

No. 2023-2346

**IN THE
UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT**

LYNK LABS, INC.,
Appellant

v.

SAMSUNG ELECTRONICS CO., LTD.,
Appellee

**COKE MORGAN STEWART, Acting Under Secretary of Commerce for
Intellectual Property and Acting Director of the United States Patent and
Trademark Office,**
Intervenor

APPEAL FROM THE UNITED STATES PATENT AND TRADEMARK
OFFICE, PATENT TRIAL AND APPEAL BOARD IN NO. IPR2022-00149

**BRIEF OF AMICUS CURIAE VLSI TECHNOLOGY LLC
IN SUPPORT OF EN BANC REHEARING**

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March 28, 2025

CERTIFICATE OF INTEREST

Counsel for VLSI Technology LLC in Appeal No. 2023-2346 certifies the following:

1. The full name of every party or amicus represented by me is:

VLSI Technology LLC.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

CF VLSI Holding LLC.

4. The names of all law firms and partners/associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this court and are not already listed on the docket for the current case are:

None (amicus).

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal are:

N/A (amicus).

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and .1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6):

None.

Dated: March 28, 2025

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INTEREST OF AMICUS CURIAE

Amicus VLSI Technology LLC (“VLSI”) is the appellant in a pending appeal (No. 23-2298) that presents the same question as this case.¹ In VLSI’s case, as here, the Patent Trial and Appeal Board ruled that a patent application may be a basis for IPR under 35 U.S.C. § 311(b) as of its filing date even though the application was undisputedly not publicly accessible before the challenged patent’s critical date.

VLSI’s interest in this question is manifest. The Board in this case cited its decision in VLSI’s case, and a correct interpretation of the statute would dispose of the patentability question in VLSI’s appeal. The panel denied VLSI’s motion for leave to participate at oral argument in this case (Dkt. 116).

ARGUMENT

The panel’s decision wrongly expands the scope of *inter partes* review (“IPR”) proceedings beyond the limits placed upon them by Congress, upending settled law of what constitutes “printed publication” prior art. This fundamental question, which resets the statutory scope of IPRs, is manifestly of exceptional importance. En banc rehearing is warranted.

¹ No one other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. The parties have consented to the filing of this brief and the intervenor does not oppose.

I. The Panel Decision Is Wrong.

A. The Statute Limits IPR Grounds To “Prior Art Consisting Of Patents Or Printed Publications.”

IPR challenges may be brought “*only* on the basis of prior art consisting of patents or printed publications.” 35 U.S.C. § 311(b) (emphasis added). This Court has always held that a “printed publication” is “prior art” only as of the date it is publicly accessible. *See, e.g., Samsung Elecs. Co. v. Infobridge Pte. Ltd.*, 929 F.3d 1363, 1369 (Fed. Cir. 2019), *Voter Verified, Inc. v. Premier Elections Sols., Inc.*, 698 F.3d 1374, 1380 (Fed. Cir. 2012). The abandoned patent application in this case (and VLSI’s case) was undisputedly not publicly accessible at the relevant time, and thus cannot be a “prior art ... printed publication[.]” “Where a statute’s language carries a plain meaning, the duty of an administrative agency is to follow its commands as written” *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 363 (2018). Here the panel joined the Board in departing from the plain meaning of the statute and the unbroken judicial interpretation of its “printed publications” language.

B. Congress Allowed For Other Prior Art Challenges In Other Forums.

Congress could have made the grounds available in IPRs more expansive. It did just that for post-grant review (“PGR”) proceedings, created simultaneously with IPRs, where petitioners are allowed to challenge patent claims under “*any* ground that could be raised” in district court. 35 U.S.C. § 321(b) (emphasis added). “As [the Supreme] Court has repeatedly stated, the text of a law controls over purported

legislative intentions unmoored from any statutory text[,] ... particularly ... when, as here, Congress has shown that it knows how to adopt the omitted language or provision.” *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 603 U.S. 799, 814-815 (2024) (cleaned up). Congress could have added prior art “applications for patent” to the categories of prior art enumerated in § 311(b), but “chose a different path.” *Id.*

