

Review of VLSI Patents in Intel Fight Seen Enticing ‘Opportunists’

Matthew Bultman

January 28, 2022

[Link](#)

An administrative tribunal’s decision to accept validity challenges to VLSI Technology LLC patents supporting a \$2.18 billion verdict against Intel Corp. invites profiteers to abuse the system, some attorneys warn.

The Patent Trial and Appeal Board in recent weeks has agreed to review VLSI’s patents based on challenges brought by two entities—OpenSky Industries LLC and Patent Quality Assurance—that were formed weeks after the March verdict.

Some attorneys fear the board’s willingness to institute inter partes review creates an incentive for opportunistic entities to emerge after a large verdict in hopes of getting paid off.

“It is concerning for complete opportunists to come in and take advantage of patent owners,” said Nicholas Match, an attorney at McKool Smith PC in Washington and former acting general counsel at the patent office.

OpenSky declined to comment. An attorney for PQA, Bruce Slayden of Slayden Grubert Beard PLLC, didn’t immediately respond to a request for comment. Neither OpenSky nor PQA has been accused of infringement.

Slayden, in an email to VLSI that was included in PTAB filings, said the organization is made up of “business people.” PQA’s goal, it has said, is to “demonstrate unpatentability of the challenged claims.” OpenSky told the PTAB review was needed to “maintain the integrity of the patent system.”

New Business Model

VLSI’s patents cover technology related to chip-making. A jury in the U.S. District Court for the Western District of Texas found Intel infringed both patents and owed \$2.18 billion—one of the largest patent verdicts in U.S. history.

Jurors also rejected Intel’s argument that one of the patents was invalid because it claimed to cover work done by Intel engineers.

Previously, Intel asked the PTAB to review the validity of both patents. The PTAB denied the petitions under a much-debated rule regarding the board’s discretion to institute review, deferring to the district court case. The board didn’t decide the merits of the challenges.

Following the verdict, OpenSky and PQA dusted off Intel’s petitions and filed virtual “carbon copies,” using the same arguments and evidence, VLSI says. OpenSky is based in Nevada and formed in April. PQA was formed in South Dakota two months later.

Regardless of OpenSky and PQA's motivations, some attorneys worry about the precedent being set.

"Every time there is a huge verdict the incentive is to go set up an LLC, try to make as limited of an identification of who's behind it as possible, recycle as much of the prior work as you can, and file it," said Alison Aubry Richards, an attorney at Global IP Law Group LLC in Chicago.

"And that's the new business model—you have to pay me to withdraw the IPR," Richards said.

Sen. Thom Tillis (R-N.C.), in a recent statement supporting the nomination of Kathi Vidal as patent office director, singled out OpenSky as an example of "bad actors" that "use the PTAB as a form of strategic litigation to attack competitors."

Others viewed the challenges as a new spin on long-standing concerns about serial challenges to patents, and people recycling old petitions. Adam Mossoff, a law professor at George Mason University, said VLSI won in court "under all of the regular rule of law norms" and "due process requirements."

"These new entities, these PTAB trolls, have arisen to try to take advantage of the failure of the PTAB to follow those same due process requirements and rule of law norms," Mossoff said.

Prospector Complaints

VLSI has suggested in PTAB filings that OpenSky and PQA are "prospectors" searching for a payout. It has asked a panel of top patent office officials to step in, arguing the board shouldn't reward "such harassment."

For some, the complaints ring hollow.

VLSI was created by Softbank Group Corp.-owned Fortress Investment Group., which has been accused of hoarding patents and making aggressive demands. The patents in the Intel case once belonged to Dutch chipmaker NXP Semiconductors Inc. and were transferred to VLSI in 2019.

"It is the height of hypocrisy for an NPE litigation vehicle that is 100 percent designed only to profiteer off of the litigation to then turn around and accuse others of doing the same," said Jonathan Stroud, chief IP counsel at Unified Patents, a membership group that seeks to deter patent assertions from NPEs.

NPE is an acronym for non-practicing entity, a term for companies that make money enforcing patents, as opposed to selling products.

Fintiv Rule

There have been attempts to make money off PTAB challenges before.

Hedge fund manager Kyle Bass, for example, caused a stir in the pharmaceutical industry when he began requesting review of drug companies' patents as part of a profit strategy. The effort fizzled in 2017 and was considered to be generally unsuccessful.

The failure of these kinds of efforts, along with the lack of outside challengers to other patents after high-dollar verdicts, suggests to some attorneys the VLSI situation is an outlier.

Stroud suggested the real problem is the NHK-Fintiv rule, which the PTAB relied on to deny Intel's challenges. PTAB judges have relied on the rule, established under former patent office director Andrei Iancu, to deny review based on the stage of a parallel infringement case.

The patent office has defended the rule as offering flexibility to help ensure the board is an alternative to district courts, and doesn't institute redundant proceedings. One of the rule's flaws, Stroud says, is that it assumes patent disputes are contained to the two parties who are at the PTAB.

"If the board hadn't denied the original petitions under Fintiv" and decided the merits of the challenges, it "wouldn't be in this position," Stroud said.