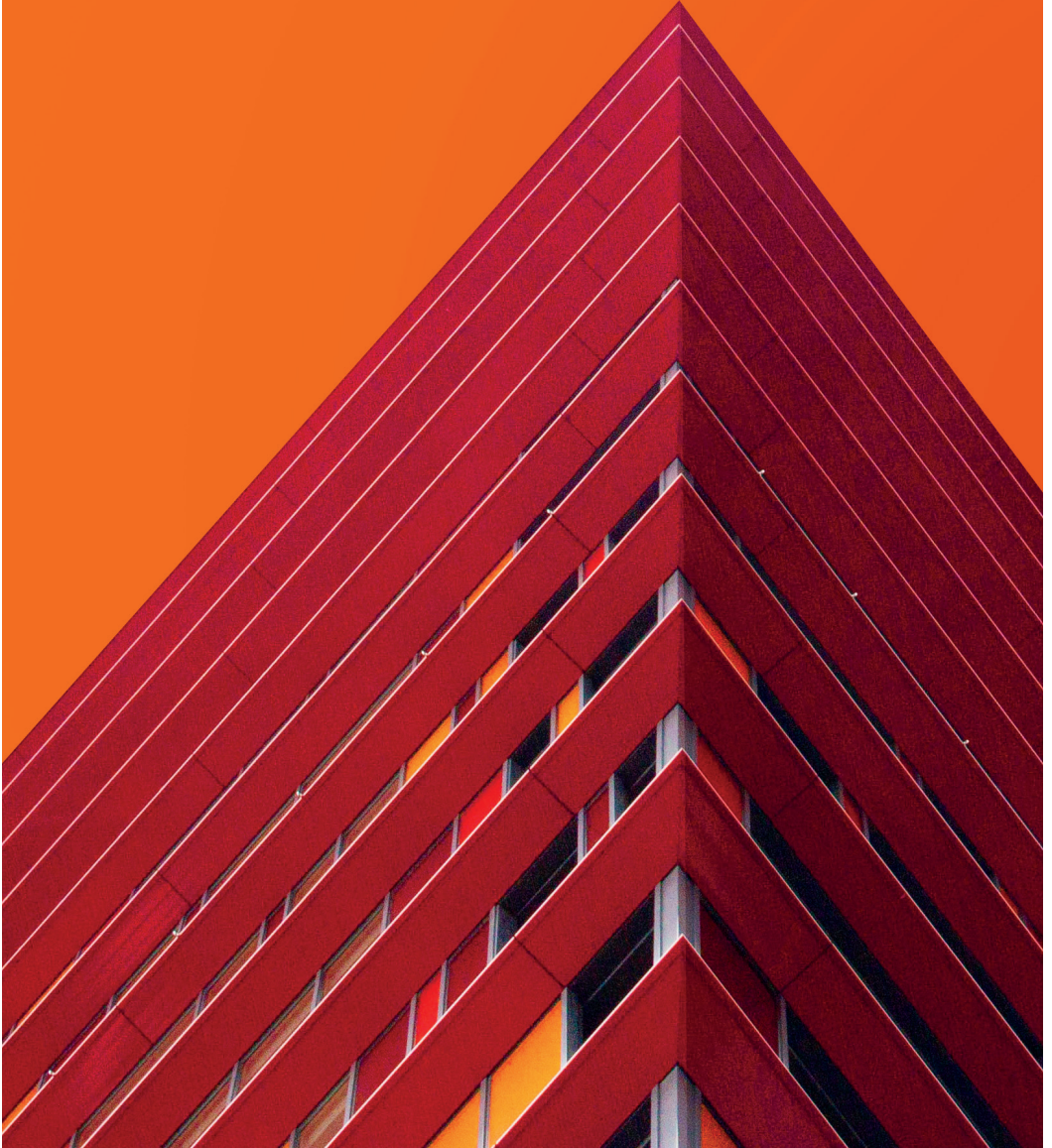


TaylorWessing

German Patent Cases: Statistics



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Overview

Germany historically plays a central role in European patent litigation. About 60 percent of all European patent cases are filed in Germany¹.

This is not just due to the key importance of Germany as a European market but is also attributed to its pro-patentee legal system. In Germany, patent infringement proceedings are comparatively cost-effective and quick, with an injunction being a regular outcome. German patent litigation is bifurcated, with infringement and validity being tried on separate tracks. This has the consequence that there is no decision on patent validity taken in the infringement proceedings. Subject to a relatively high threshold, the infringement court will consider a potential stay of the infringement proceedings pending a parallel – customarily slower – validity attack, for example, opposition proceedings or nullity action. Bifurcation can thus have the effect of an “injunction gap,” whereby a permanent injunction is available and already enforceable, although pending validity proceedings against the patent have not yet been decided. Of course, the infringing-

er is secured by potential damage claims and, indeed, the patentee would have to deposit a security for the preliminary enforcement of the first-instance judgment. Nevertheless, this “injunction gap” provides a considerable strategic advantage for the patentee.

