No. 05-1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 2006

MICROSOFT CORPORATION,
Petitioner,

v.

AT&T CORP.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF INTEL CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Intel develops and produces chips, boards, systems and software building blocks that are integral to computers and communications products. Intel is well known as the world's largest semiconductor manufacturer, but it also develops and distributes a wide range of software for use with its hardware designs. For example, Intel designs drivers, firmware and utilities that interact with Intel chips and third-party operating systems. Intel also produces a variety of compilers and tools for software development and analysis.

Intel's research, development and manufacturing operations take place around the globe. As a result, Intel regularly designs chips and programs in this country for manufacture and distribution worldwide. Intel likewise designs chips and programs abroad for manufacture and distribution in this country. Intel thus has a strong interest in the legal standards governing liability under U.S. patent law for product development and marketing activities that cross national boundaries.

Intel is a strong believer in protection of intellectual property in general and patents in particular. It invests billions of dollars each year in research and development, and it is regularly ranked among this country's top patentees. Nevertheless, Intel believes

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[1] Intel submits this brief pursuant to the written consent of the parties, as reflected in letters the parties have filed with the Clerk. No party or counsel for a party has authored this brief in whole or in part, and no person or entity other than Intel has made a financial contribution to its preparation or submission.

that the decision below is an unwarranted expansion of U.S. patent law and patent rights.

According to the Federal Circuit, copies of software code that are made and sold in foreign countries can infringe under U.S. patent law simply because the original master version of the code was developed in and shipped from this country. As a result, U.S. patentees can now claim damages based on worldwide sales regardless of whether their inventions were patented or even patentable abroad. As discussed below, Intel believes that this result is bad law and even worse public policy.

SUMMARY OF ARGUMENT

1. The plain language of 35 U.S.C. § 271(f) is limited to the "suppl[y]" from this country of "components" where "such components" *themselves* are intended to be incorporated abroad into a combination claimed in a U.S. patent. As the Federal Circuit and AT&T have recognized, Section 271(f) does not cover the exportation of design tools or design information such as templates, masks, molds and prototypes, and it does not impose liability merely for facilitating foreign combinations. Exportation of master versions of program code cannot infringe because master versions are designed to be templates for making additional copies, and only subsequent generation copies are incorporated into computer system combinations that could practice AT&T's invention.

The Federal Circuit's overbroad construction flowed from its mistake in construing "component" and "supplied" sequentially and in isolation, rather than in tandem and in conjunction with the requirement of a "combination." The only "components" that matter are those "supplied" from this country that become part of a "combination," and the only "supply" that matters is of items that themselves become "components" of the patented "combination." Regardless of whether other forms of software may qualify as a "component" of a patented invention, the master versions at issue here cannot violate Section 271(f) because they themselves are not and are not intended to be combined into computer systems that practice AT&T's patent.

The Federal Circuit extended liability to foreign-made copies by reasoning that "copying is subsumed in the act of supplying" the master versions. That assumption runs counter to two fundamental principles of intellectual property law. First, designs and concepts are distinct from their physical embodiments. Microsoft's product designs for its Windows® operating system are thus distinct from the disks or files that embody them. Second, original works are distinct from later copies, which in turn are distinct from other copies of the same work. The master files cannot be conflated with foreign-made copies.

2. Even if the Federal Circuit's broad reading of Section 271(f) were plausible, it is not the only plausible reading, and well-established canons of construction and important policy considerations counsel against it.

This Court has long presumed that U.S. patent laws do not apply extraterritorially, and it has required clear and certain signals from Congress before imposing liability under U.S. law for acts taken abroad. Nothing in the text or minimal legislative history of Section 271(f) suggests that Congress intended to extend U.S. patent liability to the domestic design of parts that would be made and sold abroad. Congress merely filled a loophole by which U.S. manufacturers could evade U.S. liability by shipping machine parts abroad for final assembly rather than completing the assembly here. The Court should apply Section 271(f) as written. If Congress perceives an additional loophole, it can legislate an additional solution. This Court should not legislate instead.

