

Software Patent Damages for Foreign Sales: Have the District Courts Gone Too Far?

By Marc J. Pensabene and Jonathan Berschadsky

In a series of recent cases, some district courts have applied a broad reading to 35 U.S.C. § 271(f). These decisions allow patent owners to seek and recover patent infringement damages for sales of computer software made, used, and sold completely abroad, based on the copying of the software object code from a master disk created in the United States.¹ Under the reasoning employed by these courts, a domestic software company may be held liable for damages based on sales of its software anywhere in the world, so long as the subject code was copied—even in a foreign country—from a US source. Many argue that the patent owner, in effect, is given worldwide patent protection vis-à-vis its US competitors based solely on the issuance of a US patent. Often, foreign sales can account for more than half of the total damages award.² In cases such as the much-publicized *Eolas Technologies, Inc. v. Microsoft Corp.*³ litigation, in which the plaintiff was awarded damages in excess of \$520 million, this can be quite significant. It is, therefore, not surprising that this expansive application of § 271(f) has caused much concern in the software industry and has attracted attention in other industries as well.

The Federal Circuit has not yet directly addressed the issue, and this leaves many practitioners and litigants asking: Have the district courts gone “too far”? This article studies an example of this broad application of § 271(f) to foreign software sales and analyzes whether it is consistent with the intent of the statute, its application to other technologies, and established Federal Circuit precedent.

AT&T v. Microsoft: The Manufacture and Distribution of Software

AT&T Corp. v. Microsoft Corp.,⁴ illustrates some of the different ways in which the question of patent damages

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based on foreign software sales can arise. In that case, the patent owner, AT&T, alleged that certain Microsoft products, including Microsoft's Windows operating system, incorporated speech codecs⁵ that infringed an AT&T patent. Microsoft moved for partial summary judgment to exclude sales of products incorporating foreign-replicated copies of Windows from any damages award.⁶

According to the undisputed facts, Microsoft conceives, writes, compiles, tests, and debugs the computer code for Windows in Redmond, WA. It then burns the object code for Windows onto a limited number of “golden master” disks in the United States. These master disks are shipped to computer manufacturers (OEMs), some of which are located outside the United States. Each OEM replicates the code contained on the master disk it receives to produce and install copies of Windows on new computers. The master disk itself is never made a part of a computer sold to any customer, and the assembly of the new computers, replication of the Windows code, and its incorporation into new computers by the foreign OEMs all take place outside the United States. Microsoft also ships golden master disks to foreign “replicators” that copy the Windows object code and ship that foreign-replicated code to other foreign OEMs. Finally, Microsoft supplies copies of its object code to certain foreign OEMs and replicators by sending a single encrypted electronic transmission of the code from the United States to the OEM or replicator.⁷

Based on these facts, AT&T alleged that it was entitled to damages for Microsoft's foreign sales because the exportation of the Windows object code constituted acts of infringement under § 271(f). Microsoft acknowledged that the object code sent overseas on the golden masters and sent electronically included the accused codes. Microsoft also acknowledged that it knew and intended that the code would be installed as an “essential part” of the foreign computer manufacturing process. Microsoft argued, however, that the object code sent overseas was not a “component” of a patented invention under § 271(f) but instead was merely “intangible information” not covered by the statute. Microsoft further argued that the foreign-replicated copies of the object code that were incorporated into the foreign-made computers were not “supplied in or from the United States” as required for liability under the statute.⁸

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The History of § 271(f)

Section 271(f) was drafted in response to the US Supreme Court's 1972 holding in *Deepsouth Packing Co. v. Laitram Corp.*⁹ In that case, the accused infringer, Deepsouth, manufactured all the parts of a shrimp deveining machine in the United States and shipped those parts unassembled to foreign customers in three separate boxes for assembly and use abroad. After the parts were removed from the boxes, the 1.75 ton machines took less than an hour to assemble. Although the fully assembled machines were found to infringe the asserted patents, Deepsouth argued that the unassembled parts did not form the patented combination, and therefore, the manufacture and exportation of the unassembled parts did not constitute an act of patent infringement.¹⁰