An obligation to compensate damages resulting from patent infringement, which in Germany reflects actual damages only, can be awarded in the infringement trial. Further, the infringer has to render accounts on the infringing acts in the past. The information provided by the infringer will usually allow the patentee to calculate the amount of damages. Disputes about the actual amount of damages are either settled or handled in a separate court proceeding, usually again before the infringement court.

In Germany, 12 courts exclusively handle patent infringement litigation.

Most important of these courts historically has been the Düsseldorf Regional Court, which has three chambers – each of them consisting of three judges – handling patent cases. About 40 percent of all German patent infringement cases are filed with the Düsseldorf Regional Court². The Düsseldorf Regional Court, because of its comprehensive jurisprudence and experience, provides for reliable results. In the recent past, the Mannheim Regional Court has become the second-ranking German court for patent infringement litigation, handling about 20 percent of all German cases³.

The Mannheim Regional Court has particularly expedited timing and has attracted a lot of mobile telecommunications and other electronics cases. Ranking third is the Munich Regional Court, followed by the Hamburg Regional Court.

In the recent past, the advantages of German patent litigation were particularly recognized by the electronics industry, which has chosen (and keeps choosing) Germany as a key forum for its “smartphone wars” in Europe. In addition, the pharmaceutical industry, for which Germany is an important market, is a major player in patent litigation in the country. In the recent past, a trend emerged whereby German courts are increasingly willing to grant preliminary injunctions against generic companies that have not “cleared the way” with a validity attack before entering the market.

¹ Thomas Kühnen/Rolf Claessen, Die Durchsetzung von Patenten in der EU–Standortbestimmung vor Einführung des europäischen Patentgerichts, GRUR [Journal for Industrial Property and Copyright Law] 592 (2013). About 2,000 patent cases were filed in Europe and approximately 1,250 of these in Germany in 2011.

² Id. 475 of 1,250 German patent cases filed in total were filed in Düsseldorf in 2011; 489 patent cases were filed in Düsseldorf in 2012.

³ Id. 265 of 1,250 German patent cases filed in total were filed in Mannheim in 2011; 234 patent cases were filed in Mannheim in 2012.

System	Civil law Bifurcated
Number of infringement trial courts	12 first instance courts (<i>Landgerichte</i>)
Number of validity trial courts	1 (<i>Bundespatentgericht</i>)
Number of trials required validity/ infringement/damages	3
Judge or panel	Infringement trial courts: panel (3 judges) Validity trial courts: panel (5 judges)
Specialized intellectual property court/judges	Infringement trial courts: yes (judges are experienced in intellectual property cases). Validity trial courts: yes
Number of appellate levels	1 (plus revision on infringement)
Loser pays?	Yes (limited to necessary costs)
Annual patent infringement litigation filings	Estimate ~1,200 ⁴
Annual patent validity litigation filings	Estimate ~250 (nullity actions) ⁵
Percentage of cases to trial	Estimate ~50% ⁶
Average time ⁷	Infringement: ~10 to 18 months (first instance). Validity: ~22 to 26 months (first instance)
Patentee win rate ⁸	Infringement cases (proceedings on the merits): 64% (699/1061) (2006–2016) Nullity actions in Federal Patent Court: 50% (2006–2016)
Preliminary/permanent injunctions	Yes/yes
Civil/criminal liability	Civil/criminal

⁴ Source: Global IP Project. ⁵ Source: Global IP Project. ⁶ Source: Global IP Project.

⁷ Source: TW estimate. ⁸ Source: DARTS-IP.

A | Statistics on Patent Litigation in Germany

B | Filings of Patent Infringement Actions

C | Average Costs

D | Average Time From Filing to Final Decision

E | Patent Infringement Litigation Patentee Win Rates

F | Validity Challenge Data

A | Statistics on Patent Litigation in Germany

In Germany, court documents are generally not publicly accessible. In individual cases in which a party can demonstrate a legal interest (i.e., is threatened to be sued), it can request a file inspection, which may contain confidential information of the plaintiff or defendant. The court will consequently decide what scope to grant to the file inspection. Accordingly, the most important source of information on patent litigation are published judgments, which in most cases are made available in a version that does not name the parties, attorneys, or other sensitive information. Another source of information are statistics of the courts, which are, however, not made publicly available by all courts. The data below are based on information provided by DARTS-IP.

B | Filings of Patent Infringement Actions

From 2006 to 2014, more than 10,000⁹ patent related actions were started in Germany. This is an average of 1,250 per year.¹⁰ Most actions (~40 percent) were filed in Düsseldorf. Mannheim and Munich Regional Courts handle about 25 percent and 15 percent, respectively, of all nationally filed patent infringement actions. The total number also includes about 250 patent nullity actions filed per year at the Federal Patent Court.

