the United States.

Although not specifically defined in section 271(f), the term "component" must be interpreted in view of its "ordinary, contemporary, common meaning." *See Bayer AG v. Housey Pharm., Inc.*, 340 F.3d 1367, 1371 (Fed. Cir. 2003). "Dictionaries of the English language provide the ordinary meaning of words used in statutes." *Id.* The term "component" is defined as "a constituent part: INGREDIENT" (Webster's 3d New Int'l Dictionary (1981)). Thus, to be a prohibited "component" within the meaning of

section 271(f), an exported item must itself become a "constituent part" of an assembled product covered by a U.S. patent. Conversely, exported items that never become a constituent part of an assembled product are not within the ambit of section 271(f).

There is an important distinction between an item that is *itself a component* of a patented product assembled abroad and an item that is *used abroad to make a component* of a patented product that is assembled abroad. For example, consider exportation of a mold or machine that may be used abroad to make a component of an assembled product. While the *component* may become a part of the assembled product, the *mold* or *machine* cannot and does not become a part of the assembled product. While exportation of the *component* is proscribed by section 271(f) under certain circumstances, the statute does not preclude the exportation of the *mold* or *machine* used abroad to make the component. Nor can it logically be said that components made abroad using the mold or machine were exported or supplied from the United States.

A golden master disk is similar to a mold or machine used to make something that, at least arguably, is a component of a computer system. But the golden master disk itself is not a "constituent part" or "component" of that computer system. At most, it could be argued that newly-created Windows software copies, replicated abroad from the golden master mold, become constituent parts of a foreign-assembled computer system. But it cannot be said that those software copies were supplied from the United States. Furthermore, as explained below, section 271(f) does not reach the exportation of the information contained in those software copies.

**B. Section 271 Limits "Products" And
"Components" To Physical Articles And Does
Not Encompass Intangible Information**

To properly define the statutory term "component" as used in section 271(f), it is appropriate to look for guidance from other provisions of section 271. *Bayer*, 340 F.3d at 1372.

The Federal Circuit has recently set forth its opinion that the terms "product" and "component" as used in section 271(g) appear "to contemplate a physical product" as opposed to "information." *Id.* at 1373. Thus, *Bayer* reinforces the view that the statutory term "components" in section 271(f) refers to actual parts of a product assembled abroad. The statute does not refer to the export or import of *information*. *Id.* at 1376-77.

Accordingly, even if the golden master disk – the physical item itself – is the "component" supplied from the U.S. to form part of a patented invention abroad, the export of the *information* contained therein is not an act of infringement pursuant to section 271(f). As such, the foreign replications of that information also cannot constitute an act of infringement pursuant to section 271(f).

In *Bayer*, the patentee accused Bayer of importing research information obtained abroad through the use of the patentee's methods in violation of section 271(g). Section 271(g) prohibits importation of "a *product* which is made by a process patented in the United States" (Ex. 1). Section 271(g), however, exempts from liability a product that "becomes a trivial and nonessential *component* of another product." At issue was whether the imported "information"

constituted "a product which is made by a [patented] process." *Bayer*, 340 F.3d at 1371.

The Federal Circuit held that section 271(g) does not proscribe the import of information. *Id.* at 1376. In its analysis, the Federal Circuit relied in part upon the language of the exemption clause of section 271(g). Because the exemption arises if the imported "product" becomes a trivial "component of another product," the Federal Circuit stated that the term "component" "appear[s] to contemplate a physical product." *Id.* at 1373. Accordingly, the Federal Circuit has already opined that the statutory term "component" contemplates a physical product, and not information that is the product of intellectual processes. *Id.* at 1376-77.

C. The Legislative History Reflects Congressional Concern With Exportation Of Physical Articles To Be Assembled Abroad Rather Than Exportation Of Intangible Information

The legislative history of section 271(f) reflects congressional concern with exportation of physical items that are assembled abroad into patented products. In the face of silence in the legislative history, this Court should decline to broadly interpret section 271(f) to prohibit the export of information. *Bayer*, 340 F.3d at 1376.