The Supreme Court agreed with Deepsouth, finding that "[i]f Laitram has a right to suppress Deepsouth's export trade it must be derived from its patent grant, and thus from the patent statute."¹¹ Relying on the plain language of the statute, the court reiterated that "it is not an infringement to make or use the patented invention outside of the United States."¹² Further, citing to earlier cases construing the patent statutes, the court reaffirmed its earlier holdings that "a combination patent protects only against the operable assembly of the whole and not the manufacture of its parts."¹³ Thus, the Supreme Court concluded that it was not an infringement to make all the components of a patented combination within the United States and subsequently ship them to foreign buyers for assembly and use abroad.¹⁴

Significantly, in reaching its decision, the Supreme Court specifically noted the international implications of its decision and the lack of congressional intent to grant extraterritorial effect to US patent law:

In conclusion, we note that what is at stake here is the right of American companies to compete with an American patent holder in foreign markets. Our patent system makes no claim to extraterritorial effect; "these acts of Congress do not, and were not intended to, operate beyond the limits of the United States," and we correspondingly reject the claims of others to such control over our markets. To the degree that the inventor needs protection in markets other than those of this country, the wording of 35 U.S.C. §§ 154 and 271 reveals a congressional intent to have him seek it abroad through patents secured in countries where his goods are being used. Respondent holds foreign patents; it does not adequately explain why it does not avail itself of them.¹⁵

The court thereby sent an unmistakable message to Congress that "a clear and certain signal" would be required to extend the patent privilege further.¹⁶

Twelve years later, Congress accepted the Supreme Court's invitation to expand the patent laws and passed the Patent Law Amendments Act of 1984¹⁷ to close the perceived loophole. The Patent Act was thereby amended to include 35 U.S.C. § 271(f):

(f)(1) Whoever without authority supplies or causes to be supplied in or from the United States all or a substantial portion of *the components* of a patented invention, where *such components* are uncombined in whole or in part, in such manner as to actively induce the combination of *such components* outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.

(2) Whoever without authority supplies or causes to be supplied in or from the United States *any component* of a patented invention that is especially made or especially adapted for use in the invention and not a staple article or commodity of commerce suitable for substantial noninfringing use, where *such component* is uncombined in whole or in part, knowing that *such component* is so made or adapted and intending that *such component* will be combined outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer. (Emphasis added.)

The stated objective in enacting § 271(f) was to overrule *Deepsouth Packing* and "to avoid encouraging manufacturing outside the United States."¹⁸ According to the legislative history, the new section was intended to:

prevent copiers from avoiding U.S. patents by supplying *components* of a patent product in this country so that the *assembly of the components* may be completed abroad.¹⁹ (Emphasis added.)

In signing the legislation into law, President Reagan pointed to the need for a strong patent system to maintain America's position at "the cutting edge of technology" and reaffirmed Congress' reasoning behind the new section, stating that:

It . . . closes a loophole in existing law which permitted copiers to export jobs and avoid liability by arranging for *final assembly* of patent machines to occur offshore. The act eliminates unwarranted

technicalities in the patent law that threaten the validity of patent for inventions arising from corporate research teams.³⁰ (Emphasis added.)

Therefore, according to the legislative history, this new provision of the patent law was directed at preventing the domestic manufacture of “components” of a patented device when those components would later be exported and the exported components “assembled” abroad into an otherwise infringing combination.

The Case Law Under § 271(f)

Since § 271(f) was enacted, the courts, and the Federal Circuit in particular, have taken a fairly literal approach in applying the statute. For example, in *Rotec Industries, Inc. v. Mitsubishi Corp.*,²¹ the Federal Circuit relied on a strict reading of the statute, which it found to be “clear on its face,” to hold that § 271(f) does not extend to include an “offer to supply” components of a patented invention but covers only their actual supply.²²

Likewise in *Waymark Corp. v. Porta Systems Corp.*,²³ the Federal Circuit looked to the plain language of the statute to hold that a finding of infringement under § 271(f)(2) does *not* require an actual combination of the exported components abroad, only the intent that they be combined in an infringing manner.²⁴ This is in contrast to the analogous requirements for liability under § 271(c),²⁵ which depends on a showing of direct infringement. The court explained this seeming inconsistency by pointing out that § 271(c) defines liability for a *contributory* infringer, whereas § 271(f)(2) defines liability for a *direct* infringer.²⁶ Further, acknowledging that infringement without a completed infringing device was not “the norm” in patent law, the court reasoned:

If 271(f)(2) required actual assembly abroad, then infringement would depend on proof of infringement in a foreign country. This requirement would both raise the difficult obstacle of proving infringement in foreign countries and pose the appearance of “giving extraterritorial effect to United States patent protection.” Thus, the language of 271(f)(2) addresses the implications of extraterritorial enforcement consistently. The statute does not require actual assembly.²⁷

Particularly pertinent to the present analysis, the courts have specifically taken a narrow view of what constitutes a “component” under the statute. In *Standard Havens Products, Inc. v. Gencor Indus., Inc.*,²⁸ the Federal Circuit found that § 271(f) was not implicated by the exportation of an apparatus for performing a patented process.²⁹ Subsequent district court decisions have fol-

lowed *Standard Havens* to hold that, while § 271(f) protects against the export of components of patented products, it does not protect against the foreign use of a patented process, even if the unpatented apparatus for performing that process was made and supplied from the United States.³⁰ The rationale supporting this conclusion is that method claims do not have physical “components” capable of being “combined” as required by the plain language of § 271(f) (or “assembled” as reflected in the legislative history) into a patented invention.³¹ At least one district court has applied this same logic to design patents, which have no “component parts” at all.³² Courts have, accordingly, declined to apply § 271(f) to method claims or design patents based on the absence of “components” that may be assembled abroad to form a patented combination.

The court applied this rule consistently to software in the case of *Enpat, Inc. v. Microsoft Corp.*,³³ in which the district court held that a patent covering a patented process was not infringed under § 271(f) by the manufacture and export of software for performing that process.³⁴ As the court explained, “While it is true that any process involves the use of physical objects, this alone is not enough to bring a method patent within the purview of § 271(f).”³⁵

In *Enpat*, the plaintiff alternatively argued that the court should take foreign sales into account in calculating reasonable royalty damages as an “economic factor” that a prudent business person would consider in a license negotiation. The court declined to do so, holding that an accused infringer cannot be required to pay royalties for foreign sales that do not violate US patent law.³⁶

Another way that district courts have narrowly construed the statute is in interpreting the number of components needed to meet § 271(f)(1)’s requirement that “all or a substantial portion of the components” be exported from the United States. These courts have, accordingly, granted summary judgment of non-infringement when the parts supplied from the United States “contribute minimally” to the accused product.³⁷ At least two district courts have gone so far as to hold that the recitation of “components” (rather than the singular “component”) in § 271(f)(1) requires the supply of more than one component of the patented combination from the United States.³⁸

From the above, it appears that courts have been hesitant to expand the reach of United States patent law, particularly when it implicates foreign activities. Consequently, § 271(f) has been construed narrowly to avoid giving extraterritorial effect to an otherwise domestic patent statute.³⁹ Indeed, the *Waymark* decision highlights that it is the domestic activity that gives rise to liability, and any foreign activity is irrelevant. It is the

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exportation of a component of a patented device that is the infringing act. The foreign combination or assembly of the patented device, or the practice of a patented method abroad, does not give rise to liability.⁴⁰

The Application of § 271(f) to Software

As indicated above, while the Federal Circuit has not addressed the question of foreign software sales under § 271(f), a number of district courts have and, in so doing, have found infringement based on the foreign replication of domestically produced master disks. The application of the statute to software by these district courts, however, has been seen by many in the software industry to be inconsistent with established precedent.

For example, in *Eolas*, the district court viewed chemical exportation cases as the most analogous to the exportation of a software master disk.⁴¹ The district court decisions cited by the *Eolas* court, finding no statutory basis for excluding chemicals, held that chemicals were “components” within the meaning of § 271(f). Thus, the export of those chemicals to be combined abroad with other compounds to form a patented combination was an act of infringement under § 271(f).⁴² In response, Microsoft argued that the master disk was merely “a series of directions (or commands)” more analogous to a chemical formula or recipe to be followed repeatedly. If followed, the formula would produce a desired result. The district court rejected this argument, however, reasoning that the contents of the golden master disk (*i.e.*, the software code), unlike the chemical formula, are an “operating element” of the computer. The court, therefore, held that software was “in law, the legal equivalent of computer hardware and not the legal equivalent of a chemical formula.”⁴³

Viewing the *Eolas* decision in light of the statute’s legislative history, the *Deepsouth* case, which it overruled, and the application of § 271(f) to other technologies, some argue that there is at least one flaw in the court’s analysis. In *Deepsouth*, there was a one-to-one correspondence between the exported components and the components incorporated into the foreign assembled products. This same one-to-one correspondence is found in cases applying § 271(f) to other technologies, including the chemical cases relied on by the *Eolas* court. Likewise, both the statute itself and the legislative history speak of the export of components and the combination of those (exported) components into the foreign assembled patented combination. For example, as indicated by the emphasized language quoted above, the statute speaks of the exportation of “components” and the combination of “such components” into the patented combination. Other than software cases, no court has applied § 271(f) to find liability

based on the foreign copying or replication of an exported component.

