U.S. law gives patentees the right to prevent others from using their inventions in the United States. 1 35 U.S.C. § 271(g) extends this protection by allowing patentees to prevent others from importing products made by patented processes. 2 In *Syngenta Crop Protection, LLC v. Willowood, LLC*, 3 the U.S. Court of Appeals for the Federal Circuit (CAFC) considered whether a patentee pursuing an action for infringement under 35 U.S.C. § 271(g) must show that the relevant patented process was performed by a single entity or whether the patentee merely needs to show that all of the steps of the patented process were performed prior to the product’s importation. 4 After considering this statute’s language and legislative history, the CAFC concluded that 35 U.S.C. § 271(g) only requires the patentee to do the latter. 5

On December 8, 1998, the U.S. Patent Office issued U.S. Patent No. 5,847,138 (‘138 Patent) to Imperial Chemical Industries PLC. 6 Imperial Chemical Industries PLC subsequently spun off its agricultural chemicals business to

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1. See 35 U.S.C. § 283 (allowing courts to grant injunctions to secure patent rights); id. § 271(a) (stating infringement occurs when individual without authority uses patented invention). Title 35 of the U.S. Code also allows patentees to seek damages to compensate for losses they incurred due to infringement. See id. § 284 (providing for compensatory damages). See generally Richard L. Stroup et al., *Patentee’s Monetary Recovery from an Infringer—A Revisit*, 98 J. PAT. & TRADEMARK OFF. SOC’Y 727 (2016) (summarizing damages law).

2. See 35 U.S.C. § 271(g) (providing infringement when individual without authority imports product made by patented process); supra note 1 (discussing remedies for infringement). Subsection (g) of 35 U.S.C. § 271 also bars offering to sell, selling, and using products made by patented processes. 35 U.S.C. § 271(g).


4. See id. at 1354, 1359-60 (summarizing issues CAFC considered). The CAFC also considered several other intellectual-property-related issues. See id. at 1356-59, 1364-65 (articulating copyright infringement and sale location issues). One such issue was whether evidence that a product was shipped free on board from a foreign country is sufficient to allow a jury to conclude that the sale took place outside of the United States. See id. at 1364-65 (holding such evidence sufficient). The court also considered whether the federal statute governing fungicide labeling, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), precludes copyright protection for fungicide labels. See id. at 1355-56 (presenting issue and remanding for further consideration on FIFRA and copyright claims).

5. See id. at 1359 (holding § 271(g) does not include single-entity requirement).

6. See U.S. Patent No. 5,847,138, at [45] (filed June 7, 1995) (providing patent’s issue date); id. at [73] (providing patent’s assignee). This patent has since expired. See 35 U.S.C. § 154(c)(1) (setting patent term at 17 years for certain patents); Uruguay Round Agreements Act, 19 U.S.C. § 3513(a) (setting Uruguay Round Agreements Act’s implementation date); ’138 Patent, at [22] (providing patent’s filing date); 944 F.3d at 1349 (providing December 8, 2015 expiration date).
a new company called Zeneca in 1993. The ‘138 Patent includes claims that encompass a process for forming azoxystrobin. These claims comprise two steps: an initial etherification step and a subsequent condensation step.

The three defendants, Willowood, LLC (W-LLC); Willowood USA, LLC (W-USA); and Willowood Limited (W-China) (collectively, Willowood), sought to sell their own azoxystrobin products. Pursuant to this objective, in 2013, W-USA purchased five kilograms of azoxystrobin from W-China, a Chinese chemical distributor. W-China had obtained this azoxystrobin from Yang-cheng Tai He Chemicals Corp. (Tai He). Upon receipt of the Tai He-synthesized azoxystrobin, W-USA and W-LLC engaged third parties to prepare azoxystrobin formulations. W-USA and W-LLC then sought EPA approval for these formulations in order to market and sell them.


9. See 944 F.3d at 1349 (describing ‘138 Patent’s scope). Azoxystrobin is a fungicide that is commonly used for crop protection. See id. (describing azoxystrobin functionality).