Congress enacted section 271(f) in response to the Supreme Court's decision in *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972). In *Deepsouth*, the defendant, after being found to be an infringer, sought modification of the injunction issued against it to export the very product it was precluded from making, using, or selling within the United States. *Id.* at 523-24. To avoid the effects

of the patent law and the injunction, the defendant made all of the components of a shrimp deveining machine within the United States and then shipped the components for assembly abroad. *Id.* at n. 5 (“Deepsouth is entirely straightforward in indicating that its course of conduct is motivated by a desire to avoid patent infringement.”) The issue was whether the defendant was “making” the patented invention within the United States and thereby infringing under 35 U.S.C. § 271(a). The Supreme Court ruled that “making” requires an “operable assembly of the whole and not the manufacture of its parts.” *Id.* at 528. Because the defendant never combined the components within the United States, the Supreme Court condoned the defendant’s actions to avoid the injunction by holding that there was no direct infringement by making.

In response to *Deepsouth*, Congress enacted section 271(f) to prevent infringers from avoiding U.S. patents by manufacturing the parts of a patented product within the United States and completing the final steps of the assembly process abroad. The legislative history reflects Congress’ desire to halt infringers from “supplying components of a patented product in this country so that the assembly of the components may be completed abroad” (Ex. 2). The legislative history, however, shows no affirmative congressional intent to prohibit either exportation of information, or exportation of physical articles that never become a “constituent part” of a patented product assembled abroad. Rather, the legislative history reflects congressional intent to prohibit export of tangible items to be assembled abroad into a product that would otherwise infringe a U.S. patent. “In the face of silence in the legislative history,” courts should be “reluctant to broadly interpret the legislation.” *Bayer*, 340 F.3d at 1376. The legislative history’s very silence thus suggests that Congress did not intend section 271(f) to broadly preclude exportation of, or

foreign replication of, intangible information (such as Windows operating system software) or exportation of items that never become a part of a patented product assembled abroad (such as the golden disks themselves).

The Federal Circuit's analysis of the legislative history of section 271(g) in *Bayer* is helpful to determine the meaning of the term "component" at issue here. While sections 271(g) and 271(f) concern different infringing acts, the Federal Circuit noted that the two sections were companion provisions sharing a common legislative history. *Id.* at 1374. This common legislative history leads to the conclusion "that Congress was concerned solely with *physical* goods that had undergone manufacture." *Id.* at 1373 (emphasis added). There is "nothing in the legislative history suggesting that Congress was concerned that the preexisting statutory scheme failed to reach *intangible information*." *Id.* at 1374 (emphasis added). Clearly, "Congress was concerned with *tangible products* and not mere *information*." *Id.* at 1376 (emphasis added).

Accordingly, the legislative history reflects no congressional intent to prohibit export of intangible information. But the Windows software contained on the golden master media is just that — intangible information. That information is subjected to a replication process *abroad* by others for incorporation into foreign computers. Microsoft does not conduct that process within the United States and export the replicated software copies. Thus, section 271(f) is not implicated by Microsoft's actions.

D. Reading The Term “Component” To Cover Something Used To Make Something Else That Is A Part Of A Patented Product Or To Cover Intangible Information Leads To Anomalous Results

Both the plain language and the legislative history of section 271(f) reflect that Congress intended to prohibit exportation of tangible items for assembly into patented products abroad. Reading the statute to cover export of information or physical items that are merely used abroad to make parts for an assembled foreign product would lead to anomalous results.

Assume, for example, that a person exports a mold for producing parts abroad. Further assume that these foreign-made parts are then combined abroad with other parts to assemble a final product. The articles made using the mold are the “parts” or “components” of the final product. The mold, however, is not a “part” or “component” of the final product. Under the proper statutory construction, exportation of the mold would not lead to infringement liability under section 271(f). But under AT&T’s proposed statutory construction, exportation of the mold *would* lead to liability.

Similar to mold replication are those instances in which chemicals exported from the U.S. are modified abroad to make a finished product. In *Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc.*, 95 Civ. 8833 (RPP), 2001 U.S. Dist. LEXIS 16895, *11-*15 (S.D.N.Y. Oct. 15, 2001), *aff’d*. 326 F.3d 1226 (Fed. Cir. 2003), exportation of a chemical precursor that was modified abroad to form one part of a two part product was held not to implicate section 271(f). The court held that the precursor was not “literally a component” of the claimed product. *Id.* at *15.