C | Average Costs

Information on the individual costs of litigation is not published in Germany. The minimum costs depend on the individual value in dispute (Streitwert) on which the court fees and the statutory attorneys' fees are calculated, as well as on the number of patents and the number of parties involved. Usually,

patent litigation in Germany is handled by a team consisting of legal attorneys and patent attorneys, both paid on the basis of hourly fee rates. As a ballpark figure, based on experience, the costs for a first-instance infringement action including court fees and defending a parallel nullity action range from about U.S. \$100,000 on the basis of a medium-value litigation to about U.S. \$500,000 on the basis of a relatively high-value litigation; these figures, however, depend on the particulars of each case.¹¹ The litigation value is estimated with regard to the economic interest of the plaintiff. The litigation value in nullity proceedings is customarily 25 percent higher than in infringement litigation, as the nullity of the patent goes beyond the economic interest of just one plaintiff.¹² In subsequent proceedings relating to payment of damages, the litigation value equals the amount of damages sought.¹³

D | Average Time From Filing to Final Decision¹⁴

At the first instance infringement courts in Germany, the average time from filing to the oral hearing takes approximately 10 to 18 months in proceedings on the merits. The average duration from filing until the decision is handed down was 16.1 months (2006–2016) according to Fig. D-1. The infringement appeal before the Higher Regional Courts currently takes about 12 to 15 months. The duration of infringement proceedings will be approximately 6 to 12 months longer, if the court has to take evidence (e.g. court appointed expert's opinion), which is, however, rarely the case. Appeal on law (Revision) is only allowable for specific cases, and the proceedings at the Federal Court of Justice usually take the longest, at 18 to 24 months.

⁹ Please note that the data of some courts may also include non-technical intellectual property cases, which may account for an overall inaccuracy of about 5% to 10%.

¹⁰ Thomas Kühnen/Rolf Claessen, GRUR [Journal for Industrial Property and Copyright Law] 2013, 592.

¹¹ €75,700–378,500.

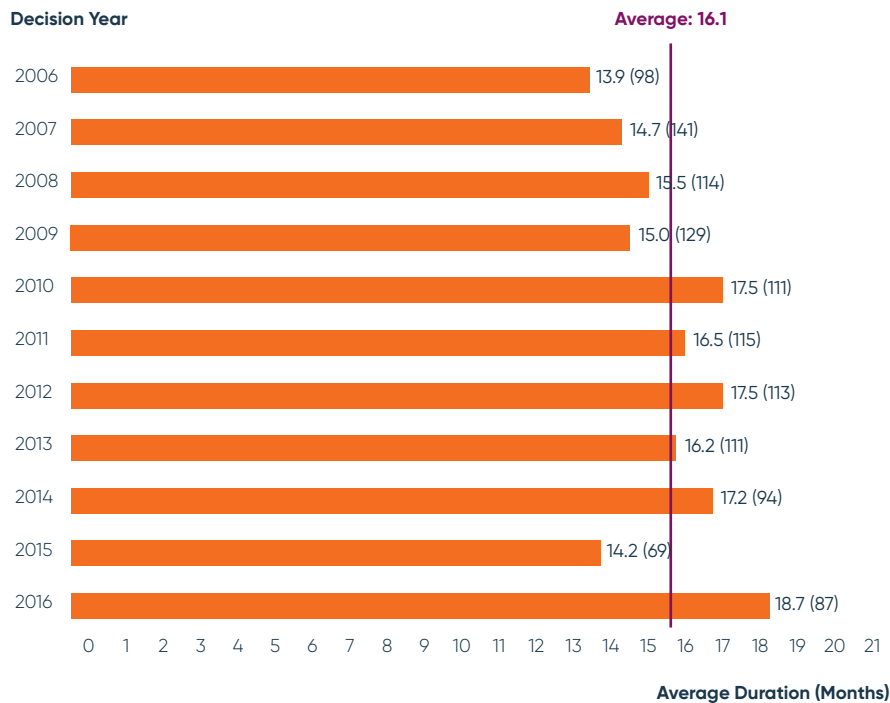
¹² Bundesgerichtshof [BGH] [Federal Court of Justice] April 12, 2011, GRUR [Journal for Industrial Property and Copyright Law] 2011, 757–Nichtigkeitsstreitwert.

¹³ German Court Fee Law (Gerichtskostengesetz) §3 s.1.

¹⁴ Source: DARTS-IP.

