No. 2023-2346

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LYNK LABS, INC.,

Appellant,

v.

SAMSUNG ELECTRONICS CO., LTD.,

Appellee,

KATHERINE K. VIDAL, Under Secretary of Commerce for Intellectual Property and 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 FOR *AMICUS CURIAE* INTEL CORPORATION IN SUPPORT OF APPELLEE AND AFFIRMANCE

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CERTIFICATE OF INTEREST

Counsel for *Amicus Curiae* Intel Corporation certifies the following:

1. Represented Entities. Fed. Cir. R. 47.4(a)(1). Provide the full names of all entities represented by undersigned counsel in this case.

Intel Corporation

2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2). Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.

Not applicable.

3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3). Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.

None.

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None.

5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

☐ Yes (file separate notice; see below) ☐ No ☒ N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). Please do not duplicate information. This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

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

None.

Dated: May 10, 2024

/s/ William F. Lee

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INTEREST OF *AMICUS CURIAE*[1]

Intel Corporation ("Intel") is a global leader in the design and manufacturing of semiconductor products, including hardware and software products for client computing, data centers, networking and edge, artificial intelligence, autonomous driving, and other applications. Intel invests billions of dollars each year in research and development and, as both a significant patent holder and a frequent defendant in patent litigation, has a strong interest in ensuring that the scope of the prior art available for the U.S. Patent and Trademark Office ("USPTO") to evaluate in *inter partes* reviews ("IPR") is not artificially narrowed to exclude published invention disclosures indisputably filed before the challenged patent in the IPR.

Intel also has a particular interest in the subject matter of this appeal because it is an appellee in an appeal pending before this Court that raises the same legal question: whether a published patent application filed before the challenged patent is available as a prior-art reference in an IPR under 35 U.S.C. § 311(b). *See VLSI Tech. LLC v. Patent Quality Assurance LLC*, No. 2023-2298 (Fed. Cir.) ("the *VLSI* appeal"). The Patent Trial and Appeal Board ("Board") has consistently held that it

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Appellee Samsung Electronics Co., Ltd. and Intervenor Katherine Vidal, Director of the U.S. Patent and Trademark Office, have consented to the filing of this brief. Appellant Lynk Labs, Inc. has not consented, and therefore Intel has moved for leave to file.

is, including in the IPRs underlying the *VLSI* appeal and the present appeal. Appx10-12; Final Written Decision at 27-29, *Patent Quality Assurance, LLC v. VLSI Tech. LLC*, IPR2021-01229, Paper 129 (P.T.A.B. June 13, 2023). Intel therefore has a strong interest in the Court's proper disposition of this issue and in assisting the Court by responding to VLSI's amicus brief that was filed on behalf of Lynk Labs.

INTRODUCTION

In two separate IPRs, the Board held that patents owned by Lynk Labs and VLSI never should have been granted over published patent applications that were undisputedly filed before the challenged patents. Lynk Labs and VLSI now argue that those patent applications—although clearly prior art under pre-AIA 35 U.S.C. § 102(e)(1)—cannot be prior art for the purposes of an IPR because they are not "patents or printed publications" under 35 U.S.C. § 311(b). That nonsensical position is contrary not only to the text of § 311(b), but also to the statutory scheme as a whole and Congress's longstanding intent in allowing the Patent Office to revisit issued claims' patentability based on printed materials.

Published patent applications are "printed publications" under § 311(b)'s plain text because they are (1) printed materials and (2) published by the Patent Office itself. And § 102(e)(1) explicitly provides that published patent applications are prior art as of their filing dates. Taken together, those two propositions make

clear that published patent applications are available as prior-art references in IPRs as of their filing dates.

Such a holding is consistent with Congress's expressed intent in enacting the various post-issuance review proceedings that have provided for challenges based on "patents and printed publications": *ex parte* reexaminations, *inter partes* reexaminations, and IPRs. Congress's stated intent in limiting these procedures to "patents and printed publications" was to more efficiently adjudicate validity disputes by allowing the Patent Office another opportunity to evaluate the kinds of materials that it was uniquely suited to address—namely, printed technical materials—while leaving fact-intensive questions requiring testimony, such as public use and prior sale, to the district courts. Published patent applications are exactly the kind of materials that the Patent Office is well-suited to address and that Congress intended the Patent Office to consider in these proceedings.

That understanding is so well established in the practice of patent law that § 102(e)(1) art has routinely been used in IPRs to find claims unpatentable without question by the parties, the Board, or this Court in its affirmances. In the two instances in which the Board has directly confronted the question, it has held that § 102(e)(1) art is a proper ground for an IPR, and no case has come out the other way.

The Court should hold that § 102(e)(1) art is available as prior art in an IPR, as the Board has consistently held.

