

Intellectual Ventures Attacks Ericsson's Prior Art At Fed. Circ.

By **Jimmy Hoover**

Law360, Washington (August 2, 2016, 3:31 PM ET) -- Intellectual Ventures blasted the prior art reference the Patent Trial and Appeal Board relied on when invalidating the company's wireless network security patent, telling a Federal Circuit panel Tuesday that Ericsson failed to prove the reference was publicly available before the invention.

Intellectual Ventures I LLC has challenged the Swedish telecom giant's successful use of a document known as Stadler, which was allegedly presented during a 1998 Institute of Electrical and Electronics Engineers conference, as anticipating prior art of U.S. Patent No. 7,496,674.

The patent licensing firm told the three-judge panel during arguments Tuesday that Ericsson Inc.'s use of a copyright line to prove the reference was publicly available in 1998 was complete "hearsay," and that Ericsson failed to establish that an exception was warranted to circumvent the hearsay rule.

"As a matter of law, it's not sufficient to establish that Stadler was publicly available," Intellectual Ventures' attorney Byron L. Pickard of Sterne Kessler Goldstein & Fox PLLC told the panel.

Pickard said that PTAB had accepted the copyright line as proof of the publication date, despite Ericsson's failure to obtain a statement from a librarian or any other evidence that the document was indexed and available.

"The law should not reward laziness," Pickard said.

When asked by U.S. Circuit Judge Kathleen M. O'Malley why Ericsson did not reach out to members of the IEEE for verification, Robert Mattson of Oblon McClelland Maier & Neustadt LLP, an attorney for the telecom company, responded, "Your honor might not be surprised that third parties rarely want to get involved in [inter partes review] proceedings."

During his rebuttal, Mattson stressed that IEEE was a "reputable" and "trustworthy" source that should not be subject to concerns about hearsay.

"If the IEEE says 1998 was the publicly available copyright date, then that's something you can take to the bank," Mattson said.

Still, Judge O'Malley said she was unsure that was the appropriate legal standard.

In its appeal, Intellectual Ventures has also argued that the '674 patent and the Stadler article are distinct enough that Stadler does not anticipate the patent's security protocol claims. The patent covers an invention by Jacob Jorgensen that uses a base station to switch information packets between wired and wireless communications systems to improve quality. Stadler's method, according to the appeal, uses only one security protocol while the '674 patent uses two separate security protocols. PTAB rejected that assertion.

Intellectual Ventures is represented by Byron Pickard and Lori Gordon of Sterne Kessler Goldstein & Fox PLLC.

Ericsson is represented by Robert Mattson, Wilbur Baker and Alexander Englehart of Oblon McClelland Maier & Neustadt LLP.

The case is Intellectual Ventures I LLC v. Ericsson Inc., case number 15-1947, in the U.S. Court of Appeals for the Federal Circuit.

--Additional reporting by Vince Sullivan. Editing by Edrienne Su.