Nullity actions at the Federal Patent Court take approximately 22 to 26 months. There is certainly an advantage for the infringement plaintiff in the bifurcated system, because the infringement court will only stay a case if a (significant) likelihood of success of the validity attack can be demonstrated. Infringement cases are not very often stayed, so that a (provisionally) enforceable judgment is often available before the competent body makes a decision on validity

Figure D-1.
Average Duration of First Instance Infringement Proceedings in Germany: 2006–2016¹⁵

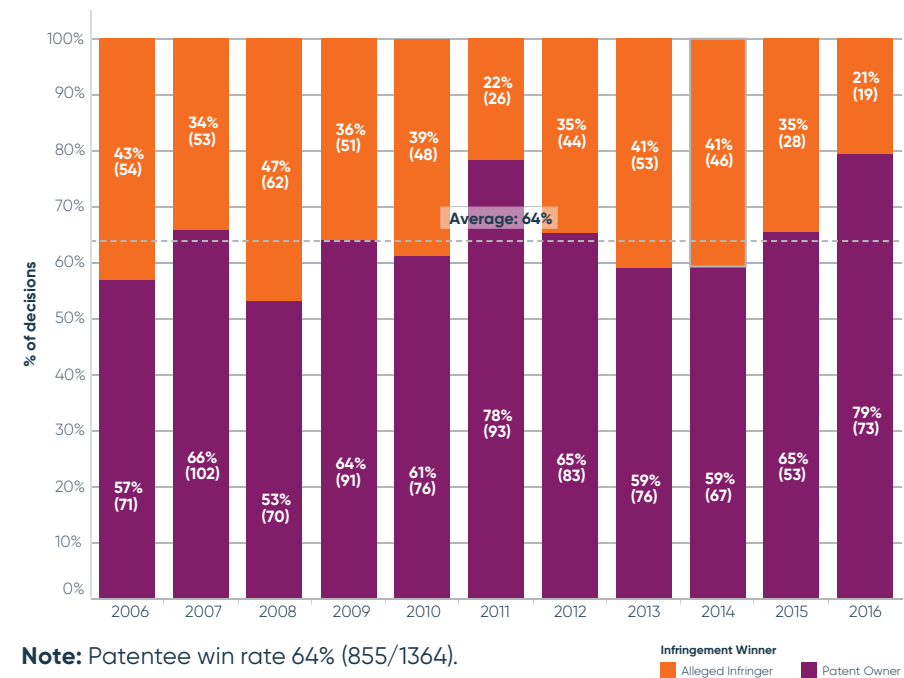


¹⁵ Source: DARTS-IP.

E | Patent Infringement Litigation Patentee Win Rates

The overall patentee infringement win rate in first instance proceedings on the merits is 64% (855/1364) based on DARTS-IP data (2006–2016) as shown in Fig. E-1; and according to Fig. E.2 this result is relatively consistent for the busiest courts ruling on patent infringement matters in Germany (Düsseldorf Regional Court: 64%, Mannheim Regional Court: 60% and Munich Regional Court: 62%).¹⁶

Figure E-1.
First-Instance Patent Infringement Decisions and Patentee Wins in Germany: 2006–2016¹⁷



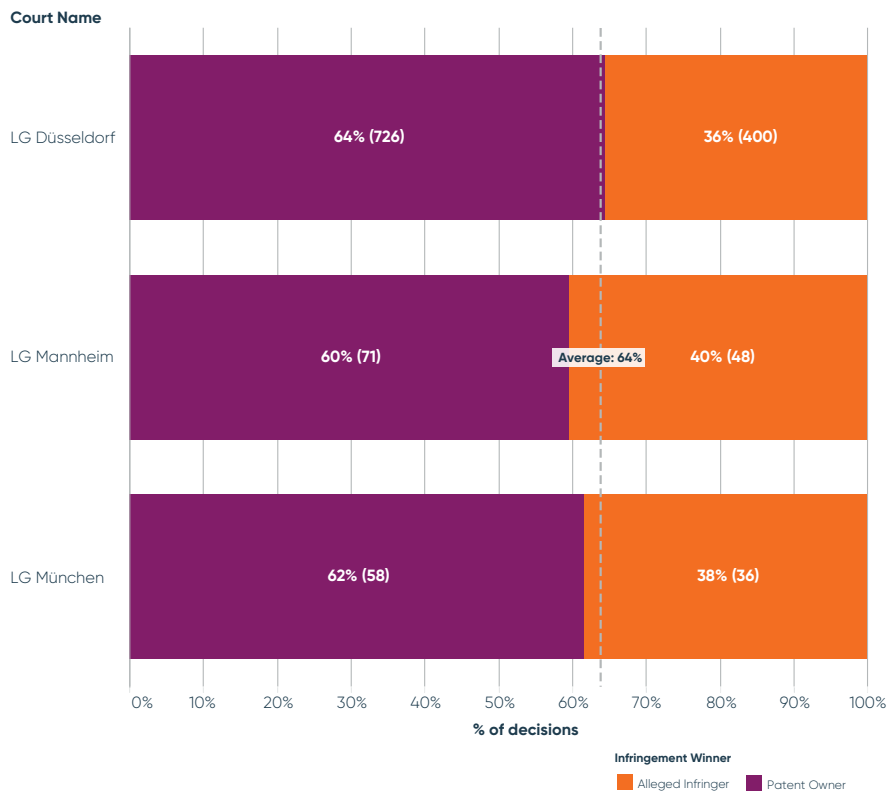
Note: Patentee win rate 64% (855/1364).