ARGUMENT

The Board correctly held that U.S. Patent Publication No. 2004/0206970 ("Martin"), which was filed on April 16, 2003, and published on October 21, 2004, is available as a prior-art reference in an IPR challenging Lynk Labs's U.S. Patent No. 10,687,400, which claims priority to February 25, 2004. Appx10-12. That decision fully accords with the IPR statute's plain text, Congress's intent when establishing IPR proceedings, and the Board's settled practice as affirmed by this Court. Lynk Labs's and VLSI's arguments to the contrary rely on outdated cases that are from the time period before patent applications were routinely published and before Congress made the policy decision to treat patent applications as prior art as of their filing dates. To the extent the Court needs to reach the issue, it should affirm the Board's decision.[2]

I. SECTION 311(B)'S "PRINTED PUBLICATIONS" INCLUDES PUBLISHED PATENT APPLICATIONS THAT ARE PRIOR ART UNDER § 102(E)(1).

35 U.S.C. § 311(b) provides that a petitioner in an IPR may request to cancel a patent claim "only on a ground that could be raised under section 102 or 103 and only on the basis of prior art consisting of patents or printed publications." Lynk

[2] Intel takes no position on the other issues raised in the present appeal.

Labs and VLSI do not dispute that anticipation by or obviousness over a published patent application constitutes a "ground that could be raised under section 102 or 103." *See* 35 U.S.C. §§ 102(e)(1), 103(a) (pre-AIA); *see also* Lynk Labs Br. 60; VLSI Br. 12 & n.5. Published patent applications are clearly "printed publications" according to the statute, and they are "prior art" as of their filing dates by virtue of Congress's specific designation in pre-AIA 35 U.S.C. § 102(e)(1). Published patent applications are therefore available as prior art in IPRs as of their filing dates, as the Board has long recognized.

A. The Text Of § 311(b) Plainly Covers Published Patent Applications.

Published patent applications are "printed publications" because they are printed and published. *See* 35 U.S.C. § 122 (providing that patent applications "shall be published … promptly after the expiration of a period of 18 months from the earliest filing date for which a benefit is sought under this title," except in certain limited circumstances); USPTO, *Published Patent Application Access and Status Information Sheet for Members of the Public* (last updated Dec. 15, 2023), https://www.uspto.gov/patents/search/published-patent-application-access-and-status-information (explaining how the public can access published patent applications electronically or by mail); MPEP § 2128 (explaining that a reference—including an electronic document—qualifies as a "printed publication" if it is accessible to persons interested and skilled in the subject matter).

Consistent with this understanding, both this Court and the Board routinely rely on published patent applications as prior art in IPRs. *See infra* § I.B.3. Indeed, neither Lynk Labs nor VLSI disputes that published patent applications are printed and published. *See* VLSI Br. 8; Lynk Labs Br. 57, 59. There can be no reasonable dispute that a published patent application is a "printed publication" according to the plain text of the statute.

B. Published Patent Applications Are Prior Art As Of Their Filing Dates, Including For The Purposes Of § 311(b).

Since patent applications became routinely published, published patent applications—like patents themselves—have been consistently treated as prior art as of their filing dates, regardless of whether they were publicly available at that time. That principle is codified in 35 U.S.C. § 102(e) and has been applied in the context of initial examination and reexaminations. In creating IPRs, Congress continued that established practice. And litigants, the Patent Office, and this Court have consistently treated IPRs as having no special rules or exceptions for published patent applications that would bypass § 102(e)(1).

1. Section 102(e)(1) specifically provides for published patent applications to be prior art as of their filing dates.

Section 311(b) allows a petitioner to raise grounds of unpatentability "that could be raised under section 102 or 103," on the basis of patents or printed publications. That includes grounds under pre-AIA § 102(e), which provides that

an "application for patent, published under section 122(b), by another filed in the United States before the invention" of the challenged patent is prior art, 35 U.S.C. § 102(e)(1) (pre-AIA), and that "a patent granted on an application for patent by another filed in the United States before the invention" of the challenged patent is likewise prior art, *id.* § 102(e)(2) (pre-AIA).

Section 102(e) reflects a determination by Congress that patents and patent applications filed with the Patent Office can be treated as prior art as of their filing dates, in addition to being treated as prior art as of the dates their disclosures became public (*e.g.*, under § 102(b)). That determination makes sense: the filing of a patent application with the USPTO demonstrates that the inventor of that application had possession of the disclosure as of the time of filing, and another, later filer cannot receive a patent on the same subject matter just because of the temporary delay in publication. *See also* 35 U.S.C. § 102(a)(2) (2012) (post-AIA statute carrying forward the principle that patents and published patent applications are prior art as of their effective filing dates).

