

## How Telecom Co. KPN Won A \$32M Verdict Against Ericsson

By **Andrew Karpan**

*Law360 (September 21, 2022, 7:06 PM EDT)* -- In a Texas courtroom in August, lawyers for a relatively small Dutch telecom company looked to convince eight jurors that Ericsson, an industry behemoth, deliberately infringed patents for improving how wireless networks transmit signals while fighting Ericsson's argument that the company's patents raised privacy concerns.

"It had sort of a boogeyman element to it," recalled KPN lawyer Lexie White of Susman Godfrey LLP in an interview with Law360.

KPN, a Rotterdam-based carrier, had sued in U.S. District Judge Rodney Gilstrap's court in Marshall, Texas, seeking a quick trial to resolve years of stalled patent licensing negotiations between the companies. Ericsson is based in Sweden, but it's known in Texas, where the telecom giant's North American operations have been run out of Plano for over two decades.

After a weeklong trial, the jury verdict amounted to more than \$31.5 million, the very number that KPN's lawyers put in front of jurors. The jurors had unanimously agreed that KPN's lawyers were able to show that infringement of at least one of the asserted claims of the three patents at issue was willful, though Judge Gilstrap later declined to enhance the award.

The number, however, was larger than the amount some of Ericsson's rivals have paid to use KPN's patents, a fact that longtime Ericsson lawyer Ted Stevenson from Alston & Bird LLP did not hesitate to bring to the attention of the eight jurors who unanimously found for KPN.

"Huawei actually paid 24-and-a-half-million dollars to license the ... patent for just five years in a combination of cash and vouchers. That's the same patent, same time frame we're valuing here," Stevenson told jurors on the last day of the trial.

The jurors were not convinced. They returned a verdict in 2 hours and 15 minutes, recalled Andres Healy, another Susman Godfrey lawyer hired by KPN.

Unlike in a lot of patent fights over telecom patents, KPN's lawyers opted against pinning the case on the wireless standards that Ericsson's products would have had to comport to.

"We didn't take the shortcut that a lot of people take in standard essential patent cases to simply chart the [patent onto the] standard," White told Law360. "We did it the old-fashioned way. We proved

infringement by looking at what the products were actually doing and comparing that to each part of the patent claims."

Representatives for Ericsson did not respond to a request for comment on the verdict.

One of Ericsson's main arguments was that the base stations the company sold to major carriers like AT&T and Verizon, making billions in the process, did not actually use the improvements to wireless communications described by the patents KPN owned.

The two companies had been licensing patents together for some time, but their relationship soured shortly after 2014, when Ericsson last paid to license KPN's patents, according to court filings. Like carriers in the U.S., KPN regularly bought equipment from Ericsson, but had decided to start buying equipment from two of Ericsson's biggest competitors, Huawei and Nokia, a switch that came up repeatedly in last month's trial.

"Ericsson all but admitted that they were punishing us for choosing one of their competitors," White told Law360. During the trial, White had turned this bad blood into a matter of justice, telling jurors that "they don't want to pay for using our property because they're Ericsson, and we have the nerve to select a competitor."

By the time the case reached jurors, Ericsson's lawyers had succeeded in whittling down KPN's case from five patents to three, and out of those, almost all the damages were tied to a single patent, which covered a way of improving how carriers can identify gaps in coverage by using data generated by phones in the same service network.

In industry-speak, this was referred to as a "minimization of drive tests," or MDT for short. Before the jurors, lawyers from both sides referenced the "Can you hear me now?" commercials that Verizon Wireless had aired during the 2000s.

KPN's lawyers largely dissuaded jurors from finding the other prong of Ericsson's defense very convincing — that claims in the patent were already covered by language in a Motorola patent that dated to 1989 — White told Law360. During trial in a contentious cross-examination, Healy had cornered Ericsson's expert, a Cornell professor named Stephen Wicker, into more or less admitting the older patent covered something different, according to White. KPN then pulled its own validity expert, in a sign of confidence that Ericsson's invalidity arguments would flop, she said.

Midtrial, Ericsson's lawyers suddenly dropped an argument they had planned to make that the rates KPN wanted to charge were too high for patents that would be considered essential to a wireless standard, a move Judge Gilstrap would later characterize as an "unfair surprise."

By the time closing arguments kicked off, the Swedish company centered its defense on the idea that its customers weren't actually using the features that KPN had developed. In front of jurors, Stevenson was now calling KPN's technology a "battery killer" and warned jurors that the technology would allow its signals to spy on phones without user consent.

"Can you imagine if a carrier in the United States turned on MDT without getting consent, just turned it on on your phone tomorrow and all of the sudden your phone started pinging the network, tracking your location, running hot, draining the battery — what would the reaction be?" Stevenson asked jurors.

KPN's lawyers disagreed, but they faced the challenge of keeping jurors focused on the infringement accusations.

"We had to make those points without having the jury lose sight of the fact that user privacy is not an element of infringement. This is an apparatus claim. It's infringed when the [stations] are sold," White told Law360. "There's no part of the patent claims that addressed user privacy. It's not part of the claim. It was really sort of an element that Ericsson was reading into the claims."

During trial, White tried to reorient jurors by arguing that Ericsson deliberately neglected to provide testimony that would support arguments that user consent laws would block companies from using KPN's tracking technology.

"None of their business partners, not AT&T, not Verizon, not T-Mobile ... took the stand, took an oath, looked you in the eye, and was willing to say what Ericsson has been telling you all week — that they are not using MDT because of consent," she told jurors during closing arguments.

The parties are now going through post-trial proceedings. Outside Judge Gilstrap's court, the Patent Trial and Appeal Board is set to take its own look at whether claims in the patent tied to the bulk of the verdict are invalid. A final ruling in that proceeding is expected sometime next year.

The patents-in-suit are U.S. Patent Nos. RE48,089; 9,235,637; and 8,881,235.

KPN is represented by Lexie G. White, Adam Tisdall, Andres C. Healy, Tamar Lusztig and Russell F. Rennie of Susman Godfrey LLP, and T. John Ward Jr. and Claire Abernathy Henry of Ward Smith & Hill PLLC.

Ericsson is represented by Douglas M. Kubehl, Jeffery S. Becker, Harrison G. Rich, Melissa L. Muenks and Michael Hawes of Baker Botts LLP, Theodore Stevenson III of Alston & Bird LLP, and Nicholas Mathews, Alexander J. Chern, Carson D. Young and Samuel F. Baxter of McKool Smith PC.

The case is Koninklijke KPN NV v. Telefonaktiebolaget LM Ericsson et al., case number 2:21-cv-00113, in the U.S. District Court for the Eastern District of Texas.

--Additional reporting by Adam Lidgett. Editing by Robert Rudinger.