10. See id. (detailing claimed method for making azoxystrobin).

11. See id. (accounting Willowood’s pursuit of Environmental Protection Agency (EPA) approval for generic azoxystrobin products). Syngenta highlighted the close ties between the various Willowood defendants in an attempt to convince the CAFC to attribute liability for W-USA’s actions to W-China. See Corrected Opening Brief of Appellant at 8, 63-64, 944 F.3d 1344 (No. 2018-1614) (asserting various Willowood entities associated with each other). This approach was not successful. See 944 F.3d at 1365 (holding jury verdict supported by sufficient evidence).

12. See 944 F.3d at 1350 (highlighting Willowood’s concession of azoxystrobin importation). Although Willowood did not contest that it imported this azoxystrobin, W-China denied Syngenta’s assertion that this act amounted to W-China selling azoxystrobin in the United States or importing azoxystrobin into the United States. See id. (summarizing dispute on this point and finding it for jury to decide). Syngenta failed to persuade the jury that W-China performed either of these actions and failed to convince both the U.S. District Court for the Middle District of North Carolina (Middle District of North Carolina) and the CAFC to set aside that verdict. See id. at 1353, 1364 (describing jury’s findings and CAFC affirmation). Accordingly, the Middle District of North Carolina and the CAFC determined W-China’s actions to be extraterritorial and thus did not cause W-China to incur liability for patent infringement. See id. at 1364 (affirming Middle District of North Carolina’s findings on this issue).

13. See id. at 1350 (emphasizing agreement where Tai He supplied azoxystrobin to W-China).

14. See id. at 1349-50 (describing W-USA’s and W-LLC’s process for obtaining generic azoxystrobin fungicides from imported azoxystrobin).

15. See id. at 1349 (describing Willowood’s interactions with EPA and marketing and sales activities). Willowood solicited EPA approval of two products, Azoxy 2SC and AzoxyProp Xtra, both of which Syngenta accused of infringing the ‘138 Patent. See id. at 1349-50 (providing origin of Syngenta’s claims). These products mimicked Syngenta’s QUADRIS, Registration No. 2068931, and QUILT XCEL, Registration No. 3934947, products, respectively, in both composition and labeling. See id. (describing Willowood’s actions precipitating litigation).
On March 27, 2015, Syngenta sued Willowood in the Middle District of North Carolina, asserting that Tai He used the method claimed in the ‘138 Patent to synthesize the azoxystrobin purchased by W-USA from W-China, and that W-USA was thus liable for infringing the ‘138 Patent under 35 U.S.C. § 271(g).16 Syngenta did not prove to the jury that Tai He either performed or controlled the performance of both the etherification step and the condensation step.17 Lacking explicit instructions from a higher court as to whether 35 U.S.C. § 271(g) required such a showing, the Middle District of North Carolina held that it did not.18 In so concluding, the Middle District of North Carolina simply stated that it would interpret 35 U.S.C. § 271(g) to impose the same single-entity requirement as 35 U.S.C. § 271(a), which sets forth what a patentee must show to establish patent infringement by the domestic actions of another party.19 The CAFC disagreed with the Middle District of North Carolina’s reasoning, holding that 35 U.S.C. § 271(g) explicitly describes the relevant single entity as the importer, not the manufacturer.20 The CAFC also gave great weight to 35 U.S.C. §

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16. See 944 F.3d at 1348-50 (providing procedural history and Syngenta’s contentions). Syngenta also argued that Willowood should still be liable for infringement if Tai He only performed a portion of the synthesis method claimed by the ‘138 Patent. See Syngenta Crop Prot., LLC v. Willowood, LLC, No. 1:15-CV-274, 2017 U.S. Dist. LEXIS 43743, at *11-12 (M.D.N.C. Mar. 24, 2017) (describing Syngenta’s arguments regarding 35 U.S.C. § 271(g)’s scope), aff’d in part by, vacated in part by, rev’d in part by, and remanded by 944 F.3d 1344. The Middle District of North Carolina did not find in favor of Syngenta on this issue. See id. at *11-13 (noting CAFC had not addressed this question and denying summary judgment for Syngenta).

17. See 944 F.3d at 1353-54 (providing jury verdict finding Syngenta did not prove Tai He performed or controlled both steps).