That logic applies equally to (1) patent applications that later become published but then are abandoned and (2) patent applications that later become issued patents. The effective disclosure for evaluating prior-art status is the same regardless of whether the claims ultimately issued. Importantly, even VLSI and Lynk Labs appear to agree that patents may be treated as prior art as of their filing

dates in an IPR, as this Court has held. *See* VLSI Br. 22 ("In *Becton*, a *patent* asserted as prior art in an IPR was given the benefit of its filing date under pre-AIA § 102(e)(2)." (citing *Becton, Dickinson & Co. v. Baxter Corp. Englewood*, 998 F.3d 1337, 1347 & n.7 (Fed. Cir. 2021))); Lynk Labs Br. 65 (acknowledging that "this Court has treated *patents* as having the effective date of their application pursuant to § 102(e)(2) in an IPR" (citing *Becton, Dickinson*, 998 F.3d at 1344-1345; *Merck Sharp & Dohme Corp. v. Microspherix LLC*, 814 F. App'x 575, 578-580 (Fed. Cir. 2020))); *see also In re NTP, Inc.*, 654 F.3d 1268, 1271-1272, 1279 (Fed. Cir. 2011) (affirming unpatentability of claims in an *ex parte* reexamination based on § 102(e)(2) patent art after holding that the Board had the authority to examine written description support in determining priority). Although both VLSI and Lynk Labs attempt to distinguish *Becton, Dickinson*'s use of § 102(e) art in an IPR as being related to "patents"—which they say are included in § 311(b), while "applications for patent" are not—neither offers any principled reason to treat patents differently from patent applications that are later published and therefore clearly fall under both the "printed publications" language in § 311(b) and § 102(e)(1). *Supra* § I.A; *see* Final Written Decision at 27-29, *Patent Quality Assurance, LLC v. VLSI Tech. LLC*, IPR2021-01229, Paper 129 (P.T.A.B. June 13, 2023) (explaining that this Court's willingness to allow patent 102(e) art in an IPR shows "that inter partes reviews properly consider prior-art references with effective

dates prior to their actual publication dates"). Neither were publicly available as of their filing dates, but both are treated as prior art as of their filing dates pursuant to § 102(e).

Indeed, under Lynk Labs and VLSI's position, the status of a published patent application's disclosure as prior art in an IPR would depend on the status of the claims, which changes over time. If the claims are pending, then—per Lynk Labs and VLSI—the published patent application is not prior art and cannot be an IPR reference. But if they issue, then it is a patent and the disclosure becomes available as an IPR reference. Such a scheme not only makes no sense—the disclosure and what it teaches are essentially the same—but is also unworkable. Defendants sued for patent infringement have a limited time in which to file their IPR petitions, and they cannot afford to wait and see whether the claims in a particular published application will issue. *See* 35 U.S.C. § 315(b); *see also Board of Trs. of Leland Stanford Junior Univ. v. Ariosa Diagnostics, Inc.*, 636 F. App'x 801 (Fed. Cir. 2016) (per curiam) (affirming in 2016 unpatentability of patent in IPR2013-00308 over a § 102(e)(1) published patent application (U.S. Patent App. Pub. No. 2009/0029377 to Lo), whose claims were allowed eight years later on February 15, 2024). There is nothing about the ultimate issuance of the claims that changes the disclosure of the published application.

2. "Patents or printed publications" refers generally to published prior art, as distinct from unpublished prior art, and includes published patent applications.

In providing for post-issuance challenges before the Patent Office based on "patents or printed publications," Congress sought to improve the efficiency of post-issuance patent-validity determinations by allowing the Patent Office another opportunity to review select prior-art grounds that the Patent Office is uniquely qualified to evaluate: printed, technical material. Considering the language used in the statutes, the development of the different procedures over time, and the legislative history, it is clear that published patent applications are included in that category.

"Patents" and "printed publications" were first singled out as limited grounds for post-grant proceedings in the *ex parte* reexamination statute in 1980. An Act to Amend the Patent and Trademark Laws, Pub. L. No. 96-517, § 301, 94 Stat. 3015 (1980), *codified at* 35 U.S.C. § 301 (eff. 1980-2012) ("Any person at any time may cite to the Office in writing prior art consisting of patents or printed publications which that person believes to have a bearing on the patentability of any claim of a particular patent.").

The legislative history related to *ex parte* reexaminations makes clear that Congress intended to allow the Patent Office to evaluate "patents and printed materials, matters which are normally handled by patent examiners," while

"[c]hallenges to validity on other grounds (e.g., public uses or prior sales) would remain the province of the courts." S. Rep. No. 96-617 at 2 (reporting on S. 1679, the text of which was ultimately incorporated as amended in H.R. 6933, which became Pub. L. No. 96-517). The intention was to limit reexamination "to the areas of primary expertise of the PTO—patents and printed publications." *Id.* at 16; *see also id.* at 8 (explaining that the USPTO in its initial examinations "tries to make a decision on each invention promptly by considering it primarily against patents and printed publications to see if the new discovery qualifies for patent protection"); *id.* at 11 (testimony of Sidney A. Diamond, Comm'r of Patents and Trademarks: "By limiting reexamination to a consideration of prior patents and printed publications, the PTO would be given a task that it can perform effectively at a reasonable cost.").