The panel declares a different outcome in this case because, it proclaims, Congress created “a special [priority] rule for published patent applications” in 35 U.S.C. § 102(e)(1). Op. 8. But Congress never mentions patent applications in § 311(b). And Congress had created other priority rules for other statutory categories of prior art, such as prior public uses and offers for sale, which it *also* did not include in 35 U.S.C. § 311(b). *See, e.g.*, 35 U.S.C. § 102(b) (pre-AIA). The fact that some materials may land in multiple categories in some contexts does not change the fact that the patent application in this case does not land in the two categories of “prior art” enumerated in § 311(b).

No one is arguing that § 311(b) operates to exclude *all* abandoned patent applications—only that a patent application needs to satisfy the requirements of a prior art category that *is* enumerated in § 311(b) to be a basis for a prior art challenge in IPR. Similarly, no one is arguing that abandoned applications not publicly available by the critical date are *uncitable* in IPR proceedings. Such documents

could, for example, conceivably be raised as evidence of the knowledge of the person of ordinary skill in the art—although their filing and public accessibility *vel non* at the critical date could certainly be relevant to how probative they are of that knowledge. *See, e.g., Qualcomm Inc. v. Apple Inc.*, 24 F.4th 1367, 1375–76 (Fed. Cir. 2022). But that is not what happened here (or in VLSI’s case). Unlike in *Qualcomm*, no one has argued that the patent application could be used merely as evidence of a skilled artisan’s knowledge before the critical date; the relevant patent application was an express part of the basis of an IPR challenge. On this issue, however, Congress was clear: IPR challenges may only be advanced “on the basis of” two “prior art” categories: “prior art consisting of patents or printed publications.” 35 U.S.C. § 311(b).

C. The Panel’s Decision Conflicts With “Printed Publications” Precedent.

1. Prior Art Printed Publications Must Be Publicly Accessible Before The Critical Date.

The panel “disagree[s]” with the notion that the term “printed publication” in the prior art context includes “not *only* a requirement that [a document] be publicly accessible,” but a limitation on “*when* [that document] must have been publicly accessible in order to be treated as prior art.” Op. at 15 (emphasis in original). As Petitioner and this amicus have shown, this upends decades of precedent. *See, e.g.,* Pet. (Dkt. 129) at 7-9 (citing cases), VLSI Amicus Br. (Dkt. 17) at 5-7 (same).

As one example, documents evidencing prior public uses and offers for sale are often involved in prior art challenges. But unless such documents are sufficiently accessible to the public interested in the art before the critical date, such documents, though usable as evidence of prior public uses and offers for sale, are ineligible to be the basis of prior art challenges as “printed publications,” whether at the PTO or in district court. *See, e.g., Next Step Grp., Inc. v. Deckers Outdoor Corp.*, IPR2024-00525, Paper 16, 10-22 (P.T.A.B. Aug. 6, 2024) (denying institution when petitioner’s voluminous documentary evidence was not shown to be publicly accessible); *Koninklijke Philips N.V. v. Zoll Med. Corp.*, 656 F. App’x 504, 529 (Fed. Cir. 2016) (affirming district court finding that description of alleged prior use in regulatory filing was not “printed publication” because it “was not sufficiently available to the public prior to the priority date”).

The panel departs from this precedent in treating “printed document” status as effectively dispositive of the “printed publication” inquiry. *See, e.g., Op.* at 12, 19. Insofar as the panel means that it should not matter *when* a printed publication becomes publicly accessible, this is wrong, as the Petition explains. *See, e.g., Pet.* at 7-9. And if the panel means that patent applications should get “special” treatment because they are printed documents, *Op.* at 18, this contradicts a wealth of precedent that the physical printing or format taken by evidentiary materials is not germane to whether those materials are “printed publication” prior art. The touchstone of the

inquiry is instead *public accessibility before the critical date*. See, e.g., *In re Cronyn*, 890 F.2d 1158, 1161 (Fed. Cir. 1989) (printed document in library not a “printed publication” because of a lack of public accessibility before the critical date), *Voter Verified*, 698 F.3d at 1380 (electronic materials were a “printed publication” because they were publicly accessible before critical date). It was against this backdrop—not the panel’s interpretation of “printed publication”—that Congress created IPRs, and expressly limited them to challenges based on “prior art consisting of patents or printed publications.”