18. See supra note 16 (describing Middle District of North Carolina’s findings and reasoning).


20. See 944 F.3d at 1359-60 (interpreting 35 U.S.C. § 271(g)). The CAFC noted that, under 35 U.S.C. § 271(g), the entity that imports the product made by the patented process is considered to infringe the patent, not the entity that performs the patented process. See id. at 1360 (emphasizing party for which 35 U.S.C. § 271(g) generates liability). The CAFC also emphasized that Congress included other sections in 35 U.S.C. that explicitly cause entities practicing patented processes, or portions of such processes, to incur liability. See id. at 1360-61 (contrasting 35 U.S.C. §§ 271(a), (f) with 35 U.S.C. § 271(g)). The court posits that these sections indicate that Congress knew how to include a single-entity requirement but chose not to do so in 35 U.S.C. § 271(g). See id. at 1361 (pointing out presumption of purposeful exclusion when language included in another section of statute).
271(g)’s legislative history, determining that Congress intended for 35 U.S.C. § 271(g) to prevent patentees’ competitors from avoiding their patents by merely shifting manufacturing offshore and then importing products made by patented processes back into the United States for subsequent sale.21

When a court interprets a statute, it begins with the statute’s language.22 First, the court assesses whether the language has a clear and unambiguous meaning.23 This analysis is performed in the context of the statute as a whole.24 If the statute’s language alone is insufficient to clarify its meaning, courts then look to its legislative history to ascertain congressional intent for the statute.25 Courts also recognize a strong presumption that statutes do not have extraterritorial effect.26

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21. See id. at 1363 (emphasizing Congress’s intent to target offshore manufacturing followed by importation of patented products). The CAFC also noted the “undue evidentiary burden” the Middle District of North Carolina’s standard would impose on patentees. See id. (identifying challenges patentees face under single-entity standard).


Section 271(g) of Title 35 dates back to 1988. At that time, Congress was concerned about a perceived loophole in the law that would allow U.S. entities to avoid infringing process patents, but still gain the benefits associated with practicing them, by performing the claimed processes abroad and then importing the resultant products into the United States. To close this potential loophole, Congress enacted 35 U.S.C. § 271(g), which holds entities that import products made by patented processes liable for infringement. Accordingly, prior CAFC decisions have characterized 35 U.S.C. § 271(g) as giving patentees protection against overseas entities commensurate with the protection they enjoy against domestic entities. Prior to the enactment of this statute, patentees could sometimes preclude their competitors from importing such products with the assistance of the International Trade Commission (ITC). ITC actions were, and remain, a comparatively undesirable option because the ITC cannot award


29. See supra note 28 (discussing congressional intent). The Process Patent Amendments Act of 1987 also sought to assist patentees by, in certain situations, shifting the burden of proof such that alleged infringers must show that products manufactured abroad do not infringe the asserted process patents. See S. Rep. No. 100-83, at 44-45 (describing conditions when burden shift applies). This burden-shifting framework is used in situations where Congress believed it would be challenging for patentees to establish infringement: when the patentee can establish that there is a substantial likelihood that a foreign entity performed the patented process and when the patentee has made a reasonable but unsuccessful effort to make this showing. See id. at 57-58 (emphasizing alleged infringer’s better position to demonstrate non-infringement); H.R. Rep. No. 100-60, at 16 (emphasizing difficulties facing patentee in making such showing and ease of infringer in doing so).

30. See Mycogen Plant Sci., Inc. v. Monsanto Co., 252 F.3d 1306, 1318 (Fed. Cir. 2001) (identifying congressional intent of granting patentees similar protection against domestic and foreign competitors), vacated on other grounds, 535 U.S. 1109 (2002). Interestingly, Mycogen also stated that, for liability under 35 U.S.C. § 271(g) to accrue, the process giving rise to such liability must have been patented at the time when the alleged infringement occurred. See id. (highlighting parallel use of “made” and “patented” in 35 U.S.C. § 271(g)). Since Mycogen, the CAFC has further restricted 35 U.S.C. § 271(g)’s scope to actions constituting the making of a product. See Momenta Pharm., Inc. v. Teva Pharm. USA Inc., 809 F.3d 610, 616 (Fed. Cir. 2015) (contrasting product manufacturing with testing and quality control).