When these limited grounds were carried forward in the creation of *inter partes* reexamination and IPR proceedings, the same governing principles applied. The *inter partes* reexamination statute explicitly referred to the grounds established by the *ex parte* reexamination statute as the permissible grounds on which to request review: "Any person at any time may file a request for inter partes reexamination by the Office of a patent on the basis of any prior art cited under the provisions of section 301." Optional Inter Partes Reexamination Procedure Act of 1999, Pub. L. No. 106-113, § 4604, 113 Stat. 1501, 1501A-567 (1999), *codified at* 35 U.S.C. § 311

(eff. 1999-2002); *see also* 35 U.S.C. § 311 (eff. 2002-2012).[3] That very same statute provided that patent applications should be published as a matter of course, American Inventors Protection Act of 1999, Pub. L. No. 106-113, § 4502, 113 Stat. 1501, 1501A-561-563 (1999) (codified as amended at 35 U.S.C. § 122), and amended § 102(e) to make published patent applications prior art as of their filing dates, *id.* § 4505, 113 Stat. 1501A-565 (codified at 35 U.S.C. § 102(e)(1) (pre-AIA)), thereby expanding the universe of "printed publications" to include published patent applications and defining how they should be treated for prior-art purposes.

Published patent applications are printed materials "normally handled by patent examiners" and are in "the areas of primary expertise of the PTO." S. Rep. No. 96-617 at 2, 16. Indeed, with respect to published U.S. patent applications, they are among the references the Patent Office is most well-equipped to review, as they are the very same materials the Patent Office reviews on a daily basis—they are directly in the possession of the Patent Office, organized by art unit, and searchable. There is no indication that Congress intended to exclude published patent applications from the scope of "printed publications." Rather, the intent was to allow the Patent Office another avenue by which to consider prior art within its expertise—technical documents that could be effectively reviewed by technical expert

[3] In 2002, "[a]ny person" was amended to say "[a]ny third-party requester." Pub. L. No. 107-273, § 13202(a)(1), 116 Stat. 1901, 1902 (2002).

examiners—while leaving to the courts the decisions primarily within their expertise—fact-based determinations regarding prior art like public use and prior sales that require extrinsic documentary evidence and witness testimony to adjudicate. Review of published patent applications clearly falls on the USPTO side of that sensible division of labor.

The America Invents Act was enacted against this backdrop. It replaced *inter partes* reexaminations with IPRs, resulting in a new 35 U.S.C. § 311 that includes § 311(b) in its current form. Pub. L. No. 112-29, § 6, 125 Stat. 284, 299 (2011), *codified at* 35 U.S.C. § 311 (eff. 2012-2013); *see also* 35 U.S.C. § 311 (current).[4] The legislative history of the AIA likewise makes clear that the scope of the prior-art grounds for IPRs was intended to be the same as that for *ex partes* reexamination:

> The scope of "patent and printed publication" prior art in the amended section 301 [the reexamination statute] is intended to be coextensive with these terms in current section 102 of the title 35. Further, amendments made by Section 2 of the Act, which expand and contract the definition of certain other forms of prior art, are not intended to change the particular "patent or printed publication" prior art, which will continue to be the sole basis for initiating reexamination proceedings.

[4] In 2013, the Leahy-Smith America Invents Technical Corrections Act deleted "or issuance of a reissue of a patent" from § 311(c)(1). Pub. L. No. 112-274, § 1(d)(2), 126 Stat. 2456 (2013).

H.R. Rep. No. 112-98 at 46 n.42 (2012). The relevant section of "amended section 301" is no different from the originally enacted § 301 in relevant part.[5] The text of the amendments and the legislative history therefore confirm that the scope of allowable prior-art challenges in *ex parte* reexaminations, *inter partes* reexaminations, and IPRs is the same: patents and printed publications, including published patent applications, which are among the references most suited to review by the subject-matter experts at the Patent Office, as opposed to the generalist district courts.

Consistent with the text and legislative history, this Court has expressed its "understanding that Congress sought to create [with IPR] a streamlined administrative proceeding that avoided some of the more challenging types of prior art identified in 35 U.S.C. § 102, such as commercial sales and public uses, by

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[5] As enacted, § 301 provided: "Any person at any time may cite to the Office in writing prior art consisting of patents or printed publications which that person believes to have a bearing on the patentability of any claim of a particular patent." 35 U.S.C. § 301 (eff. 1980-2012). Following the 2012 amendments, new § 301(a) provides:

> Any person at any time may cite to the Office in writing—
>
> (1) prior art consisting of patents or printed publications which that person believes to have a bearing on the patentability of any claim of a particular patent; or
>
> (2) statements of the patent owner filed in a proceeding before a Federal court or the Office in which the patent owner took a position on the scope of any claim of a particular patent.

35 U.S.C. § 301(a).

restricting the 'prior art' which may form a basis of a ground to prior art documents." *Qualcomm Inc. v. Apple Inc.*, 24 F.4th 1367, 1376 (Fed. Cir. 2022); *see also id.* at 1375 (agreeing that Congress intended the scope of "prior art consisting of patents or printed publications" in § 311(b) to be the same as that in § 301). Lynk Labs cites *Qualcomm* repeatedly for the proposition that patent applications described in § 102(e) must be "other types of prior art," not included in "patents and printed publications." *E.g.*, Lynk Labs Br. 60. But, in context, the *Qualcomm* court made no such distinction. Rather, it contrasted documentary prior art—which includes published patent applications—with fact-intensive prior art:

> In *OddzOn Prods., Inc. v. Just Toys, Inc.*, 122 F.3d 1396, 1401-02 (Fed. Cir. 1997), we held that "prior art," as referenced in 35 U.S.C. § 103, includes § 102(f), in addition to subsections (a), (b), (e), and (g), which "are clearly prior art provisions." We observed that § 102(a) and (b) identify, among other things, "prior patents and publications" as prior art. *Id.* As for other types of prior art identified in § 102, we have explained, in the context of the reexamination statute, that "questions of public use and on sale were explicitly excluded by statute from those issues on which reexamination could be obtained." *Quad Envtl. Techs. Corp. v. Union Sanitary Dist.*, 946 F.2d 870, 875 (Fed. Cir. 1991). That is so because "[t]he congressional purpose in restricting reexamination to printed documents, 35 U.S.C. § 301, was to provide a cheaper and less time-consuming alternative to challenge patent validity on certain issues." *Id.* at n.7 (citing H.R. Rep. No. 1307 at 4). Holding a patentee to descriptions of the prior art made in its specification does not implicate the type of fact-intensive inquiries Congress was seeking to avoid.

Qualcomm, 24 F.4th at 1376.[6]

The continuity of permissible grounds throughout *ex parte* reexaminations, *inter partes* reexaminations, and IPRs stands in contrast to the grounds Congress provided in the post-grant review and covered business method review proceedings. *See* 35 U.S.C. § 321(b) (post-grant review statute providing for petitions based on "any ground that could be raised under paragraph (2) or (3) of section 282(b) (relating to invalidity of the patent or any claim)"); America Invents Act, Pub. L. No. 112-29, § 18(a)(1)(C), 125 Stat. 284, 330 (2011) (covered business method patent review providing for petitions based on "prior art that is described by [pre-AIA] section 102(a)," or prior art that "discloses the invention more than 1 year before the date of the application for patent in the United States" and would fall under pre-AIA § 102(a) "if the disclosure had been made by another before the invention thereof by the applicant for patent"). Congress knows how to use different language to provide different prior-art bases for review. Its consistent use of the same language—and explicit statements in the statutes and legislative history—

[6] Lynk Labs and VLSI also cite *Qualcomm* for the proposition that IPR grounds must be based on a "prior art patent or prior art printed publication" that was "existing at the time of the patent application" for the challenged patent. Lynk Labs Br. 65; *see also id.* at 57, 59; VLSI Br. 5, 23-24. But *Qualcomm* did not exclude published patent applications from the scope of "printed publications" (or even address published patent applications). And § 102(e)(1) specifically provides that published patent applications ***are*** prior art as of their filing dates—at which time they indisputably "exist[ed]."

shows that it intended the available "patent[] or printed publication[]" grounds to be the same in IPRs as in *ex parte* reexaminations and *inter partes* reexaminations.

3. The Patent Office's settled practice is to allow post-issuance challenges based on § 102(e)(1) art.

In the decades since 35 U.S.C. § 102(e) was enacted in 1999, the Patent Office, litigants, and this Court have consistently treated § 102(e)(1) as a proper basis for post-issuance challenges.

In response to the challenges raised by Lynk Labs and VLSI, the Board has twice explicitly ruled that § 102(e)(1) art is a proper basis for an unpatentability challenge under § 311(b) in an IPR. Appx10-12; *Patent Quality Assurance, LLC*, IPR2021-01229, Paper 129 at 27-29. Neither VLSI nor Lynk Labs has cited any case that has ruled otherwise, and Intel is not aware of any.

In other IPRs, both this Court and the Board have explicitly recognized that an asserted reference was § 102(e)(1) art and then gone on to find the challenged claims unpatentable. For example, in *Purdue Pharma L.P. v. Iancu*, 767 F. App'x 918 (Fed. Cir. 2019), this Court affirmed the unpatentability of a patent filed on August 6, 2002, and claiming priority to a provisional application filed on August 6, 2001, over the Joshi reference, which was filed on August 30, 2001 (between the challenged patent's provisional filing date and utility filing date), and published on December 12, 2002 (after the challenged patent's utility filing date). *Id.* at 919-920. After extensive discussion, the *Purdue* court held that the challenged patent was not

entitled to the priority date of its provisional application, and therefore Joshi was prior art under § 102(e). *Id.* at 920-921, 923-925 ("[G]iven our conclusion that the claims of the '376 patent do not have written description support in the '534 provisional, we hold that Joshi qualifies as prior art and that the Board permissibly relied on Joshi in all three grounds of the Board's obviousness analysis."); *see also Activision Blizzard Inc. v. Game & Tech. Co.*, IPR2016-01885, Paper 35 at 61-65 (P.T.A.B. Mar. 14, 2018) (holding challenged claims unpatentable over Rogers and "find[ing] Rogers is prior art under 35 U.S.C. § 102(e)(1)), *aff'd*, *Game & Tech. Co. v. Activision Blizzard Inc.*, 926 F.3d 1370, 1381 (Fed. Cir. 2019); *Ariosa Diagnostics v. Board of Trs. of the Leland Stanford Junior Univ.*, IPR2013-00308, Paper 40 at 17-27 (P.T.A.B. Nov. 19, 2014) (holding claims in a patent claiming priority to September 20, 2008, "unpatentable under 35 U.S.C. § 102(e) as anticipated by Lo," a patent application filed on July 23, 2008, and published on January 29, 2009), *aff'd*, *Board of Trs. of Leland Stanford Junior Univ. v. Ariosa Diagnostics, Inc.*, 636 F. App'x 801 (Fed. Cir. 2016).