Concerns for international comity also should caution the Court against expanding Section 271(f) to cover foreign-made components absent clear congressional instruction. Nations are entitled to adopt their own intellectual property laws, and other countries are more restrictive than the U.S. in patenting software-related inventions. By imposing U.S. liability for worldwide use, the decision below would effectively impose U.S. patent law on the rest of the world, even in countries where the U.S. patentee did not or could not obtain foreign patent protection. In some cases, like this one, the patentee may hold foreign patents. Even then, however, the scope of foreign coverage often varies, and in any event U.S. law should not threaten duplicative liability.

Finally, the construction urged by AT&T would disadvantage American software companies and encourage them to relocate abroad. Under the decision below, U.S. software companies face damages (potentially treble damages) in U.S. courts for their worldwide sales solely because they design software from the U.S. In contrast, foreign software companies would be subject to U.S. law only as to copies of their products made or sold in this country. The ramifications are impossible to predict with certainty, but one thing is certain: the political branches are better situated to weigh the difficult political and policy considerations inherent in extending U.S. patent liability as AT&T proposes.

ARGUMENT

I. By Its Terms, 35 U.S.C. § 271(f) Is Limited to the Exportation of Components that *Themselves* Will Be Assembled Abroad into a Patented Combination

The question formally presented in this case is whether copies of software object code that were made abroad can qualify as "components" that have been "supplied" from this country in violation of 35 U.S.C. § 271(f). The practical issue for litigants is whether patentees may claim damages under American law based on sales and use of software products throughout the world simply because the original master version of the code was developed in and shipped from this country.

Intel submits that under the plain language of 35 U.S.C. § 271(f) the answer to both questions is *no.*

A. Section 271(f) Does Not Cover Exportation of Master Disks, Prototypes and Templates that Merely Enable Foreign Production of Invention Components

Section 271(f) is expressly limited to the exportation of components that themselves will be incorporated abroad into a combination claimed in a U.S. patent. By its terms, the statute merely prohibits supplying components of an invention from this country in order to induce the combination of *such* *components* abroad in a manner that practices a U.S. patent:

> 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.

35 U.S.C. § 271(f)(1) (emphasis added). Congress's selection of the words "such components" made clear that infringement under U.S. law can occur only if the specific items exported from this country are the components intended to be incorporated into the patented combination. Indeed, Congress used the phrase "such components" twice, once to make clear that the components must be supplied from this country in uncombined form, and once to emphasize that those very components must form part of the "combination" that will be completed abroad.[2]

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[2] Section 271(f)(2) is not at issue in this case, but it likewise uses "such component" terminology to stress that the exported components covered by the statute must themselves form part of the foreign-made combination:

> 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 noninfring-

Section 271(f) thus does *not* cover the exportation of design tools or design information (e.g., templates, molds, masks and prototypes) that may be used abroad to manufacture components of a patented invention. The Federal Circuit itself has recognized that such exports are a level removed from the ambit of Section 271(f) and that mere facilitation of foreign combinations is not enough to infringe. *Pellegrini v. Analog Devices, Inc.,* 375 F.3d 1113 (2004). As that court put it, Section 271(f) "applies only where components of a patent[ed] invention are physically present in the United States and then either sold or exported." *Id.* at 1117. The statute "clearly refers to physical supply of components [from this country], not simply to the supply of instructions or corporate oversight." *Id.* at 1118.

As an illustration, assume that a "widget" is an important component of a patented "gadget." If an American company exports 100 widgets to a German manufacturer that then incorporates them into 100 gadgets, the American company may have committed 100 acts of infringement under Section 271(f). On the other hand, if the American company exports one widget as a prototype and the German manufacturer creates 100 duplicate widgets using that prototype and incorporates them into 100 gadgets, there is no infringement under U.S. law because the one widget

> ing 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.

35 U.S.C. § 271(f)(2) (emphasis added).

exported from this country was not intended to become part of a patented gadget. The patentee's remedy, if any, is under German patent law, not American law.