31. See 19 U.S.C. § 1337(a)(1)(B) (forbidding importation of products made by patented process); id. §§ 1337(d)(1), (i)(1) (providing remedies). This statute does, however, allow for civil penalties if an entity disobeys an exclusion order. See id. § 1337(O)(2) (setting forth consequences of violating order).
damages and requires findings beyond patent infringement before it can issue any remedy. 32

The other subsections of 35 U.S.C. § 271 also inform the interpretation of subsection (g). 33 Subsection (a), which causes entities to incur liability for making or using a patented invention without authorization, has been interpreted to require a single entity (possibly as one member of a joint entity) to perform or control the performance of all steps of a patented process to infringe the patent claiming that process. 34 Subsection (b), which causes inducers of infringement to incur liability, has been understood to require an act that would constitute infringement under one of the other subsections and, therefore, to have the same entity requirement as the subsection under which such infringement is alleged. 35 Subsection (f), which was enacted only four years prior to subsection (g), identifies the entity incurring liability as the entity that “without authority supplies or causes to be supplied . . . the components of a patented invention.” 36 Notably, Congress enacted subsection (f) to explicitly overrule the Supreme Court’s decision in Deepsouth Packing Co. v. Laitram Corp. and provide actionable claims against entities seeking to avoid the technicalities of the law by shifting their operations abroad. 37

32. See 19 U.S.C. §§ 1337 (d)(1), (e)(1), (f)(1) (providing remedies); id. § 1337(a)(2) (limiting remedies to actions where patent protects product with related domestic industry). This statute also allows the President to circumvent ITC findings by rescinding its exclusion orders. See id. § 1337(j)(2) (nullifying ITC actions upon presidential disapproval). Both the House of Representatives and the Senate found these limitations, and the challenges associated with policing importers, to be substantial drawbacks. See S. Rep. No. 100-83, at 37-38 (describing ITC action requirements and emphasizing costs to patentees); H.R. Rep. No. 100-60, at 3-4 (stating ITC remedies “not effective” for many reasons).

33. See 944 F.3d at 1360 (interpreting subsection (g) in context of entire statute); supra note 24 and accompanying text (explaining well-established rule of interpreting each subsection in context of other subsections).


36. See 35 U.S.C. § 271(f) (prohibiting acts of supplying components of patented invention and inducing their combination outside United States); 944 F.3d at 1361 (noting four year gap between enactment of subsection (f) and subsection (g)).

In Syngenta Crop Protection, LLC v. Willowood, LLC, the CAFC held that 35 U.S.C. § 271(g) imposes liability on an entity for importing a product manufactured abroad by a patented process, even when the patented process is performed by two or more entities. The CAFC highlighted that 35 U.S.C. § 271(g) specifically precludes importation of products made by patented processes and assigns liability to whoever performs this forbidden importation. Thus, according to the CAFC, 35 U.S.C. § 271(g) is unconcerned with the identity of the actor or actors performing the process that results in the product whose importation is forbidden.

The CAFC then noted that this language differs from that in 35 U.S.C. § 271(a), which has a single-entity requirement, as that subsection assigns liability to whoever “makes, uses, offers to sell, . . . sells . . . or imports . . . any patented invention.” The CAFC also noted that 35 U.S.C. § 271(f) specifically prohibits inducing action in the United States, and so held that the absence of similar language in 35 U.S.C. § 271(g) strongly implies that 35 U.S.C. § 271(g) does not have an analogous requirement. Finally, the CAFC analyzed the Senate Report that accompanied 35 U.S.C. § 271(g)’s enactment and held that it supported the conclusion that 35 U.S.C. § 271(g) is directed to deterring importation of products and is indifferent as to the entities that manufactured them.