Infringement Winner
■ Alleged Infringer ■ Patent Owner

¹⁶ Source: DARTS-IP.

¹⁷ Source: DARTS-IP.

Figure E-2.
First Instance Infringement
Win Rate across Courts: 2006–2016¹⁸

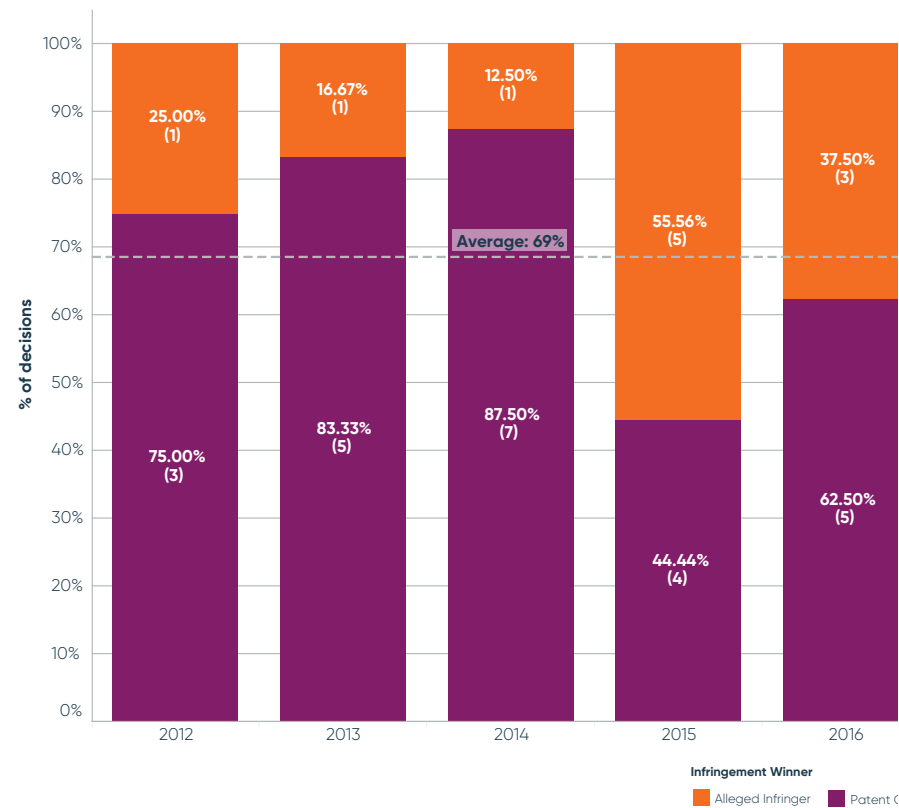


The overall patentee infringement win rate for preliminary injunction proceedings is 69% (24/35) between 2012 and 2016.¹⁹

¹⁸ Source: DARTS-IP.

¹⁹ Source: DARTS-IP.

Figure E-3.
Preliminary Injunction
Decisions and Patentee Wins in Germany: 2012–2016²⁰



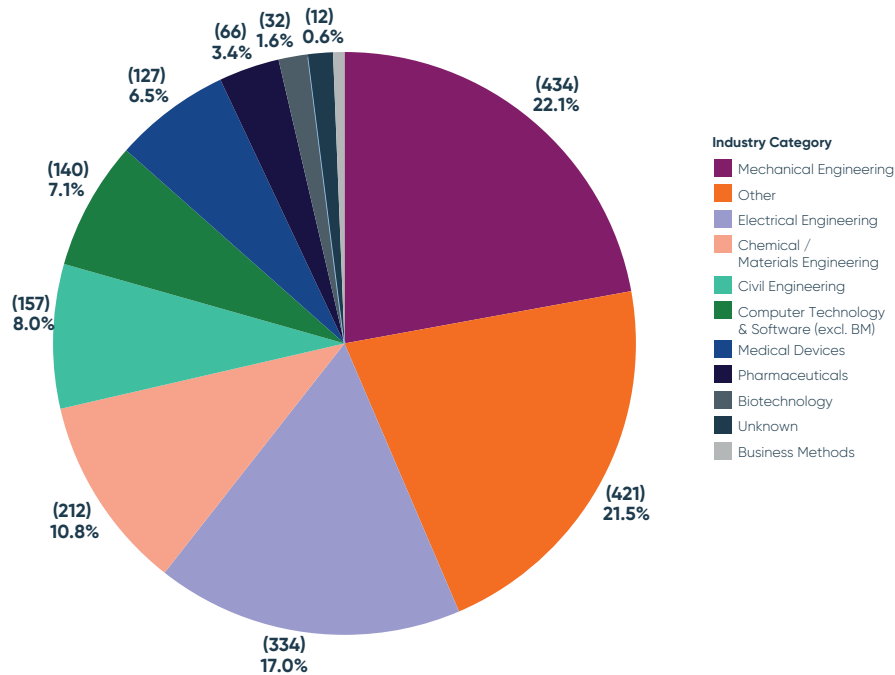
Note: Patentee win rate 69% (24/35).