Even AT&T appears to accept the limited scope of Section 271(f). Recognizing that the exporter must intend that the "component" "supplied" from this country itself become part of the patented "combination," AT&T argues that Microsoft "suppl[ies] the actual software that will itself be 'combined' with devices that would infringe patents if manufactured in the United States." [Resp. to U.S. Br. 5] The problem with that position is that it contradicts the stipulated facts.

Microsoft supplies original object-code versions of its Windows operating system to foreign computer manufacturers in the form of "golden master disks" or encrypted electronic files. It was undisputed, however, that the exported master versions are not *themselves* intended for incorporation into computer systems that are made, used or sold in other nations. Rather, the exported master versions serve as templates for making *additional* copies, and only those subsequent copies (or, more likely, copies of those copies) are incorporated into computer systems that ultimately could practice AT&T's claimed invention. [*See* Pet. App. 45a-46a, ¶¶ 4-7]

Because the master disks and files that Microsoft supplies from the United States are not themselves combined into a system covered by AT&T's U.S. patent, Section 271(f) does not apply by its terms. As Judge Rader put it in dissent below, "[a]s a matter of logic, one cannot supply one hundred components of a patented invention without first making one hundred copies of the component, regardless of whether the components supplied are physical parts or intangible software." *AT&T Corp. v. Microsoft Corp.,* 414 F.3d 1366, 1373 (2005) (Rader, J., dissenting).

If AT&T obtained foreign counterpart patents and if foreign-made computer systems infringe those foreign patents, then AT&T may have a remedy under foreign patent law. American patent law, however, does not extend that far. *See id.* at 1376 (Rader, J., dissenting) ("AT & T can protect its foreign markets from foreign competitors by obtaining and enforcing foreign patents. . . . Section 271(f) does not . . . protect foreign markets from foreign competitors.").

B. AT&T and the Federal Circuit Have Erred in Defining "Component" and "Supply" Separately and Abstractly, Rather than in Tandem and in Context

The Federal Circuit's overly broad reading of Section 271(f) stemmed in part from the historical accident of how the issues were presented to it.

In *Eolas Technologies Inc. v. Microsoft Corp.,* 399 F.3d 1325 (2005), the Federal Circuit decided a host of other issues before reaching Section 271(f). Moreover, when finally reaching Section 271(f), the court merely decided the abstract issue of whether software code exported abroad can qualify as a "component" of a patented invention. *Id.* at 1338-41 (holding that it can).

Then, in this case, the Federal Circuit took *Eolas*'s construction of "component" as a given and limited its consideration to whether "software replicated abroad from a master version exported from the United States . . . may be deemed ‘supplied’ from the United States for the purposes of § 271(f).” 414 F.3d at 1369. The majority held that the copies could be deemed “supplied” from this country because “the act of copying is subsumed in the act of ‘supplying.’” *Id.* at 1370.

AT&T now urges this Court to follow the same tack: to hold that “components” of patented inventions are not limited to tangible things and then to rule that a broad construction of “supplied” necessarily follows from that premise. *See* Resp. to U.S. Br. 2-5 (arguing that “The Solicitor General’s Answer To The First Question Presented Compels The Federal Circuit’s Answer To The Second”). In Intel’s view, this approach of determining the meaning of individual words of the statute in isolation is misguided and biased toward an overbroad construction that Section 271(f) as a whole cannot bear.

Rather than construing “component” and “supplied” sequentially and in the abstract, the Court should construe them in their statutory context—*together*. Section 271(f) refers to “suppl[ying]” from the U.S. “components” of a patented invention that will be combined abroad in a manner that would infringe if the combination occurred domestically. The only “components” that matter are those that have been directly “supplied” from this country for use in a patented combination. Likewise, the only “supply” that matters is that of items that themselves become “components” of the patented combination. The two issues are inseparable.

As a result, this Court need not decide whether or when all the various forms of “software” may qualify as a “component” for purposes of Section 271(f). In this case, Microsoft "supplied" only master versions of Windows from this country. Those master versions were not "components" of AT&T's patented invention because they themselves were not intended to be combined with hardware to form a computer system capable of practicing AT&T's patent.