38. See 944 F.3d at 1359-60 (presuming statute’s language).
39. See id. (emphasizing importer—not manufacturer—incurs liability).
40. See id. at 1360 (explaining 35 U.S.C. § 271(g)’s language shows immateriality of manufacturer identity).
41. See 35 U.S.C. § 271(a) (identifying actions constituting patent infringement); 944 F.3d at 1360 (contrasting subsections (g) and (a) of 35 U.S.C. § 271). By contrast, 35 U.S.C. § 271(g) states that “[w]hoever . . . imports into the United States or offers to sell, sells, or uses . . . a product which is made by a process patented in the United States shall be liable as an infringer.” 35 U.S.C. § 271(g). These subtle differences in language caused the CAFC to interpret these two subsections very differently. See 944 F.3d at 1360, 1363 (providing textual support for different interpretation of subsections (a) and (g)).
42. See 944 F.3d at 1361 (emphasizing language and legislative history of 35 U.S.C. § 271(f)). The CAFC took pains to note that 35 U.S.C. § 271(g) was passed shortly after 35 U.S.C. § 271(f). See id. (emphasizing four-year difference in enactment dates). Based on this proximity in time and the difference in the language between the two subsections, the CAFC inferred that Congress knew how to assign liability to entities for actions performed abroad that would constitute infringement if performed domestically. See id. (assuming congressional knowledge). Because Congress, despite this knowledge, did not do so, the CAFC interpreted 35 U.S.C. § 271(g) to not impose such a requirement. See id. (presuming differences in language intentional).
43. See id. at 1362 (focusing on Senate Report’s emphasis on protecting products).
The CAFC’s decision effectuates Congress’s intent for 35 U.S.C. § 271(g) by protecting patent holders’ interests from competition with foreign entities who wish to shield themselves from liability by practicing in countries that allow less extensive discovery than the United States. Nevertheless, the CAFC did not analyze this statute’s plain language as fully as it should have. The CAFC correctly emphasized that the phrase “whoever without authority imports” in 35 U.S.C. § 271(g)’s first sentence assigns liability to the entity importing the accused product. The CAFC did not, however, pay appreciable attention to the phrase “made by a process patented in the United States” that follows later in that same sentence. This second phrase defines which products trigger liability upon importation.

In declining to consider this phrase’s meaning, the CAFC failed to demonstrate that its interpretation of the statute is consistent with the statute’s plain language. One plausible interpretation of 35 U.S.C. § 271(g)’s reference to a product that is “made by a process patented in the United States” is that it describes a product made by a process whose performance would, if performed in the United States, constitute patent infringement. This interpretation of 35 U.S.C. § 271(g) is consistent with the Supreme Court’s and the CAFC’s prior interpretation of subsection (b) of this same statute. Both of these statutory subsections assign liability to entities that cause patented processes to be practiced, but do

44. See supra note 28 and accompanying text (describing congressional intent).
45. See infra notes 50-54 and accompanying text (providing alternate interpretation for 35 U.S.C. § 271(g) CAFC didn’t consider).
46. See 944 F.3d at 1359 (emphasizing importation gives rise to liability under 35 U.S.C. § 271(g)). The CAFC explicitly noted that subsection (g) does not proscribe practicing patented processes abroad. See id. at 1359-60 (contrasting practicing patented process in foreign jurisdiction with activities generating liability). Given the presumption against the extraterritorial reach of U.S. statutes, this is an appropriate, if not fully informative, interpretation of 35 U.S.C. § 271(g). See supra note 26 and accompanying text (summarizing this presumption and associated two-step framework).
47. See 944 F.3d at 1359-63 (summarizing CAFC’s statutory interpretation); see also infra notes 50-54 and accompanying text (discussing this phrase’s possible import).
48. See 35 U.S.C. § 271(g) (defining products whose importation causes liability for infringement to accrue).
49. See supra notes 22-26 and accompanying text (describing process courts must use to interpret statutes); see also 944 F.3d at 1359 (providing overview of process CAFC employed to interpret 35 U.S.C. § 271(g)).
50. Cf. Momenta Pharms., Inc. v. Teva Pharms. USA Inc., 809 F.3d 610, 622 n.1 (Fed. Cir. 2015) (Dyk, J., dissenting) (stating 35 U.S.C. § 271(g) should also apply to products made in United States). The only way for Judge Dyk’s interpretation of 35 U.S.C. § 271(g) to be consistent with the CAFC’s jurisprudence regarding divided infringement would be for 35 U.S.C. § 271(g) to have a single-entity requirement. See supra notes 34-35 (describing single-entity requirement for 35 U.S.C. §§ 271(a)-(b)). Mycogen also supports an interpretation of 35 U.S.C. § 271(g) that incorporates standards used to assess domestic patent infringement. See Mycogen Plant Sci., Inc. v. Monsanto Co., 252 F.3d 1306, 1318 (Fed. Cir. 2001) (requiring issuance of patent to process for liability to accrue under 35 U.S.C. § 271(g), vacated on other grounds, 535 U.S. 1109 (2002). Notably, Mycogen also states that this interpretation of 35 U.S.C. § 271(g) is supported by its legislative history. See id. (reasoning 35 U.S.C. § 271(g) granted patentees commensurate protection abroad and domestically).
51. See supra note 35 and accompanying text (describing single-entity requirement jurisprudence related to 35 U.S.C. § 271(b)).
not practice such processes themselves.\textsuperscript{52} Accordingly, it would be natural to understand these two subsections to both either have or lack a single-entity requirement.\textsuperscript{53} As apparent from \textit{Syngenta}, this is not the only plausible interpretation of the phrase “made by a process patented in the United States”; the CAFC, however, should have considered this interpretation pursuant to its obligation to assess the statute’s plain language.\textsuperscript{54}