Even where the basis for a reference's status as prior art has not been explicitly acknowledged, there are many additional examples of IPRs and reexaminations in which this Court has affirmed unpatentability determinations based on § 102(e)(1) art:

***Inter partes* reviews**: *CUPP Computing AS v. Trend Micro Inc.*, 53 F.4th 1376, 1378-1379 (Fed. Cir. 2022) (affirming unpatentability of patents claiming priority to August 4, 2008, over an abandoned patent application published on August 26, 2010, but filed on May 26, 2008); *Bot M8 LLC v. Sony Interactive Entm't LLC*, 66 F.4th 1380, 1382 (Fed. Cir. 2023) (affirming unpatentability of patent claiming priority to April 19, 2005, over an abandoned patent publication, U.S. Patent App. Pub. No. 2006/0101310, published on May 11, 2006, but filed on October 22, 2004); *Arthrex, Inc. v. Smith & Nephew, Inc.*, 935 F.3d 1319, 1322 (Fed. Cir. 2019) (affirming unpatentability of patent claiming priority to September 12, 2006, over an abandoned patent application published on November 30, 2006, but filed on May 26, 2005); *Apator Miitors ApS v. Kamstrup A/S*, 887 F.3d 1293, 1294 (Fed. Cir. 2018) (affirming unpatentability of patent claiming priority to April 12, 2010, over a patent application published on January 12, 2012, but filed on March 25, 2010, and later issued on May 10, 2016 (after institution of the IPR)); *AGIS Software Dev., LLC v. Google LLC*, 835 F. App'x 607 (Fed. Cir. 2021) (per curiam) (affirming unpatentability of patent claiming priority to September 21, 2004, over an abandoned patent application, U.S. Patent Application No. 2005/0221876, published on October 6, 2005, but filed on April 5, 2004); *Aker Biomarine Antarctic AS v. Rimfrost AS*, 786 F. App'x 251, 255 (Fed. Cir. 2019) (affirming unpatentability of patent claiming priority to January 28, 2008, over an abandoned patent

application, Breivik, published on June 10, 2010, but filed on November 15, 2007); *Google LLC v. Personal Audio LLC*, 743 F. App'x 978, 986-987 (Fed. Cir. 2018) (affirming unpatentability of some claims of patents claiming priority to October 2, 1996, over an abandoned patent application, Chase, published on November 28, 2002, but claiming priority to at least August 30, 1996); *Intellectual Ventures II LLC v. Ericsson Inc.*, 686 F. App'x 900, 907 (Fed. Cir. 2017) (affirming unpatentability of patent claiming priority to November 14, 2001, over an abandoned patent application published December 27, 2001, but filed on February 28, 2001).

Reexaminations: *Bosch Auto. Serv. Sols., LLC v. Matal*, 878 F.3d 1027, 1038 (Fed. Cir. 2017), *as amended on reh'g in part* (Mar. 15, 2018) (affirming unpatentability of patent claiming priority to April 21, 2003, over a patent application published on May 1, 2003, but filed on October 31, 2002); *Smith & Nephew, Inc. v. Hologic, Inc.*, 721 F. App'x 943, 947 (Fed. Cir. 2018) (affirming unpatentability of certain claims in a patent claiming priority to October 26, 2001, over a patent application published on November 15, 2001, but filed on April 12, 2001).

Taken together, these examples show a broad consensus that published patent applications are prior art as of their filing dates pursuant to § 102(e)(1) not just for initial examinations, but for IPRs and previously established post-issuance proceedings. VLSI and Lynk Labs point out that *Purdue* did not specifically address

the question of whether the § 102(e)(1) reference was properly prior art. Lynk Labs Br. 64-65; VLSI Br. 21-22. But the fact that in more than twenty years of post-issuance proceedings, requesters, petitioners, patent owners, the Patent Office, and this Court have all understood without question that published patent applications may be prior art as of their filing dates—and Congress made no effort to change that—only shows that Lynk Labs's and VLSI's self-serving interpretation of the statute is wrong.

II. LYNK LABS'S AND VLSI'S ATTEMPT TO CARVE OUT § 102(E)(1) ART IS UNPERSUASIVE.

In contrast to this straightforward and well-accepted reading of the statutes and history, Lynk Labs and VLSI seek to artificially exclude § 102(e)(1) published patent applications from the category of "printed publications" simply because § 311(b) does not specifically mention "applications for patent" and because ***other*** kinds of printed publication prior art must be publicly accessible before the priority date of the challenged patent. Their twisted reading of the statute and recitation of outdated and irrelevant case law fails to give meaning to the specific language and policy behind § 102(e)(1).