Another potential inconsistency in the *Eolas* analysis is its dependency on foreign activity, which appears to be at odds with the Federal Circuit’s *Waymark* decision. In *Eolas*, the court allowed the jury to award damages for copies of software replicated and sold abroad. This necessarily focuses on foreign activity and disregards the cautioning of the Federal Circuit against the appearance of giving extraterritorial effect to US patent laws.⁴⁴

In the *AT&T* case, Microsoft put forth a different analysis, using the example of a mold or template.⁴⁵ In particular, Microsoft analogized the software on the master disk to a mold for tires, when the mold is exported to a foreign plant for the foreign molding of tires to be installed on foreign-made cars. Microsoft argued that the foreign-replicated software, like the foreign-molded tires, could not be said to be components of the patented combination “supplied” from the United States as required by the plain language of § 271(f).⁴⁶ The district court rejected this analogy, reasoning:

Unlike the tires that are manufactured from a mold, however, the software here has already been manufactured in, and supplied from, the United States and is only copied abroad—the software is not a mold for the creation of another separate type of component. Indeed, there is no evidence before this Court that the foreign-incorporated object code or software is being created anew from instructions concerning a process for creating code abroad.⁴⁷

This analysis, however, may raise more questions than it answers. Consider the example of a tire made in the United States and sent abroad, where it is copied (*e.g.*, by creating a mold from the tire) and the foreign-made tires are installed on foreign-made cars. It is unlikely that any court would find infringement under § 271(f) (or otherwise) based on the foreign manufacture and sale of these tires. The court’s analysis gives no reason why software should be treated any differently simply because it is easier to copy. Likewise, would the *AT&T* court have reached a different conclusion if the master disk contained *source* code rather than *object* code?⁴⁸ Since the exported source code would have to first be compiled abroad before it could be incorporated into the foreign-made computers, under the *AT&T* court’s logic, this might be more analogous to the non-infringing exportation of a mold. Domestic software companies are, therefore, left to wonder how far back in the development process they have to go in order to export software in a form that will avoid the possibility of global liability based on work done in the United States.

Part of the difficulty in applying § 271(f) to computer software in a manner consistent with other technologies appears to arise from the very nature of software. On the one hand, software may be viewed as “intangible information” and, thus, not a “component” as contemplated by the statute. Microsoft urged this position in the *AT&T* case,⁴⁹ citing as support the Federal Circuit’s exclusion of “information” from the meaning of “component” in § 271(g).⁵⁰ On the other hand, it is difficult to deny that software becomes an “operating element” and an “essential part” of a computer. Consequently, this is the justification that has been relied on by the district courts in finding computer programs meet the statutory requirement of a “component.”⁵¹

To resolve this seeming conflict, it may be useful to treat the physical embodiment of the computer program (e.g., a disk containing the object code) separate from the intangible “information” (i.e., the computer instructions) that it contains and limit the application of § 271(f) to the physical embodiment. Thus, when a disk containing computer code is exported to be combined abroad with a foreign-made computer to form a patented combination, § 271(f) would be implicated. When, however, the disk is exported, not to be combined with a computer, but instead to be used only as a master “template” to make other disks, § 271(f) would not apply. Though appearing somewhat arbitrary, this distinction is wholly consistent with the Federal Circuit’s *Waymark* decision in that it would focus on the intent of the party exporting the disk and not on the actual foreign activity.⁵² In addition, this approach avoids the anomalous result of infringement being found through the “exportation” of a computer program that has been memorized by a programmer who leaves the country to input and use the program on a computer in a foreign country.⁵³

Returning to the tire analogy, the above-proposed test also would bring the treatment of software under § 271(f) in line with the treatment of products in other areas of technology. For example, both the tread pattern of a tire and a computer program may be described as functional or “operational elements” of a larger product and both may be required elements of a patent directed to the larger product.