The patentee infringement win rate data for first instance proceedings on the merits has further been broken down into specific industries.²¹

²⁰ Source: DARTS-IP.

²¹ Source: DARTS-IP.

Figure E-4.
Breakdown by Technology of First-Instance Patent Infringement Decisions in Germany: 2006–2016²²

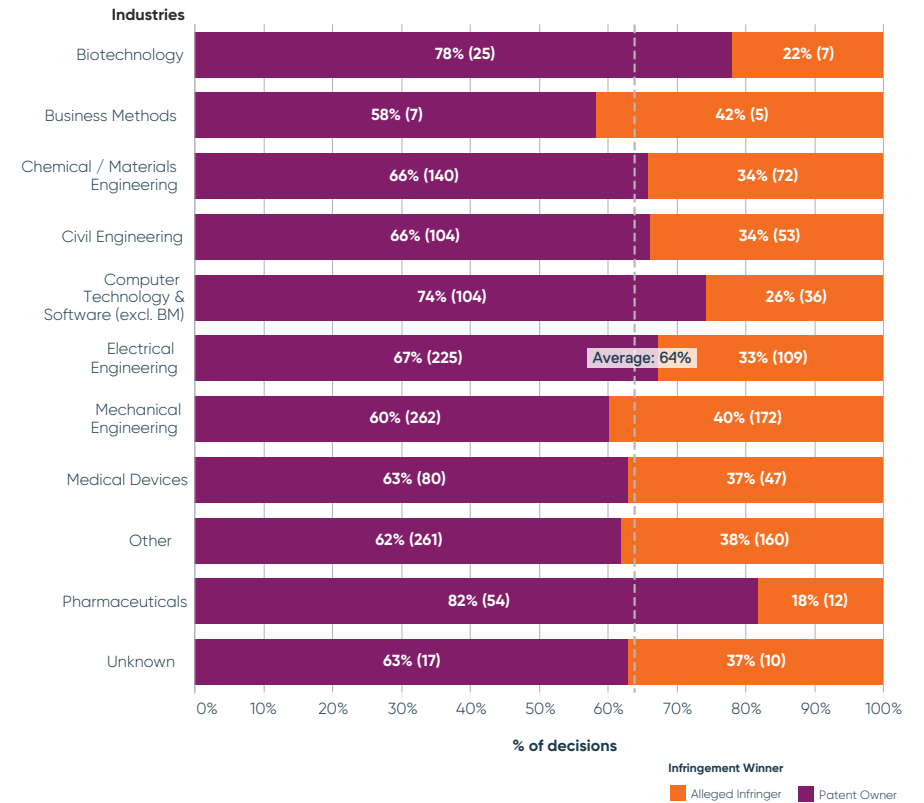


As can further be seen from Fig. E-5 patentees from the following industries have been most successful in first instance proceedings on the merits: Pharmaceuticals (82%, 54/66), Biotechnology (78%, 25/32) and Computer Technology & Software (74%, 104/140).²³

²² Source: DARTS-IP. The total number of cases represented may be higher than the number of decisions because DARTS-IP counts a case for each technology to which it is considered relevant, which leads to some double-counting.

²³ Source: DARTS-IP.

Figure E-5.
First Instance Patentee Win Rate on Infringement by Industry: 2006–2016²⁴