A. The Language Of § 102 Does Not Exclude "Applications For Patent" From "Printed Publications."

Lynk Labs and VLSI contend that, because § 102 lists "printed publication[s]" in some sections but "application[s] for patent" in another, the term "printed

publication" must exclude patent applications. Lynk Labs Br. 60-61; VLSI Br. 12-13. But that ignores the plain meaning of the term "printed publication" and does not fit with how the statutory scheme treats patent art.

While Lynk Labs and VLSI argue that "'printed publication[s]' and 'application[s] for patent' are distinct terms with distinct meanings," Lynk Labs Br. 60; *see also* VLSI Br. 13-14, that does not mean that those terms are mutually exclusive. Rather, "printed publication[s]" is a broader category of art that includes "application[s] for patent[s] published under [35 U.S.C.] § 122(b)." *See supra* § I.A. Such an understanding does not result in the term "printed publication" "mean[ing] something different in § 102 than in § 311(b)," Lynk Labs Br. 63; *see also* VLSI Br. 17-18. Instead, it simply means that "application[s] for patent[s] published under [35 U.S.C.] § 122(b)" are a subset of "printed publications." The fact that § 102(e)(1) separately addresses published patent applications is only an acknowledgement that that subcategory of published patent applications has different priority rules, which need to be explained separately: specifically, published patent applications—in contrast to other printed publications—are prior art under § 102(e)(1) if they were "by another filed in the United States before the invention by the applicant for patent." 35 U.S.C. §102(e)(1) (pre-AIA); *see also* 35 U.S.C. § 102(a)(2) (2012) (post-AIA carrying forward the principle that published

patent applications naming other inventors and effectively filed before the effective filing date of the claimed invention are prior art).

That interpretation accords with how §§ 102 and 311(b) treat "patents." Both pre-AIA and post-AIA § 102 mention patent prior art at least twice—once with reference to patents issued before the filing date of the claimed invention (old § 102(a) and new § 102(a)(1)), and once with reference to patents issued after but filed before the filing date of the claimed invention (old § 102(e)(2) and new § 102(a)(2)). But § 311(b) does not refer to "patents" twice or separately enumerate the parts of § 102 that are encompassed by the term—it just refers to "patents" and § 102 generally. Even Lynk Labs and VLSI concede that this Court has treated patents as having the effective date of their application pursuant to § 102(e)(2) in an IPR. VLSI Br. 22; Lynk Labs Br. 65; *see Becton, Dickinson*, 998 F.3d at 1344-1345; *Merck*, 814 F. App'x at 578-580; *supra* pp. 7-9. If § 311(b) may refer to different categories of § 102 patent art by referring generally to "patents," so may it refer to different categories of § 102 printed publication art (including published patent applications under § 102(e)) by referring generally to "printed publications."

VLSI contends that Congress must have intended to exclude published patent applications from the scope of "printed publications" because when it enacted pre-AIA § 102(e)(1), it did not "redefin[e] the term 'printed publication' to encompass patent applications" but instead "recogniz[ed] a new, distinct category of

prior art: 'application[s] for patent.'" VLSI Br. 15. But Congress did not need to "redefine" anything because that very same statute provided for the near-automatic publishing of patent applications. Pub. L. No. 106-113, § 4502, 113 Stat. 1501A-561-563 (codified as amended at 35 U.S.C. § 122). The amendment as a whole thus ensured that patent applications would become "printed publications," and at the same time provided that they would be treated as prior art as of their filing date. Far from indicating that "printed publications" do not include published patent applications, it affirmatively changed the law so that published patent applications would fall into that category.

B. The Cases Lynk Labs And VLSI Cite Do Not Address The Right Question.

Unable to find a single case where the Board or this Court prevented a petitioner from relying on § 102(e)(1) art in an IPR (or an *ex parte* reexamination or *inter partes* reexamination), VLSI resorts to citing reams of irrelevant cases from other contexts. Because those cases did not examine the role of § 102(e)(1) art—and in several cases pre-date its existence—they cannot support Lynk Labs's and VLSI's position.

First, Lynk Labs and VLSI cite several cases for the proposition that patent applications cannot be "printed publications." Lynk Labs Br. 60-61 (citing *Brown v. Guild*, 90 U.S. 181, 224 (1874); *In re Wertheim*, 646 F.2d 527, 532 (C.C.P.A. 1981); *Interurban Ry. & Terminal Co. v. Westinghouse Elec. & Mfg. Co.*, 186 F.

166, 168 (6th Cir. 1911); *Lyman Ventilating & Refrigerator Co. v. Lalor*, 15 F. Cas. 1163, 1164 (C.C.S.D.N.Y. 1874)); VLSI Br. 14 (citing Lynk Labs Br. 60-61 and also citing *Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co.*, 18 F. Cas. 394, 398 (E.D. Pa. 1874); 1 William C. Robinson, *The Law of Patents for Useful Inventions*, §§ 325, 327, at 446-447, 448 n.4 (1890)).