Similarly, both may be designed and incorporated into a physical embodiment in the United States—software being burned onto a master disk and the tire tread formed in the mold (or a sample tire)—and both may be memorialized (or memorized) and transmitted in other forms. By focusing the relevant inquiry on what is physically exported and what the intended use of that exported article is, the computer program would be

treated the same as the protected tread design. Liability would attach only if *the exported article* is to be physically combined abroad to form the patented combination. If the computer program or the tread design is exported in any form to be replicated abroad and incorporated onto a new disk (or computer) or into a new tire, there would be no liability under § 271(f) for these foreign-made copies.

Conclusion

The issue of liability for foreign-replicated software is already widely recognized as having “profound ramifications” for the software industry⁵⁴ and can easily be seen as having further reaching implication, for example, in other industries in which molds or other components are copied overseas. Moreover, rather than achieving the intended purpose of encouraging domestic innovation and manufacturing, the recent expansive application of § 271(f) appears to be having the opposite effect by encouraging software companies to move operations outside the country.⁵⁵ Understandably, many are anxious for a definitive statement on the issue from the Federal Circuit.⁵⁶

Fortunately, this definitive statement should be forthcoming shortly. Since the district court rendered its decision in the *AT&T* case, the parties have reached a settlement. Pursuant to that settlement, as reflected in court records, Microsoft will pay damages to AT&T based on Microsoft’s domestic sales and make an additional payment of damages in the event that the district court’s ruling on § 271(f) is affirmed on appeal. Hopefully this appeal will bring some closure to the issue.

Notes

1. See *AT&T Corp. v. Microsoft Corp.*, 2004 WL 406640 (S.D.N.Y. Mar. 5, 2004); *Eolas Technologies Inc. v. Microsoft Corp.*, 2004 WL 170334 (N.D. Ill. Jan. 15, 2004); *Imagexpo, L.L.C. v. Microsoft Corp.*, 299 F. Supp. 2d 550 (E.D. Va. 2003); *NTP, Inc. v. Research In Motion, Ltd.* 261 F. Supp. 2d 423, 431 (E.D. Va. 2002) (noting infringement under § 271(f) where the defendant supplied “application programs” that are “components” to be combined with a microprocessor outside of the United States in a manner that would infringe the asserted patent claim if combined in such a manner in the United States).
2. See *AT&T*, 2004 WL 406640 at *8 (the defendant, Microsoft, noting that the broad application of § 271(f) to foreign sales would cause it to move the manufacture of the master disks outside of the United States in order to reduce its exposure by two-thirds).
3. *Eolas Technologies, Inc. v. Microsoft Corp.*, 2004 WL 170334 (N.D. Ill. Jan. 15, 2004).
4. *AT&T Corp. v. Microsoft Corp.*, 2004 WL 406640 (S.D.N.Y. Mar. 5, 2004).
5. “Codec” is short for coder/decoder (or compressor/decom-