More directly, however, is that section 271(f) cannot be interpreted to cover export of information. In *Bayer*, the Federal Circuit specifically noted that to disregard the plain meaning and legislative history of the statute by holding that information is covered by section 271 "could lead to anomalous results." *Bayer*, 340 F.3d at 1376. The Court rejected the patentee's proposed construction of section 271(g) because, under it, "a person possessing the allegedly infringing information could . . . possibly infringe by merely entering the country." *Id.* at 1376. The court stated: "Such an illogical result cannot have been intended." *Id.* Similarly under AT&T's proposed construction of section 271(f), a person possessing the Windows software information could possibly infringe AT&T's patent by merely leaving the country with that information and entering the information into a foreign computer system possessing all of the other necessary claimed components.

If section 271(f) is to be extended to preclude exportation of information, as urged by AT&T, Congress and not the Courts should make that determination. *Id.* at 1376-77 ("Congress is in a far better position to draw the lines that must be drawn if the product of intellectual processes rather than manufacturing processes are to be included in the statute.").

E. Section 271(f) Should Not Be Expanded Beyond Prohibiting The Exportation Of Physical Articles That Become A Component Of A Patented Product

Bayer's admonition that section 271(g) should be narrowly construed applies equally to the construction of section 271(f) here. The Court should not expand section 271(f) beyond the export of the physical components used in products assembled

abroad. For example, various cases have found section 271(f) liability where physical parts were exported for assembly abroad into a final product. *See, e.g., Moore U.S.A., Inc. v. Standard Register Co.*, 144 F. Supp. 2d 188, 195-96 (W.D.N.Y. 2001) (supply of paper and glue required to make mail envelopes); *T.D. Williamson, Inc. v. Laymon*, 723 F. Supp. 587, 590-93 (N.D. Okla. 1989), *aff'd*, 923 F.2d 871 (Fed. Cir. 1990) (supply of components used to assemble caliper pig); *W.R. Grace & Co. -Conn. v. Inter-cat, Inc.*, 60 F. Supp. 2d 316, 320-21 (D. Del. 1999) (supply of chemical materials to be combined with other materials abroad).

In contrast, courts have repeatedly rejected efforts to expand the scope of section 271(f) beyond its limited sphere. *See, e.g., Pellegrini v. Analog Devices, Inc.*, C.A. No. 02-11562-RWZ, 2003 U.S. Dist. LEXIS 7598, *1-*4 (D. Mass. May 7, 2003) (rejecting as "sophistry" patentee's argument that exportation of instructions for foreign disposal of computer chips was within section 271(f)); *Bristol-Myers*, 2001 U.S. Dist. LEXIS 16895, at *16-*18 (rejecting argument that instructions from the United States to combine parts made abroad implicated section 271(f) liability); *Fieldturf, Inc. v. Southwest Recreational Indus., Inc.*, 235 F. Supp. 2d 708, 733 (E.D. Ky. 2002) (limiting scope of section 271(f) to avoid extraterritorial effect of U.S. patent law); *Enpat, Inc. v. Microsoft Corp.*, 6 F. Supp. 2d 537, 539-40 (E.D. Va. 1998) (because there are no "components" or "patented physical product" to a patented method, section 271(f) does not apply); *Aerogroup Int'l v. Marlboro Footworks, Ltd.*, 955 F. Supp. 220, 231-32 (S.D.N.Y. 1997) (section 271(f) inapplicable to a design patent for a shoe sole because the design patent claimed no tangible "components"); *see also Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 953 F.2d 1360, 1374 (Fed. Cir. 1991) (section 271(f) does

not apply to an apparatus exported to implement a patented process because process has no components).

The *Eolas* and *Imagexpo* cases (Ex. 3) are not governing precedent for the present issue. Neither addressed the statutory construction of the term "component." Neither analyzed the legislative history. Neither took the *Bayer* case into consideration.

CONCLUSION

For the foregoing reasons, AT&T should be precluded from advancing a section 271(f) theory of patent infringement liability.

/s/

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