But those cases—which emphasized the lack of public accessibility for patent applications—all pre-date the 1999 change in the law that (1) required publication of patent applications as a matter of course, Pub. L. No. 106-113, § 4502, 113 Stat. 1501A-561-563 (codified as amended at 35 U.S.C. § 122), and (2) amended § 102(e) to make published patent applications prior art as of their filing dates, *id.* § 4505, 113 Stat. 1501A-565 (codified at 35 U.S.C. § 102(e)(1)). Understanding that patent applications had previously been excluded from the categories of "patents" and "printed publications," *Brown*, 90 U.S. at 224; *Wertheim*, 646 F.2d at 532, because they were not "published by the Patent Office," *Interurban Ry.*, 186 F. at 168, Congress explicitly decided to change the law, requiring publication of patent applications, and at the same time providing that published patent applications can be available as prior art as of their filing dates. Lynk Labs's and VLSI's arguments do not account for that purposeful change in the law.

Second, Lynk Labs and VLSI cite several cases for the proposition that a "printed publication" must have been publicly accessible before the priority date.

See Lynk Labs Br. 58, 64; VLSI Br. 5-7. But none of these cases addressed published patent applications—which are a specific category of printed publications that, under § 102(e)(1), may be treated as prior art as of their filing dates. Instead, they addressed materials that were not filed in (and thus not published by) the Patent Office: *Valve Corp. v. Ironburg Inventions Ltd.*, 8 F.4th 1364 (Fed. Cir. 2021) (internet article reviewing a game controller); *Samsung Elecs. Co. v. Infobridge Pte. Ltd.*, 929 F.3d 1363 (Fed. Cir. 2019) (working draft of High Efficiency Video Coding standard); *Acceleration Bay, LLC v. Activision Blizzard Inc.*, 908 F.3d 765 (Fed. Cir. 2018) (technical report uploaded to university department website); *Jazz Pharms., Inc. v. Amneal Pharms., LLC*, 895 F.3d 1347 (Fed. Cir. 2018) (FDA Advisory Committee Art materials); *B/E Aerospace, Inc. v. C&D Zodiac, Inc.*, 709 F. App'x 687 (Fed. Cir. 2017) (customer configuration summary); *Voter Verified, Inc. v. Premier Election Sols., Inc.*, 698 F.3d 1374 (Fed. Cir. 2012) (online periodical article); *RESQNet.com, Inc. v. Lansa Inc.*, 594 F.3d 860, 865-866 (Fed. Cir. 2010) (user manuals for software product); *Orion IP, LLC v. Hyundai Motor Am.*, 605 F.3d 967, 974 (Fed. Cir. 2010) (Electronic Parts Catalog promotional document); *In re Lister*, 583 F.3d 1307 (Fed. Cir. 2009) (manuscript on file with the U.S. Copyright Office); *Cordis Corp. v. Boston Sci. Corp.*, 561 F.3d 1319, 1333-1334 (Fed. Cir. 2009) (documents distributed to colleagues and companies whom inventor hoped would commercialize invention); *In re Klopfenstein*, 380 F.3d 1345 (Fed. Cir. 2004)

(slide presentation and posterboard); *In re Cronyn*, 890 F.2d 1158 (Fed. Cir. 1989) (undergraduate thesis); *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560 (Fed. Cir. 1988) (specification sheet for computer chip); *In re Hall*, 781 F.2d 897 (Fed. Cir. 1986) (doctoral thesis); *In re Bayer*, 568 F.2d 1357, 1359 (C.C.P.A. 1978) (applicant's thesis).

To be sure, these cases considered the public accessibility of certain types of references in determining whether they were available as prior art. But, following the amendments of §§ 102(e) and 122, that principle simply does not apply to the prior art date of published patent applications, as indicated by the fact that not a single public accessibility case that Lynk Labs or VLSI cites relates to a patent application. Instead, by providing for near-automatic publication of patent applications, 35 U.S.C. § 122, Congress has ensured that published patent applications ***are*** publicly accessible. Lynk Labs and VLSI do not dispute that, and the concerns regarding public accessibility for non-patent application prior art in the cases cited by VLSI have no bearing on the question at issue here.

* * *

Lynk Labs's and VLSI's argument that Martin is not a "patent" because it never issued and is not a "printed publication" because it was not accessible as of the priority date is nothing more than an attempt to rewrite the statute and ignore the specific determination by Congress that published patent applications—which are

indisputably printed publications—are prior art as of their filing dates. Lynk Labs and VLSI offer no reason why published patent applications should be treated differently in IPRs compared with reexaminations (for example), and no reason why the Patent Office should blind itself to this category of prior art that it is uniquely suited to address. The Court should effectuate Congress's intent as shown by the text of the statutes and the history of the statutory scheme as a whole and confirm—consistent with the established practice of this Court and the Board—that § 102(e)(1) art may be asserted in IPRs.

CONCLUSION

For the foregoing reasons, Intel respectfully requests that the Court affirm the Board's holding that § 102(e)(1) references are available as prior art in IPRs pursuant to § 311(b).

Respectfully submitted,

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