

Appealing PTAB Loss, IV Finds Tough Crowd At Fed. Circ.

By **Jimmy Hoover**

Law360, Washington (June 6, 2017, 4:34 PM EDT) -- Intellectual Ventures faces tough odds of reviving a wireless communications patent successfully challenged by Ericsson after it struggled to convince a Federal Circuit panel during oral arguments Tuesday that the Patent Trial and Appeal Board made a crucial error in claim construction.

Judge Timothy B. Dyk, a member of the three-judge panel, repeatedly voiced his concern that Intellectual Ventures II LLC had not pointed to expert testimony showing how the PTAB's construction of a claim term during Ericsson's America Invents Act review was problematic.

"I want to see testimony," Judge Dyk told Intellectual Ventures' lawyer Michael E. Joffre of Sterne Kessler Goldstein & Fox PLLC after being told that the board's claim construction would have caused technological problems. "Where is the testimony saying what you are saying?"

Judge Dyk was unsatisfied by the expert testimony that Joffre cited in response to the question. "But that's not saying what you're saying," the judge said. "Is that the best you have?"

A Law360 analysis published in March found that, over the previous year, Judge Dyk voted to affirm about 96 percent of AIA appeals — despite an affirmance rate of about 65 percent in appeals of district court patent cases.

The instant appeal involves U.S. Patent Number 7,269,127, which Intellectual Ventures has asserted in five infringement lawsuits in Delaware federal court against AT&T Mobility LLC, Nextel Operations Inc., T-Mobile USA Inc., U.S. Cellular Corp. and Cricket Communications Inc.

The '127 patent covers a wireless-communications protocol that is used in multiple-antenna systems to synchronize a receiver to a transmitter. According to Intellectual Ventures, the patent solves "inefficiencies" of prior art systems with new ways of preprocessing and combining data before transmission.

Nevertheless, the PTAB ruled in a final written decision in January 2016 that claims 1-10 and 17 of the patent are obvious in light of previously issued patents, or prior art references titled "Schmidl," "Arslan" and "Kim."

In its appeal to the Federal Circuit, Intellectual Ventures argues that the board erroneously construed independent claim 1 of the patent to share a similar data structure to that of the prior art. Specifically,

the board interpreted the claim to cover a system where so-called pilot symbols are inserted “not only within a single data block ... but also between one data block and another data block.”

Doing so, the board ignored the technical reality that having pilot signals between data blocks, as opposed to within a single data block, would necessitate forming a string of pilot signals that would undermine the patented system, Intellectual Ventures says. “If you had that,” Joffre told the panel, “that would be totally inefficient because you’d be doing this incredible amount of course correction.”

When Joffre made the same point on rebuttal, Judge Dyk interjected: “Except you don’t have any testimony that says that.”

J. Andrew Lowes of Haynes and Boone LLP, an attorney for Ericsson Inc., defended the board’s ruling. “They’re trying to create an embodiment and then read limitations from that embodiment into the claims,” he said. “That embodiment does not exist.”

Intellectual Ventures, which owns more than 70,000 patents, was recently at the Federal Circuit appealing a separate PTAB decision that scrapped a wireless network security patent following another AIA review lodged by Ericsson. In that case, IV sought to overturn the board’s ruling that U.S. Patent Number 7,496,674 was anticipated by a prior art reference.

During oral arguments before the appeals court in August, Intellectual Ventures attacked the legitimacy of that reference — a document known as “Stadler” that was allegedly presented during a 1998 Institute of Electrical and Electronics Engineers conference. Specifically, Intellectual Ventures argued Ericsson could not prove that the document was publicly available, as is required for prior art references, and that Ericsson’s use of a copyright line to prove otherwise was “hearsay.”

The Federal Circuit panel was unconvinced and affirmed the board’s decision in a two-page order.

Intellectual Ventures is represented by Michael E. Joffre, Paul Ashley Ainsworth, Lori A. Gordon, Pauline Pelletier and Byron Leroy Pickard of Sterne Kessler Goldstein & Fox PLLC.

Ericsson is represented by J. Andrew Lowes, Debra Janece McComas and Clint S. Wilkins of Haynes and Boone LLP.

The case is Intellectual Ventures II LLC v. Ericsson Inc., case number 16-1955, in the U.S. Court of Appeals for the Federal Circuit.

--Additional reporting by Matthew Bultman. Editing by Aaron Pelc.