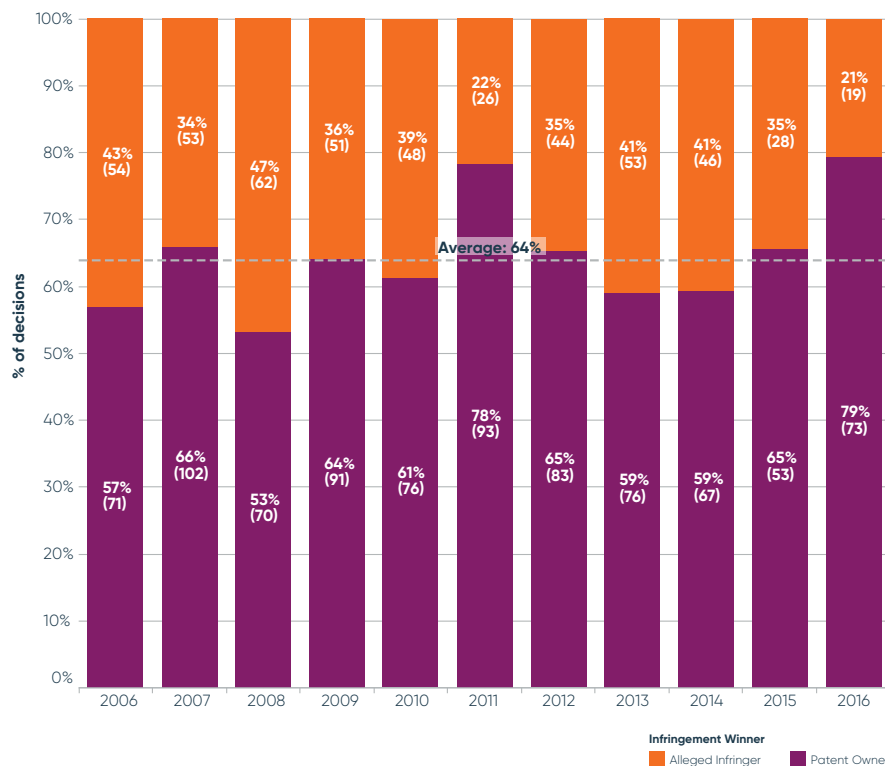


The patentee’s overall infringement win rate after appeal (2006–2016) is also high: 61% (232/378).²⁵

²⁴ Source: DARTS-IP. The total number of cases represented may be higher than the number of decisions because DARTS-IP counts a case for each technology to which it is considered relevant, which leads to some double-counting.

²⁵ Source: DARTS-IP. Definition of “win” on appeal: at least one claim held infringed.

Figure E-6.
Appeal Infringement Win Rate: 2006–2016²⁶



²⁶ Source: DARTS-IP.

F | Validity Challenge Data

1. Win Rate at the Federal Patent Court

The outcome of the nullity proceedings at the German Federal Patent Court is as follows (2006–2016):²⁷

- Total validity: 41.9%
- Not valid: 40.7%
- Partial validity: 17.4%

According to the Global IP Project methodology, the patentee win rate in the validity challenge is the percentage of all claims confirmed plus one-half of the number of decisions in which at least one claim was amended. Consequently, the average patentee win rate (as a defendant in the nullity proceedings) at the German Federal Patent Court is about 50.0 percent.

2. Decisions Depending on Validity Challenges

It is remarkable that parallel validity challenges were only found in approximately 50% of the infringement proceedings on the merits that went to trial at the Düsseldorf Regional Court between 2009 and 2011.²⁸ About 10% of the infringement proceedings on the merits were stayed at the Düsseldorf Regional Court pending validity challenges in this period. Notably, the percentage of stays is relatively low compared to the success rate for validity challenges.

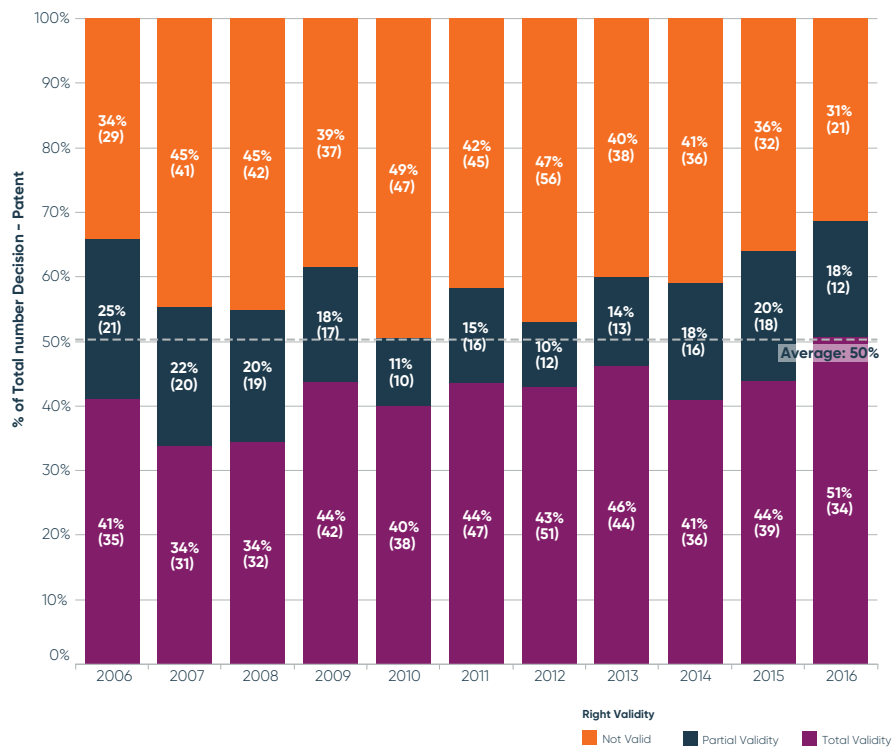
According to the usual practice, the infringement cases are stayed until the parallel validity challenge is decided in the first instance and depending on the result, the infringement cases can then either be commenced or they would be further stayed until the parallel validity challenge is finally decided.

The average validity win rate for nullity actions before the German Federal Patent Court is about 50% as shown in Fig. F-1; the results for 2006 to 2016 are summarized in Fig. F-2.

²⁷ Source: DARTS-IP. These statistics do not include opposition proceedings at the EPO.

