

*Why Most Patents are Invalid –
Extent, Reasons, and Potential Remedies of Patent Invalidity*

Joachim Henkel

Professor, Technische Universitaet Muenchen
Muenchen, Germany

Uncertainty regarding legal robustness of patents entails inefficiencies. It is an important question for IP policy and management how severe this problem is. Only few patents are litigated, and these are not a random selection. Thus: if a randomly picked patent underwent invalidation proceedings, what would be the odds of it being invalidated? And which characteristics of the patent and the parties in suit correlate with the outcome of the invalidity suit? We address these questions for the case of Germany. Our study is based on 13 years of court decisions, 19 hours of expert interviews, a survey among 320 patent lawyers, and an econometric analysis of 310 decisions. We find that 55% of invalidity suits are settled, while 45% conclude with a decision. Of these, 65% are appealed. The final decision is "fully invalid" in 35% and "partially invalid" in 40% of cases. Only in 25% the patent is held fully valid. Regarding selection effects, the patents in those 55% of suits that settle are seen as significantly less robust. Furthermore, the plaintiff's budget was seen as having a strong effect on the likelihood of invalidation. Econometric analysis confirms this finding. Thus, assuming that in the hypothetical suit involving a randomly picked patent a large budget was spent by the plaintiff, the likelihood of full or partial invalidation would be even higher than 75%. The same logic holds for other legislations. Where validity is decided during infringement proceedings, an additional selection effect is that patentees more likely litigate robust patents. We concur with Lemley (2001) that a more detailed examination would not solve the problem, but we do not consider "rational ignorance" a satisfactory explanation. Even patents that are never litigated create inefficiencies. To address the problem that many patents are latently invalid we suggest a radical increase of the required inventive step.

Email: henkel@wi.tum.de

Henkel