C. The Suggestion that "Copying Is Subsumed in the Act of Supplying" Ignores Critical Distinctions Between Software Designs and Their Physical Embodiments and Between Original Works and Later Copies

The Federal Circuit recognized that the copies of Windows code installed on foreign-made computers are actually made abroad by replicating the master versions. 414 F.3d at 1368-69. Indeed, the panel majority tacitly acknowledged that Section 271(f) did not literally apply. *See id.* at 1370 ("All . . . resulting copies have *essentially* been supplied from the United States.") (emphasis added); *see also id.* at 1369 (asking whether copies should be "deemed" supplied from the U.S.). Nevertheless, the Federal Circuit held Microsoft liable for its worldwide sales on the theory that "the act of copying is subsumed in the act of 'supplying,' such that sending a single copy abroad with the intent that it be replicated invokes § 271(f) liability for those foreign-made copies." *Id.* at 1370.

In holding that supplying the original master code is equivalent to supplying copies later made from that code, the Federal Circuit ignored two fundamental distinctions long recognized in intellectual property law.

First, designs and concepts are distinct from their physical embodiments. Copyright law, for example, distinguishes between "works of authorship" and the "tangible medi[a] of expression" in which they are fixed. *See* 17 U.S.C. § 102. For its part, patent law distinguishes between conceptions and reductions to practice. *See* 35 U.S.C. § 102(g).

Here, Microsoft may have supplied the features of Windows in the sense that Microsoft conceived those ideas and expressed them in computer programs, but that is not the sense in which 35 U.S.C. § 271(f) uses the word "supplied." Section 271(f) plainly refers to the provision of actual, concrete embodiments ("components") that will be incorporated into a patented combination. In this case, the master versions supplied from this country were not designed to be and were not incorporated into computer systems, and the copies that were incorporated into computer systems were undisputedly foreign-made.

Second, original works are analytically distinct from later-generation copies, and each copy is likewise distinct from other copies of the same work. Under the "first sale" doctrine of copyright law, for example, the lawful owner of a particular copy or phonorecord is entitled to use, sell or otherwise dispose of that particular copy or phonorecord. 17 U.S.C. § 109. That owner is not, however, entitled to make additional copies or derivative works. *See* 17 U.S.C. § 106(1) & (2). This Court has recognized a similar distinction in patent law. A patentee's initial sale of a particular patented article generally exhausts its rights to collect royalties on that article. *United States v. Univis Lens Co.,* 316 U.S. 241, 249-52 (1942). The patentee nevertheless maintains the exclusive right to make, use and sell other products that practice the patent. *See* 35 U.S.C. § 271(a).

Here too, the master versions of Microsoft's Windows code are physically, analytically and legally distinct from later copies of that code. The master versions themselves are not designed to be combined with hardware components. They are intended only to be templates for replication, and only the subsequent-generation, foreign-made copies are actually installed into computer systems. Microsoft may have facilitated such foreign combinations, but as *Pellegrini* properly recognized and as AT&T concedes, that is not enough to trigger extraterritorial liability under Section 271(f). AT&T's remedy, if any, lies with foreign patent law. *See Deepsouth Packing Co. v. Laitram Corp.,* 406 U.S. 518, 531 (1972) ("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.").

II. The Court Should Not Strain to Expand the Scope of Section 271(f)

The Federal Circuit strained to construe Section 271(f) beyond its literal scope, suggesting that policy reasons and congressional intent supported a broad reading. Even if the Federal Circuit's construction were a plausible reading of the statute, it is not the only plausible reading, and well-established canons of statutory construction and important policy considerations both favor a *narrow* interpretation.

