



Vidal Reprimands OpenSky for IPR Abuses
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In a scathing [decision](#) published yesterday, October 4, Vidal said that OpenSky filed the IPR in an opportunistic attempt to extract payment from VLSI as well as from [Intel](#), which was joined as a petitioner by the [Patent Trial and Appeal Board](#) (PTAB) in June.

Vidal sanctioned OpenSky by barring it from the IPR proceedings, relegating it to a “silent understudy” role, “temporarily elevating” Intel to lead petitioner.

She has ordered OpenSky to prove why it should not be ordered to pay compensatory damages to VLSI, and has remanded to the PTAB for further proceedings to determine whether the petition presents a “compelling, meritorious challenge”.

Vidal said: “OpenSky’s behaviour in this proceeding is entirely distinguishable from conventional settlement negotiations that take place in an adversarial proceeding.”

Vidal: sanctions necessary to ‘deter others’

The director found that the firm “engaged in abuse of process and unethical conduct by offering to undermine and/or not vigorously pursue this matter in exchange for a monetary payment”.

“Each aspect of OpenSky’s conduct—discovery misconduct, violation of an express order, abuse of the IPR process, and unethical conduct—taken alone, constitutes sanctionable conduct,” she went on.

“Taken together, the behaviour warrants sanctions to the fullest extent of my power. Not only are such sanctions proportional to the conduct here, but they are necessary to deter such conduct by OpenSky or others in the future.”

Vidal also suggested that OpenSky’s counsel had acted unethically. “The conduct of the individual attorneys in this case might also rise to the level of an ethical violation under the rules of their respective bars.”

The director has precluded OpenSky from filing further papers or presenting further argument or evidence in the underlying proceedings or on director review “unless expressly instructed to do so by me or the Board”.

Data-processing tech

Vidal’s statement is the latest in a long and complex patent dispute, which began with VLSI’s complaint in April 2019 against Intel alleging infringement of its US patent 7,725,759 concerning data-processing technology.

California-based Intel subsequently filed two petitions for IPR, challenging the claims of the ’759 patent, which the PTAB denied having considered the precedential decision in *Apple v Fintiv* (from March 2020).

Intel requested a Precedential Opinion Panel (POP) review of the PTAB’s decisions, which the board denied.

The ensuing trial, in the Western District of Texas in March 2021, resulted in a jury verdict finding of infringement and [Intel was hit with a record \\$2.18 billion](#) in damages.

Open Sky Industries formed after the verdict, and then brought a validity challenge to the '759 patent at the PTAB.

Vidal subsequently [stepped in](#) to scrutinise the validity of the VLSI tech patent. She pointed out that in June 2021, OpenSky filed the petition for an IPR in the current case, challenging various claims of the '759 patent and another patent, which "copied extensively from Intel's two earlier petitions".

OpenSky-style petitions 'should not be tolerated'

[Nick Match](#), a principal in McKool Smith's IP practice, largely agreed with Vidal's objection to OpenSky's petition.

"There's been widespread agreement in the IP world that the OpenSky petition is abusive and should not be tolerated," he told *WIPR*. "What there's less consensus on is precisely what made it so offensive."

Match added that he's not entirely in agreement with Vidal's decision.

"Vidal takes the view that the problem with the petition was Open Sky's motives, that Open Sky never intended to litigate to conclusion and just wanted a payment from Intel or VLSI.

"She's right that initiating a legal proceeding on false pretences is bad, but I think she misses the larger picture. Allowing anyone or everyone to challenge a patent destabilises the patent system."

He added that the result of this case is a good example.

"Vidal is letting Intel take over the petition, even though Intel couldn't itself file one and Intel already had the chance to challenge the patent, once in court and once previously at the PTAB.

"Now Intel gets a third chance. That's unfair and is the kind of outcome that disincentivises inventors from trusting the patent system with their inventions."

WIPR has contacted attorneys for OpenSky, Intel and VLSI for comment.

USPTO's request for comment

Meanwhile, the USPTO [announced yesterday](#), October 4, that it is seeking public comment on patent practice initiatives, "to ensure the robustness and reliability of patent rights".

The request for comments, stated the USPTO, will address a variety of topics, including prior art searching, support for claimed subject matter, and request for continued examination (RCE) practice.

The office also seeks comments on questions set out in a letter to the USPTO on July 6, 2022, from the six US senators.