Nevertheless, the CAFC’s interpretation of 35 U.S.C. § 271(g) is correct on the merits.\textsuperscript{55} The CAFC appropriately contrasted subsection (f)’s language, which imposes liability for actions performed abroad that would constitute patent infringement if performed in the United States, with subsection (g), which is silent regarding whether the foreign actions for which it imposes liability must be actions that would also incur liability if performed domestically.\textsuperscript{56} Additionally, applying a stricter standard to importers than to U.S. manufacturers accords with Congress’s goal for subsection (g)—establishing broad protections for U.S.-based companies from foreign competitors.\textsuperscript{57} Therefore, the CAFC’s interpretation of 35 U.S.C. § 271(g) is appropriate because it is reasonable both textually and in view of congressional intent.\textsuperscript{58}

In \textit{Syngenta Crop Protection, LLC v. Willowood, LLC}, the CAFC interpreted 35 U.S.C. § 271(g) to bar importation of products manufactured by two or more entities together performing a patented process. Although the CAFC did not fully consider alternate, plausible interpretations of subsection (g), it interpreted subsection (g) consistently with congressional intent and appropriately contextualized it relative to the other subsections of 35 U.S.C. § 271. As now interpreted, 35 U.S.C. § 271(g) causes importers to incur liability for acts performed by foreign entities that 35 U.S.C. § 271 does not bar domestic entities from performing. Looking forward, this interpretation will promote U.S.-based manufacturing for products whose methods of making are covered by patents comprising steps that can be split into groups that different entities can perform independently from each other. It will also pose additional challenges for

\textsuperscript{52} See 35 U.S.C. § 271(b) (declaring inducement of patent infringement causes infringement liability to accrue); id. § 271(g) (declaring importation of product made by patented process causes infringement liability to accrue). Neither of these subsections of 35 U.S.C. § 271 specify that direct infringement must be performed by the entity incurring liability. See id. §§ 271(b), (g) (assigning liability to inducer and importer, respectively).

\textsuperscript{53} See 944 F.3d at 1361 (stating different language implies different meaning, thereby suggesting similar language implies similar meaning).

\textsuperscript{54} See id. at 1359-60 (interpreting 35 U.S.C. § 271 differently than proposed in this Comment); supra notes 22-26 and accompanying text (outlining process employed during statutory interpretation).

\textsuperscript{55} See infra text accompanying notes 56-58 (describing appropriateness of CAFC’s interpretation of 35 U.S.C. § 271(g)).

\textsuperscript{56} See 944 F.3d at 1361 (holding lack of U.S.-specific language in 35 U.S.C. § 271(g) reflective of congressional intent).

\textsuperscript{57} See supra notes 28, 30 and accompanying text (describing legislative history of 35 U.S.C. §271(g)).

\textsuperscript{58} See 944 F.3d at 1360-62 (providing congressional intent and textual basis for holding); supra notes 28, 30 and accompanying text (describing congressional intent behind 35 U.S.C. § 271(g)); supra notes 39-42 and accompanying text (explaining CAFC’s textual analysis of 35 U.S.C. § 271(g)).
importers seeking to escape patent infringement liability by purchasing products from countries that do not provide the robust discovery of the U.S. courts.

Charlotte Stewart-Sloan