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By Michael Shapiro

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A D.C. federal appeals court will hear arguments that could change how damages are calculated in patent infringement cases, as it considers a jury's decision that a tech giant owed $2.2 billion to a hedge-fund-backed patent monetization firm.

Intel Corp.'s case challenges one of the largest patent awards ever following a verdict from jurors in Waco, Texas who found that the semiconductor maker infringed two VLSI Technology LLC patents for improving microprocessor performance.

Oral argument at the US Court of Appeals for the Federal Circuit is set for Thursday.

Central to Intel's case are claims that VLSI's presentation on damages ran afoul of Federal Circuit precedent on apportionment—a patent's contribution to profit—and that VLSI prejudiced the jurors by showing them a $1.5 billion settlement Intel reached with Nvidia Corp. in 2011. The review will offer judges a chance to address the law for determining patent damages, said Paul Gugliuzza, a law professor at Temple University who has written extensively about the court.

"If there's one thing we know about the Federal Circuit, it's that they really, really like to closely scrutinize large damages awards," he said. Such scrutiny is predictable "almost without even reading the briefs," he said adding that it's easy to find "massive infringement verdicts chopped down on appeal."

Indeed, the court has wiped out historically large patent damages awards, including separate $2.5 billion and $1.2 billion awards against Gilead Sciences Inc., and a $1.1 billion verdict against Apple Inc. and Broadcom Inc.

Apportionment

In an early and influential Supreme Court case on patent damages, justices in the late 19th century held that an owner of a patent covering an improvement—as opposed to "an entirely new machine or contrivance"—must determine how much of an alleged infringer's profits resulted from the improvement itself, a concept known as apportionment.

The 1884 decision in which the high court laid out that broad principle involved a patent for an improved mop-head.But the concept comes up frequently in cases involving more complex technologies, like smart phones that can be affected by a plethora of patents.

"With any semiconductor case, there's thousands and thousands of patents that cover a particular chip device, so courts have struggled with identifying the proper amount to attribute to any one patent," said Dennis Abdelnour, a partner at Honigman LLP. "Intel is arguing there hasn't been any apportionment and it's just complete disgorgement."

Intel's opening brief attacked VLSI's "convoluted, made-for-litigation damages methodology that contravened this Court's precedent in several ways." Among other things, the company took issue with a regression analysis used by VLSI's damages expert, Ryan Sullivan. "Critically," it argued, his analysis "was not based on the value of the Intel product features accused of infringement."

"It's considered a black-box analysis—there's 15 factors and then the expert comes up with a number of $2.2 billion," said Tim Getzoff, a partner at Holland & Hart following the case.

VLSI defended Sullivan and his methodology in its response brief, arguing that "Intel misapprehends how regression analysis works." The non-accused features described by Intel were included in Sullivan's analysis, but that was by design, VLSI said. Those features were used as "control factors," that allowed for a more precise measurement of the improvements in speed directly tied to the patented technology. "That is necessary for, not inconsistent with, apportionment and proper regression analysis," the company argued.

Comparable Agreements?

Another issue highlighted in the dueling appellate briefs is a $1.5 billion settlement agreement from 2011 when Intel paid Nvidia to use its chipset patents. That agreement, which ended two years of patent litigation, was shown to the Intel and VLSI jury on the last day of the 2021 trial.

VLSI argued that the settlement agreement was properly admitted into evidence so that it had a chance to respond after Intel told jurors "that VLSI's damages request was not 'even in the same universe' of figures Intel would ever pay for patent licenses in the 'real world.'"

Intel countered, arguing that Waco Judge Alan D. Albright should've kept the jury from seeing the agreement and several others because they "were not comparable to a hypothetical license to the asserted patents, as VLSI's own expert admitted." Specifically, it said the agreements weren't economically or technologically related to the VLSI patent

Nevertheless, Intel continued, the court allowed VLSI to use the documents, which concerned payments for patents for different technological features "to portray Intel as a serial infringer who pays large amounts to license patents in litigation and to urge the jury to award similar amounts here—which is exactly what the jury did."

"I think Intel's got a pretty good argument there," said Tim Getzoff, a partner at Holland & Hart. "For something to be relevant to show a jury, the patents in those agreements need to be either the same patents or related technology, because the chance for prejudicing a jury is so high."

"But if I'm in VLSI's shoes," he added, "I'd say, 'They agreed to pay these sums, why isn't that a useful data point?'"

Whatever the outcome, the issues are likely to get a lot of scrutiny at the court "because there's some discomfort with eye-popping verdicts," Getzoff said.

Other Questions

Intel's arguments aren't limited to damages.

The chipmaker also argued that both judgments of patent infringement should be reversed. Intel separately made the case that its license to use patents owned by Finjan Holdings LLC and Finjan affiliates immunized it from the suit, because Fortress Investment Group LLC, the New York hedge fund that created VLSI, acquired Finjan during the course of the lawsuit.

While Intel could've focused more intently on a small number of legal issues, "it's such a well-covered case that the litigants can kind of trust the court to do the deep dive," said Gugliuzza.

One issue not debated in the briefs, however, is timing. After a lengthy saga with multiple interventions from US Patent and Trademark Office Director Kathi Vidal, the Patent Trial and Appeal Board, an administrative tribunal, weighed in on the validity of the patents underlying VLSI's suit—US Patent Nos. 7,523,373 and 7,725,759.

The board found that the asserted patent claims from both were invalid in separate decisions issued more than two years after the jury verdict issued.

Though VLSI appealed those decisions to the Federal Circuit, the cases are significantly behind Intel's district court appeal on the court's calendar, meaning that the invalidity findings are not final and the patents and the related jury verdict are still alive.

That makes the dispute the rare species of case where a patent infringement verdict could potentially reach a final judgment before the Federal Circuit has weighed in on parallel invalidity rulings from the PTAB, Lauren Dreyer, a partner at Baker Botts LLP, noted.

But the appeals court might also send the case back to the district court for further deliberations, "which would create the delay that Intel certainly seeks," she said.

Whether this dynamic—where the two parties are in a race to have the district court and PTAB judgments finalized first—is brought up in questioning by one of the judges could depend on which three are assigned the case—something that the parties and the public won't learn until the morning of arguments.

Dreyer said she wouldn't be surprised if the timing of the dueling proceedings comes up, whoever the judges may be, saying, "Curiosity may just get the better of them."

MoloLamken LLP and Irell & Manella LLP represent VLSI. Intel is represented by Wilmer Cutler Pickering Hale and Dorr LLP.

The case is VLSI Tech. LLC v. Intel Corp. , Fed. Cir., No. 22-1906, oral argument scheduled 10/5/23 .

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Documents

- Fed. Circuit Docket
- Fed. Circuit Intel Opening Brief
- Fed. Circuit VLSI Response Brief

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