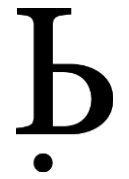


IP-Litigation in the telco area – Lessons to be learned for the automotive industry?

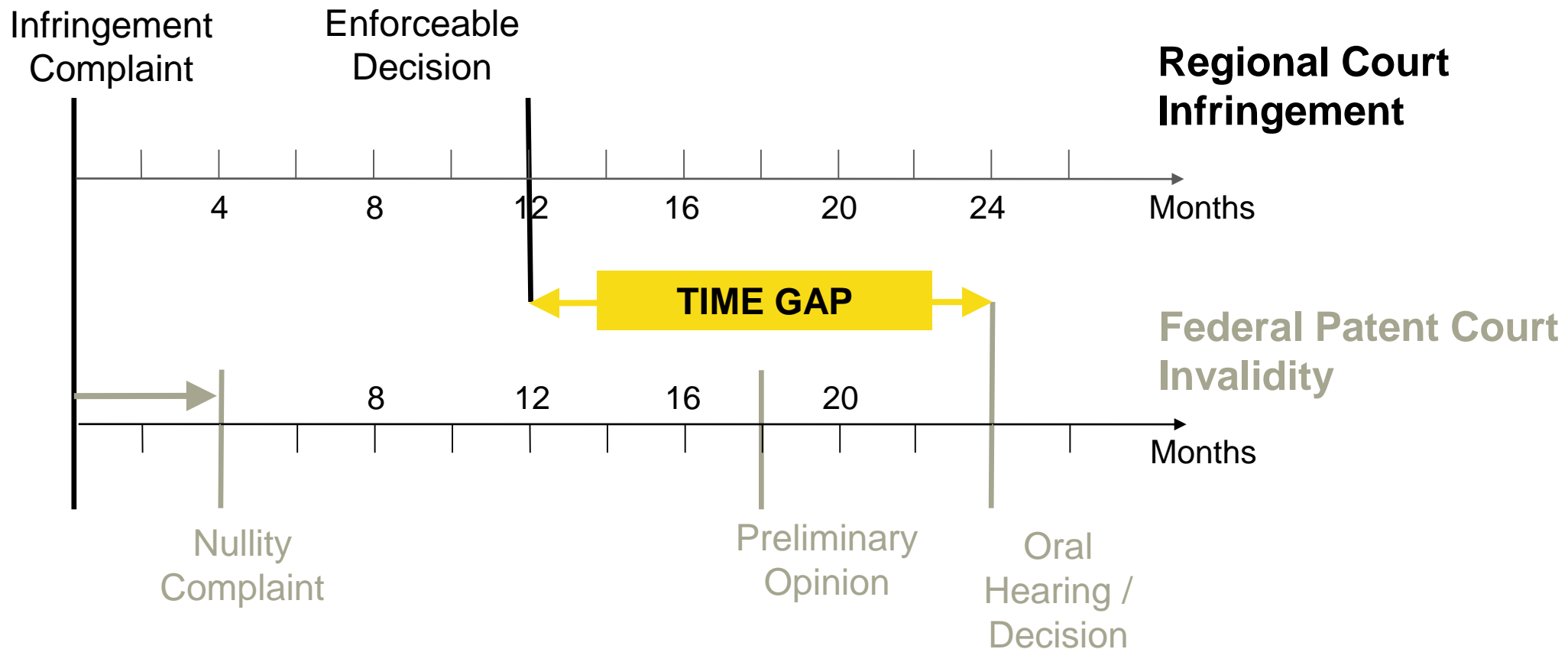
RA Prof. Dr. Peter Chrocziel

PA Dr. Hans Wegner

RA, EUPA Johannes Heselberger



Infringement and invalidity – the time gap

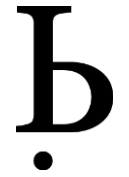


Injunction without thorough „validity check“

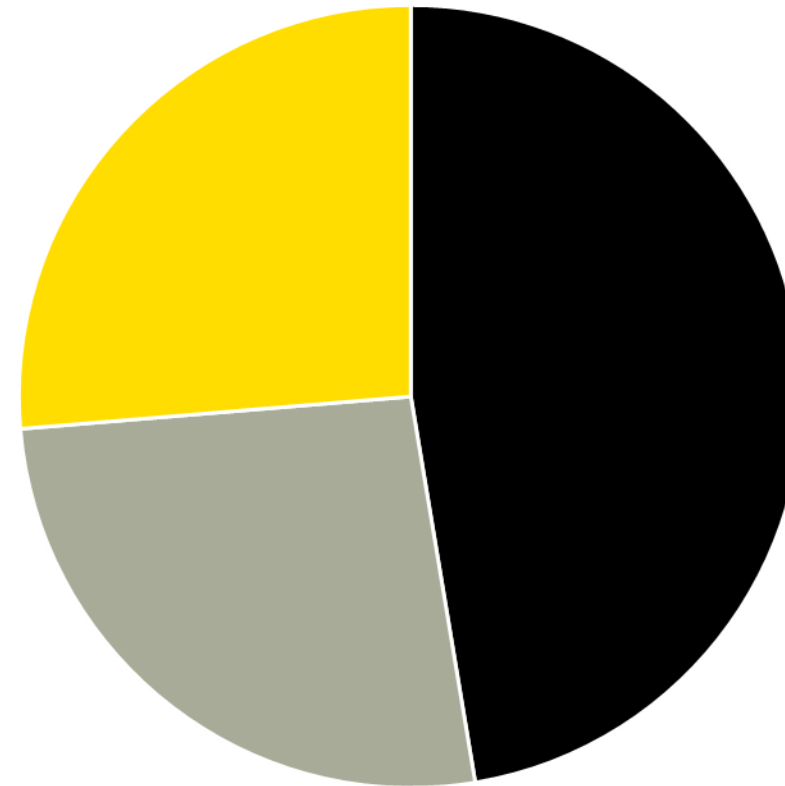