The panel asks why Congress might not want some patent applications to be the basis of IPR challenges when they can be the basis of challenges in district court. See Op. at 9. As a threshold matter, the plain meaning of the statute neither invites nor turns upon this inquiry. But the history of the statutory language suggests a Congressional desire for continuity. Congress originally used “prior art consisting of patents and printed publications” to define the scope of reexamination before patent applications were recognized as a distinct category of prior art. 35 U.S.C. § 301 (1980). It then used the same term to define the scope of in *inter partes* reexamination while separately providing for patent applications to be published, 35 U.S.C. § 311(a) (1999) (using § 301 to define the scope of *inter partes* reexamination), and then to define the scope of IPRs (but not PGRs), compare 35 U.S.C. § 311(b) with 35 U.S.C. § 321(b), see also Pet. at 13-14, Op. at 12-13

(describing this history). This history suggests that Congress intended this series of post-grant administrative proceedings to develop against a single, stable concept. The statute might well have reflected concerns about allowing these proceedings to be based upon materials “later abandoned and potentially of dubious quality” when these materials had not historically been available as prior art. *See generally* L. Mishchenko, *Thank You For Not Publishing (Unexamined Patent Applications)*, 47 *BYU L. REV.* 1563, 1567 (2022). Ultimately, any concerns that animated Congress were resolved in the statutory text enumerating the “prior art” category of “printed publications,” which had a settled meaning—until now.

2. The Panel’s Inferences About Congressional Purpose Are Inconsistent With Precedent And Would Illogically Embrace Sale And Use Art.

The panel’s emphasis on the status of an abandoned application as “printed document” derives in part from inferences about Congressional purpose. In the panel’s view, if IPR proceedings were intended as streamlined alternatives to district court validity challenges, then to expand § 311(b) by adding documentary materials beyond what Congress included would be “consistent with” that purpose. *See Op.* at 19. But this rationale for why Congress harbored some paramount—and, paradoxically, unwritten—desire to include other document-based art within “printed publication” prior art makes little sense.

The panel’s analysis proposes a dichotomy between “prior art in the form of sales and public use,” which supposedly requires “substantial discovery or fact finding” into ancillary issues, on the one hand, and patents and printed publications, which “generally do not require such additional discovery or fact finding,” on the other. Op. at 12; *see also id.* at 19-20. Because patent applications seem more like the latter category, the panel reasoned, they should be available in IPRs.

The fragility of this overgeneralized distinction illustrates the danger of departing from statutory text. Congress knew prior to enacting the AIA that printed publication-based challenges are not immune from discovery and fact finding. *See, e.g., Cordis Corp. v. Boston Sci. Corp.*, 561 F.3d 1319, 1334 (Fed. Cir. 2009) (citing expert testimony relating to “professional norms” in assessing accessibility of documents distributed by an academic to professional colleagues). IPR proceedings commonly include factual inquiry into the circumstances of accessibility, often with the aid of non-documentary evidence, such as witness testimony. *See, e.g., B/E Aero., Inc. v. C&D Zodiac, Inc.*, 709 F. App’x 687, 697 (Fed. Cir. 2017) (referring to deposition testimony from two witnesses in analyzing whether a document in an IPR proceeding was a “printed publication”). In *Infobridge*, for example, the Court noted that “public accessibility depends on a careful, case-by-case examination of how a particular reference was disseminated, to whom, for how long, and under what

circumstances” in “some cases” and even remanded for additional factfinding about public accessibility. 929 F.3d at 1369.

Conversely, prior art sales and public uses are commonly proved with the aid of documents (albeit documents that may only have become publicly accessible *after* the critical date, like the patent application in this case and VLSI’s case). A prominent recent example is *Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, which involved an invalidating prior sale proved with reference to a “license agreement,” a “supply and purchase agreement,” a “joint press release,” and an SEC Form 8-K. 586 U.S. 123, 126 (2019).