A. This Court Has Consistently Refused to Extend the Reach of U.S. Patent Laws Abroad Absent Clear Congressional Authorization

This Court has long presumed that U.S. patent laws do not apply extraterritorially, absent a clear congressional directive to the contrary. *See, e.g., Brown v. Duchesne,* 60 U.S. 183, 195 (1856) (U.S. patent did not cover improvements to ships fitted in foreign ports, even when such ships entered American ports; "these acts of Congress do not, and were not intended to, operate beyond the limits of the United States"); *Dowagiac Mfg. Co. v. Minn. Moline Plow Co.,* 235 U.S. 641, 650 (1915) (sales of drills in Canada did not infringe U.S. patent; "[t]he right conferred by a patent under our law is confined to the United States and its territories"); *Deepsouth,* 406 U.S. at 527 (shrimp deveining machine did not infringe where entire machine was not assembled domestically; "it is not an infringement to make or use a patented product outside of the United States"). The Court accordingly requires a "clear and certain signal" from Congress before extending U.S. patent liability to conduct abroad. *Deepsouth,* 406 U.S. at 530-31.

There was no such signal here. In adopting Section 271(f), Congress intended to address the *Deepsouth* decision under which a U.S. manufacturer evaded U.S. patent liability simply by having the final assembly of U.S.-made machine parts take place abroad. Nothing in the text of Section 271(f) or its minimal legislative history suggests, however, that Congress intended to impose U.S. patent liability for merely *designing* parts that would later be made and sold abroad. The legislative history indicates only that Congress intended to provide "a legislative solution to close a loophole in patent law"—to "prevent copiers from avoiding U.S. patents by supplying components of a patented product in this country so that the assembly of the components may be completed abroad." *Patent Law Amendments of 1984,* 1984 U.S. CODE CONG. & ADMIN. NEWS 5827, 5828.

The Federal Circuit viewed the loophole-closing nature of Section 271(f) as a mandate to construe it more broadly than its literal language covers. In particular, the Federal Circuit strove not to "permit[] a technical avoidance of the statute by ignoring the advances in a field of technology . . . that developed after the enactment of § 271(f)." 414 F.3d at 1371. That analysis, however, contradicts this Court's repeated admonition that it is up to Congress, not the courts, to extend the territorial scope of U.S. patent law to address modern developments in technology and international trade. For 150 years, this Court has held that the courts must avoid "strain[ing] by technical constructions to reach cases which Congress evidently could not have contemplated." *Brown,* 60 U.S. at 197.[3]

Ultimately, the Federal Circuit failed to heed the lesson of *Deepsouth*. The process there worked. The Court's decision properly construed Section 271(a) as it was written, rather than broadening it by judicial

[3] To the extent that Congress *did* contemplate exportation of master disks back in 1984, that merely confirms the flaw in the Federal Circuit's statutory construction. Nothing in the language or legislative history of Section 271(f) suggests that Congress was concerned about such exportation.

fiat. The Court instead invited Congress to reexamine the statute. Congress did, detected a loophole, and enacted Section 271(f) to fill it. In this case, this Court again should construe Section 271(f) as written and originally intended and understood. If Congress thinks modern technology has opened further loopholes, then Congress can step in and fill them. The Court should not assume a legislative role itself.

B. Awarding U.S.-Law Damages Based on Worldwide Sales Would Raise Serious International Comity Concerns

International comity considerations also caution against expanding Section 271(f) to cover foreign-made components. AT&T is correct that "'U.S. intellectual property laws are often more protective than those of other countries.'" [Resp. to U.S. Br. 6 (citation omitted)] But it draws the wrong conclusion from that fact. As this Court explained in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991), application of legislation beyond the territorial jurisdiction of the United States may lead to "unintended clashes between our laws and those of other nations which could result in international discord." Thus, "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffman-La Roche Ltd. v. Empagran S.A.,* 542 U.S. 155, 164 (2004).

By imposing liability for worldwide use, the effect of the decision below is to impose U.S. standards of patentability on the rest of the world—even in countries where the U.S. patentee did not seek patent protection, and even in countries where patent coverage would have been statutorily barred. Sovereign nations are entitled to fix their domestic intellectual property laws and policies in the way they see fit and without interference from other sovereigns.

The conflict-of-laws problem is very real because many countries view patentable subject matter more narrowly than this country does. That is particularly so in the realm of software-related inventions. *See generally* Jinseok Park, *Has Patentable Subject Matter Been Expanded? A Comparative Study on Software Patent Practices in the European Patent Office, the United States Patent and Trademark Office and the Japanese Patent Office,* 13 INT'L J.L. & INFO. TECH. 336 (2005).