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- pressor) and is used to refer to any technology for encoding (or compressing) and decoding (or decompressing) data.
6. For purposes of the motion, the court assumed that the accused codecs infringed AT&T's patent. See *AT&T*, 2004 WL 406640 at *1 n.4.
 7. *Id.* at *1.
 8. *Id.* at *1-2.
 9. *DeepSouth Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972).
 10. *Id.* at 523-524.
 11. *Id.* at 526.
 12. *Id.* at 526-527.
 13. *Id.* at 527-528.
 14. *Id.* at 528-529.
 15. *Id.* at 531 (internal citations omitted).
 16. *Id.* at 531-532.
 17. Pub. L. No. 98-622, § 101, 98 Stat. 3383 (Nov. 8, 1984).
 18. Section-by-Section Analysis of H.R. 6286, "Patent Law Amendments Act of 1984," *Congressional Record*, Oct. 1, 1984, H10525-26.
 19. *Id.*
 20. *Weekly Compilation of Presidential Documents*, Vol. 20, No. 45 (Nov. 9, 1984).
 21. *Rotec Industries, Inc. v. Mitsubishi Corp.*, 215 F.3d 1246 (Fed. Cir. 2000).
 22. *Id.* at 1257-1258.
 23. *Waymark Corp. v. Porta Systems Corp.*, 245 F.3d 1364 (Fed. Cir. 2001).
 24. *Id.* at 1367-1368.
 25. Subsection (1) of § 271(f) imposes liability for the export of "all or a substantial portion of the components" of a patented combination and, like § 271(b), requires a showing of active inducement. Subsection (2) similarly borrows from § 271(c) in imposing liability for the export of any component of a patented invention, where that component is "especially made or especially adapted for use in the invention" and is not a "staple article . . . suitable for substantial noninfringing use."
 26. *Waymark*, 245 F.3d at 1368.
 27. *Id.* (internal citation omitted).
 28. *Standard Havens Products, Inc. v. Gencor Indus., Inc.*, 953 F.2d 1360 (Fed. Cir. 1991).
 29. *Id.* at 1374.
 30. See, e.g., *Synaptic Pharm. Corp. v. MDS Panlabs, Inc.*, 265 F. Supp.2d 452, 463-464 (D.N.J. 2002).
 31. *Id.*
 32. *Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd.*, 955 F. Supp. 220, 232 (S.D.N.Y. 1997) (holding that § 271(f) did not apply to a design patent for a shoe sole because it had no "component parts").
 33. *Enpat, Inc. v. Microsoft Corp.*, 6 F. Supp. 2d 537 (E.D. Va. 1998).
 34. *Id.* at 539.
 35. *Id.*
 36. *Id.* at 539-540.
 37. See, e.g., *Rothschild v. Ford Motor Co.*, 2 F. Supp. 2d 941, 947 (E.D. Mich. 1998).
 38. *Fieldturf, Inc. v. Southwest Recreation Indus., Inc.*, 235 F. Supp. 2d 708, 733 (E.D. Kan. 2002); *Bristol-Myers Squibb Co. v. Rhône-Poulenc Rorer, Inc.*, 2001 WL 1263299, *4-5 (S.D.N.Y. Oct. 19, 2001).
 39. *Waymark*, 245 F.3d at 1368; see also *Fieldturf*, 235 F. Supp. 2d at 733 n.23.
 40. *Waymark*, 245 F.3d at 1368.
 41. *Eolas*, 2004 WL 170334 at *3.
 42. *W.R. Grace & Co-Conn v. Intercat, Inc.*, 60 F. Supp. 2d 316, 319-321 (D.Del. 1999); *Lubrizol Corp. v. Exxon Corp.*, 696 F. Supp. 302, 325 (N.D. Ohio 1988).
 43. *Eolas*, 2004 WL 170334 at *3-4.
 44. *Waymark*, 245 F.3d at 1368.
 45. A similar argument was advanced and rejected by the court in *Imagexpo*, 299 F. Supp. 2d at 552-553.
 46. As noted by the district court, Microsoft conceded at oral argument that if individual disks were exported for incorporation into each foreign assembled computer, § 271(f) would apply. *AT&T*, 2004 WL 406640 at *7, n.7.
 47. *Id.* at *7.
 48. "Source code" is the human readable form in which a computer program is written by the programmer. The source code is then compiled into "object code" that can be executed by a computer.
 49. *AT&T*, 2004 WL 406640 at *4-6 (citing *Bayer AG v. Housey Pharms., Inc.*, 340 F.3d 1367, 1376-1377 (Fed. Cir. 2003)).
 50. Section 271(g) prohibits the import, sale, or use within the United States of "a product which is made by a process patented in the United States." There is, however, an exception to this prohibition where the product so produced by the patented process "becomes a trivial and nonessential component of another product." § 271(g)(2) (emphasis added). In *Bayer*, the Federal Circuit construed the statutory term "made" to mean the manufacture of a physical article and to exclude the production of information. *Bayer*, 340 F.3d at 1377. In reaching this conclusion, the court noted that the term "component" in § 271(g) "appears to contemplate a physical product." *Bayer*, 340 F.3d at 1372-1373. This statement, Microsoft maintained, controlled the issue of whether information could be a "component" with the meaning of § 271(f).
 51. See, e.g., *Eolas*, 2004 WL 170334 at *3; *AT&T*, 2004 WL 406640 at *6-7.
 52. *Waymark*, 245 F.3d at 1367-1368.
 53. See *Bayer*, 340 F.3d at 1376-1377 (avoiding a construction of § 271(g) that could result in a finding of infringement in the converse situation in which a person enters the country having memorized information that was generated by a patented process).
 54. See, e.g., *AT&T*, 2004 WL 406640 at *1.
 55. See, e.g., *id.* at *8.
 56. See, e.g., *id.* at *1 (noting the issue is "ripe for review by the Federal Circuit").

