

Court of Appeal confirms that prior art publication date is to be determined by reference to the timezone of the patent office of filing

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Brian Cordery (Bristows)

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by Steven Willis

Given the furore surrounding Birss J's decision on the non-technical issues in *Unwired Planet v Huawei* earlier this month, which included the first determination of FRAND terms by an English Court (reported on by my colleague Rachael [here](#)), it would have been easy to miss the first appellate Court judgment on the related technical issues which was handed down last week. However, the Court's decision to uphold Birss J's first instance finding that *Unwired Planet's* patent to a polling system for use in a wireless communication network is valid and infringed by wireless telecommunication networks that operate in accordance with the LTE (4G) standard should not be overlooked as it confirms the position in relation to a hitherto untested area of the law of novelty.

The issue arises as follows: the application from which the patent in suit claimed priority was originally filed by Ericsson at the USPTO at 16:59 EST on 8 January

2008. Over 14 hours earlier, at 08:36 CET (02:36 EST) on 8 January 2008, Ericsson had uploaded a submission to the relevant standard setting committee on a publicly available internet server (the “Ericsson TDoc”). In some parts of the world, including Hawaii, the Ericsson TDoc was available to the public for download on 7 January 2008 by virtue of the prevailing timezone. There was no dispute that if the Ericsson TDoc formed part of the state of the art, it amounted to an anticipating disclosure of the patent in suit.

It is a requirement of Article 54(2) EPC that for a document to form part of the state of the art for the purposes of novelty, it must be made available “before the date of filing”. Huawei argued on appeal that the publication date of a prior art document should be determined by reference to the date in the place of publication. Where a document is published simultaneously in more than one timezone, one should take the earliest date (i.e. in this case 7 January by virtue of the Hawaii publication). Unwired Planet disagreed with Huawei’s approach and considered the only relevant date to be that in which the patent application was filed. Accordingly, the Ericsson TDoc was made available at 02:36 on 8 January which was not “before the date of filing” and as a result the Ericsson TDoc did not form part of the state of the art.

The Court of Appeal preferred Unwired Planet’s submissions and the approach adopted by Birss J at first instance. Floyd LJ, delivering the leading judgment, summarised the position as follows: *“The priority date is the 24 hour period of the day on which filing took place, in the time zone of the patent office where it was filed. The publication must occur before that day, on a time basis, by reference to the time zone of the patent office of filing.”*