The tension between the panel’s analogy and the evidentiary reality also points toward a broader impact of the panel’s decision. The panel provides no limiting principle that distinguishes using “printed documents” to establish an application for patent from using “printed documents” to establish (for example) a prior art sale. Op. at 11-12, 17-20. Are all such materials now “printed publications” for prior art purposes under § 311(b), if they are printed documents that eventually become publicly accessible? Under the panel’s reasoning, *eventual* public accessibility (in the form of an exhibit in litigation, for example) is enough to make a document a “printed publication” for IPR proceedings. It is of no import that “on sale” is nowhere mentioned in § 311(b), because “application for patent” is not mentioned either. The panel offers no reason why IPR petitioners cannot now avail

themselves of the “special prior-art rule that Congress prescribed” for prior sales, public uses, or anything capable of being proven by “printed documents” that are “later published (and thus become printed publications)” after the critical date, Op. at 9, and assert *those* types of challenges in IPRs too, as “on the basis of prior art consisting of patents or printed publications.” This interpretation eviscerates clear statutory limitations.

II. This Issue Is Exceptionally Important and Recurring.

En banc review is appropriate because the issue on appeal is arising in many cases, including one involving amicus, *VLSI Tech. LLC v. Patent Quality Assurance LLC*, No. 23-2298 (Fed. Cir.), and many others. *See, e.g., PLR Worldwide Sales Ltd. v. Flip Phone Games, Inc.*, IPR2024-00209, Paper 27, 7 (P.T.A.B. Feb. 24, 2024) (hearing transcript discussing *Lynk Labs*), *Kia Corp. v. Emerging Automotive LLC*, IPR2024-01167, Paper 14, 31 (P.T.A.B. Jan. 27, 2025) (final written decision citing *Lynk Labs*), *Dropbox, Inc. v. Motion Offense, LLC*, IPR2024-00287, Paper 27, 6 (P.T.A.B. Jan. 24, 2025) (party discussing *Lynk Labs*), *Samsung Elecs. Co. v. ASUS Tech. Licensing Inc.*, IPR2024-01217, Paper 6, 4 (P.T.A.B. Dec. 27, 2024) (same), *Amazon.com Inc. v. Nokia Techs. Oy*, IPR2024-00627, Paper 24, 56 (P.T.A.B. Dec. 16, 2024) (same), *LG Elecs. Inc. v. Multimedia Techs. Pte. Ltd.*, IPR2024-00354, Paper 24, 36 (P.T.A.B. Dec. 3, 2024) (same).

As evidence of a supposedly “settled practice” of statutory interpretation, appellee cited cases before the panel where parties relied upon patent applications published after the critical date without addressing whether doing so was consistent with the statute. *E.g.*, Samsung Br. (Dkt. 118) at 66; *see also* Intel Amicus Br. (Dkt. 73) at 17-21 (collecting cases). Cases in which the meaning of a statute was not litigated are not probative of the meaning of that statute—and as the issue wasn’t raised in these cases, Congress could not have known of this “practice,” much less ratified it in the AIA. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 169 n.5 (2001) (“Absent ... overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation.”). Such cases do show that this situation has arisen in many IPRs—and with the panel opening the door to public uses and sales as additional IPR grounds, *see* § I.C.2 *supra*, variants of this issue are likely to recur. En banc review is therefore especially appropriate.

CONCLUSION

The petition should be granted.

Date: March 28, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that counsel of record have been served with a true and correct copy of the foregoing document via the Court's CM/ECF system on March 28, 2025.

Date: March 28, 2025

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume and typeface limitations of the Federal Rules of Appellate Procedure and the Federal Circuit Rules, including Fed. R. App. P. 29(b)(4) and Fed. Cir. R. 40(i)(3), because this brief contains 2596 words and has been prepared in a proportionally spaced typeface using Microsoft Word in a 14-point Times New Roman font.

Date: March 28, 2025

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