- often finally unintended: stay rates << invalidation rates
- dangerous: virtually no protection for a defendant from preliminary enforcement of an injunction; if at all for suppliers!

Results of first instance

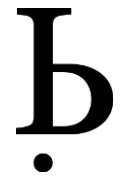


Outcome of First Instance Invalidation Proceedings 2010 – 2013 (392 cases)

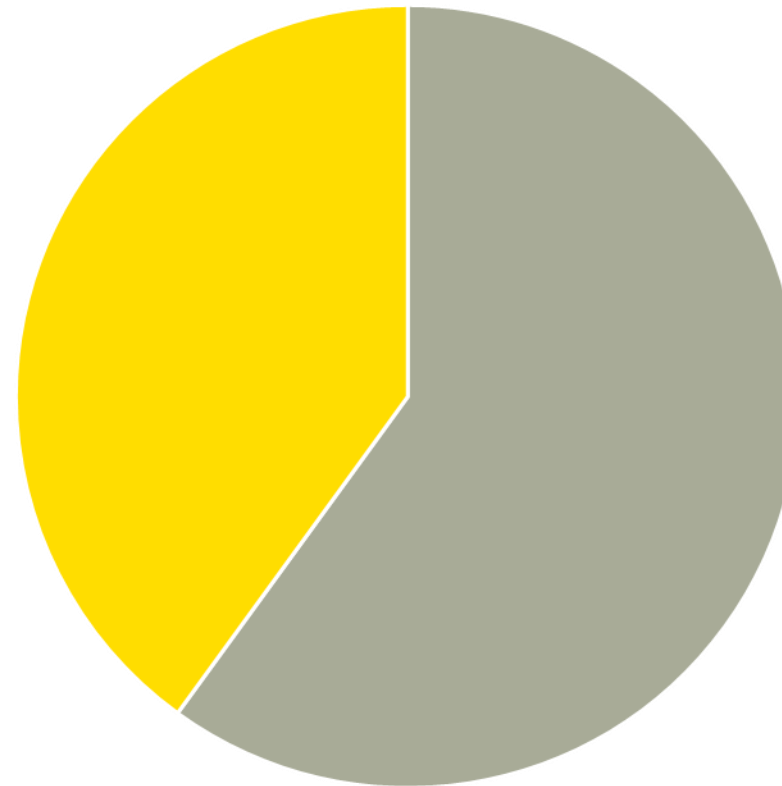


- Fully Revoked (ca. 45%)
- Revoked in Part (ca. 25%)
- Fully Maintained (ca. 30%)