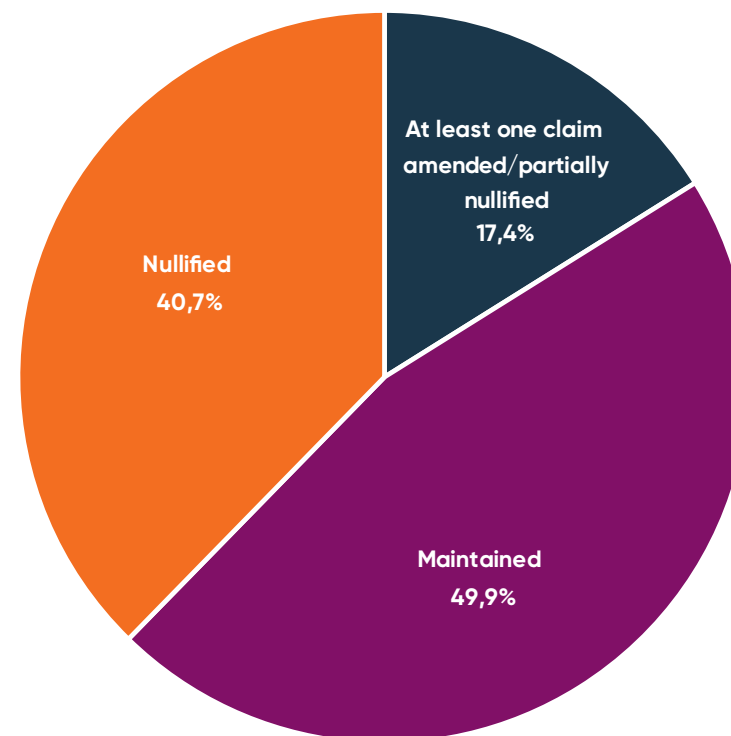
²⁸ Thomas Kühnen/Rolf Claessen, GRUR [Journal for Industrial Property and Copyright Law] 2013, 592, 593.

Figure F-1.
Patent Validity at Federal Patent Court: 2006–2016²⁹



²⁹ Source: DARTS-IP.

Figure F-2.
Summary of Patent Validity: 2006–2016³⁰

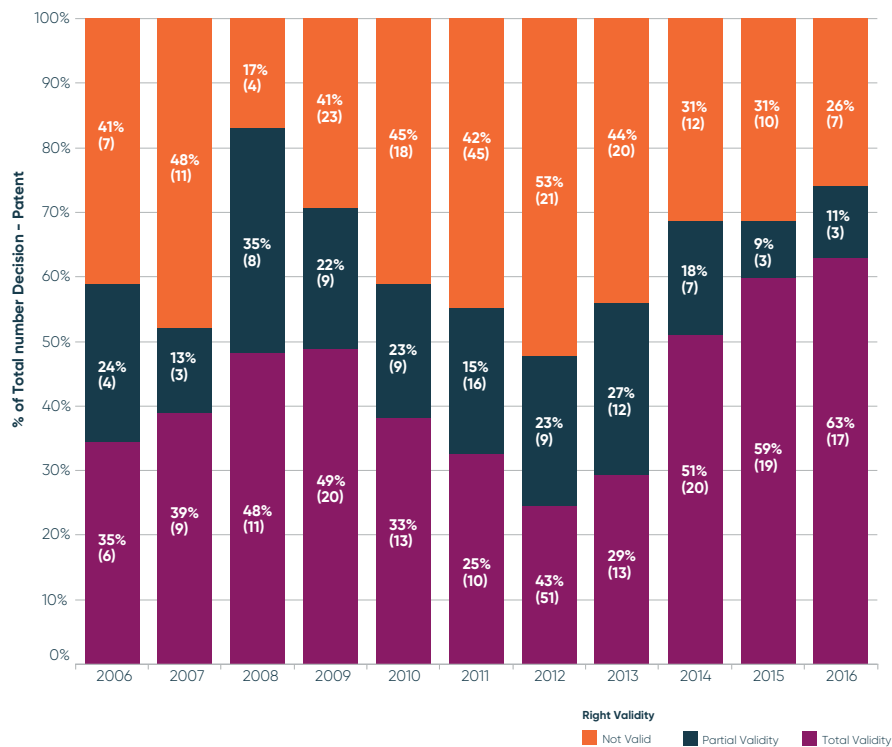


Note: According to the methodology, win = maintained + ½ (amended/partially nullified), so the average patentee win rate for 2006 to 2016 = 41.9% + ½(17.4%) = 50.0%.

→ On appeal, the average validity win rate is 52% between 2006 and 2016.

³⁰ Source: DARTS-IP.

Figure F-3.
Validity Win Rate of Nullity Actions of Appeal, Federal Court of Justice:
2006–2016³¹



Note: According to the methodology, win = maintained + ½ (amended/partially nullified), so the average patentee validity win rate on appeal for 2006 to 2016 = 52.5% (42%, 159/383 + ½(21%, 79/383)).


³¹ Source: DARTS-IP.


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