American courts have taken a relatively broad view of the patentability of such inventions. *See, e.g., In re Alappat,* 33 F.3d 1526 (Fed. Cir. 1994) (en banc) (computer programmed to carry out a claimed invention held patentable). In contrast, Article 52(2)(c) of the European Patent Convention, specifically forbids patenting computer programs. European courts have struggled to construe that exclusion from patentability, but there is little doubt that "[t]he position is different in Europe from that in the USA." *Aerotel Ltd v. Telco Holdings Ltd,* [2006] EWCA Civ 1371, ¶ 13, 2006 WL 3102401 (also questioning several of the policy assumptions of U.S. law). Japan follows its own, different path. *See* MANUAL FOR THE HANDLING OF APPLICATIONS FOR PATENTS, DESIGNS AND TRADEMARKS THROUGHOUT THE WORLD, "Japan" at 5 (Arnold Siedsma eds. 2006).

The potential for conflict is magnified because American law may authorize treble damages in circumstances where foreign law would allow no recovery at all. *See* 35 U.S.C. § 284.

When other countries have declined to allow or award patent protection under their laws, American courts should refrain from subverting those decisions by awarding damages under U.S. law based on manufacturing and sales in those countries. At a minimum, this Court should require clear and unmistakable instruction from Congress before holding that U.S. courts may award damages under U.S. law for actions in foreign countries that are perfectly legal in those countries.

The rule should be the same in cases like this one, in which the patentee has secured patent protection in some foreign jurisdictions. To begin with, the patentee may not have obtained coverage worldwide. Moreover, the breadth of foreign patent claims often differs from that of U.S. patent claims: the claim language, the patentee's written description of the invention in the specification, and its representations to patent office examiners during prosecution all can and frequently do differ. The problem of international conflict is thus virtually unavoidable.

In any event, where foreign patent coverage does exist, there is no need for U.S. law to provide an additional remedy. Authorizing liability under both U.S. and foreign law would only raise the specter of duplicative liability and double recovery. Once again, unless and until Congress clearly dictates otherwise, the soundest approach is to leave it to other nations to determine liability and remedies for any patent infringement that may have occurred within their borders.

C. AT&T's Construction of Section 271(f) Would Put American Companies at a Disadvantage and Encourage Them to Move Design Activities Abroad

Expansion of Section 271(f) to cover the exportation of master versions of software code ultimately would backfire by disadvantaging American software companies and encouraging them to relocate their design activities abroad.

Consider two software companies, one American-based and one European-based, both of which are accused of infringing a U.S. patent. Under the Federal Circuit's construction of Section 271(f), the American company may be liable for damages based on worldwide use because it "supplied" a "component" from the U.S. The potential liability of the European company, in contrast, would be just a fraction of that amount because the damages base would be limited to usage within this country.

Over the long run, that asymmetry would encourage U.S. software companies to design their products and write their code abroad. It is no answer to say that software companies should simply avoid infringing others' patents. Of course they should try, but as a practical matter, the thicket of software-related patents is dense, and it is hard to predict how broadly they will be construed. As a result, virtually every significant high technology company is likely to face patent infringement allegations. Companies are already moving software design activities offshore for economic reasons, and American courts should not worsen the situation by placing U.S. software designers at a competitive disadvantage.

No one knows for sure what will happen if this Court affirms the decision below: we are treading in uncharted waters. One thing is certain, however: Congress and the President are far better equipped than the courts to weigh the difficult policy issues involved in expanding Section 271(f). AT&T itself agrees that "Congress, not the Judiciary, should resolve the complex current debate about the net effect of Section 271(f) on U.S. economic interests." [Resp. to U.S. Br. 1] The proper disposition in this case is thus to limit the scope of Section 271(f) to its plain language and leave it to the political branches to tackle the difficult international political and policy issues that would arise if U.S. patent liability were extended as AT&T proposes.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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