Results of second instance



**Outcome of
First Instance Invalidation
Proceedings
2010 – 2013
(392 cases)**



■ Confirmed (ca. 60%) ■ Changed (ca. 40%)

Close-Up: gap for preliminary enforcement without thorough „validity check“



- as of preliminary opinion (§ 83 I PatG) chances to obtain a stay of the preliminary enforcement with the Appeals Court
- foreign invalidity proceedings may provide faster ruling on validity
- requests for acceleration rarely lead to earlier decision

Close-Up: prerequisites for preliminary enforcement



- provision of security: usually low hurdle, even if (very) high amount of security is ordered
- liability of Plaintiff, if injunction is later lifted: no hurdle, as it is no easy claim for defendant
- change in “philosophy” over time, particularly in view of the asymmetric situation with NPEs compared to competitors

Close-Up: defense against preliminary enforcement



- practically no successful legal defense against preliminary enforcement, unless risk of bankruptcy exists
- request of maximum security for preliminary enforcement requires the Defendant to “make credible” his expected damage

Smart Phone Wars



Patent Litigation in the past

- Academic, if not „elegant“ discussions
- All the way through the courts, no enforcement
- Settlement: license
- Exception: pharma business

Smart Phone Wars



Mobile Phone Industry

- SEP at core of litigation („one bullet to kill“)
- Patent litigation as a business tool:
 - Many patents
 - Worldwide
 - Preliminary enforcement
 - Closing businesses as option
- Focus: OEM and net selling price
- Higher royalties
- Profit redistribution!
- „Single point of licensing“

Smart Phone Wars



Automotive

- No royalties paid by OEM
- Component supplier takes care of own and third party IPRs – incorporated in supplier contract / price

Lessons learned: Plaintiff's view



- **sue quickly**
- **preliminarily enforce, regardless**

Lessons learned: Defendant's view



Legal steps: prepare court defense from “day 1”, i.e. first letter received:

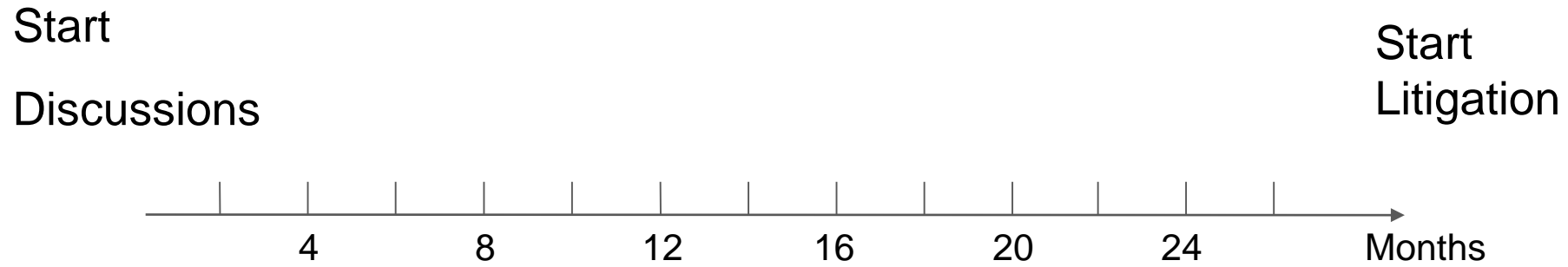
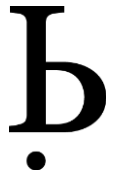
- search for prior art, prepare invalidity attack, with a view to arguing a stay of the infringement case; possibly “turn on” foreign lawyers as well
- “invite” supply chain to the infringement / invalidity cases for better defense; higher, asymmetric cost risk may help also

Lessons learned: Defendant's view (continued)

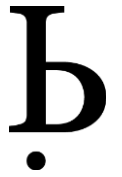


- consider powerful representation re. value in litigation, in particular if foreigner security is required (§ 110 ZPO)
- invest energy in “making credible” the damage caused by preliminary enforcement, without disclosing sensitive data (particularly re. lack of alternatives)
- scrutinize chain of ownership / transfers of patents to final Plaintiff
- factually: consider practical consequences of injunction: possibilities to mitigate effects?

Pre-Litigation Phase: Overview



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Partnerschaft mbB
Prinzregentenplatz 7
81675 München



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