

# Agenda

- Main Results
- Motivation
- Anecdotal Evidence from Germany
- Institutional Aspects – Annulment Proceedings in Germany
- A New Database
- Comparing Annulment and Infringement Outcomes
- “Angora Cat” Problems
- Conclusions and New Questions

# Main Results (1/2)

- Bifurcation systems – as in Germany and in the planned pan-European litigation system - separate annulment and litigation proceedings.
- Critics argue that these systems may generate errors:
  - A regular infringement court may rule for the plaintiff – later annulment proceedings at the validity court may invalidate the patent.
  - Infringement court and annulment court may use inconsistent claims construction – “Angora cat” problems.
- Anecdotal evidence appears to support this notion, but there has been no systematic statistical evidence.

# Main Results (2/2)

- A new database covering more than 4,500 German litigation cases for the time period 2000-2008 allows us to assess the arguments empirically.
- $\approx 20\%$  of patents for which the first-instance court ruled in favor of the plaintiff are later held invalid or partially invalid by the annulment court.
- We also address the “angora cat” issue by comparing outcomes of German and British (no bifurcation) courts. There are early indications of inconsistencies.

# Motivation

- Bifurcation separates infringement and validity proceedings. Built-in: a strong presumption of validity.
- Bifurcation has been hotly contested in recent discussions regarding a harmonized litigation system in Europe.
- Potential outcome of patent litigation (in Germany):
  - A regional court (Landgericht) grants injunction on infringement
  - Eventually, the Federal Patent Court (BPatG) revokes the patent.
- Injunctions are fully enforceable - regardless of pending revocation procedures.
- Result: party held liable for infringing an invalid patent.
- Compensation rules exist, but compensation may not be commensurate to the damage caused.

# Anecdotal Evidence from Germany (1/4)

- On April 24, 2012, the district court in Düsseldorf ruled that **Nokia and HTC infringed ICom's UMTS-related patent EP1841268**. The court granted an injunction forcing Deutsche Telekom to stop selling certain Nokia and HTC phones. Before the judgment was handed down, the EPO had already scheduled its decision on the opposition procedure for the same patent for April 25, 2012. The EPO revoked the patent.

# Anecdotal Evidence from Germany (2/4)

- The **Olanzapine patent (DE69112895)** assigned to **pharmaceutical company Eli Lilly** was revoked by the Federal Patent Court. Whereas the first instance court in Düsseldorf refused granting a preliminary injunction based on the decision of the Federal Patent Court, the second instance Appeal Court nevertheless granted a preliminary injunction.

Note: the Appeal Court does not represent the court of appeal for the validity dispute, but solely decides on appeals from the infringement proceedings.

# Anecdotal Evidence from Germany (3/4)

- A recent case in point is the injunction forcing Apple to de-activate its **email push service in its iOS handhelds** in Germany. The relevant patents was **EP0847654** held by Motorola. Apple's appeal against this injunction was dismissed by the court of appeal, the Karlsruhe Higher Regional Court, despite ongoing invalidity proceedings before the Federal Patent Court.

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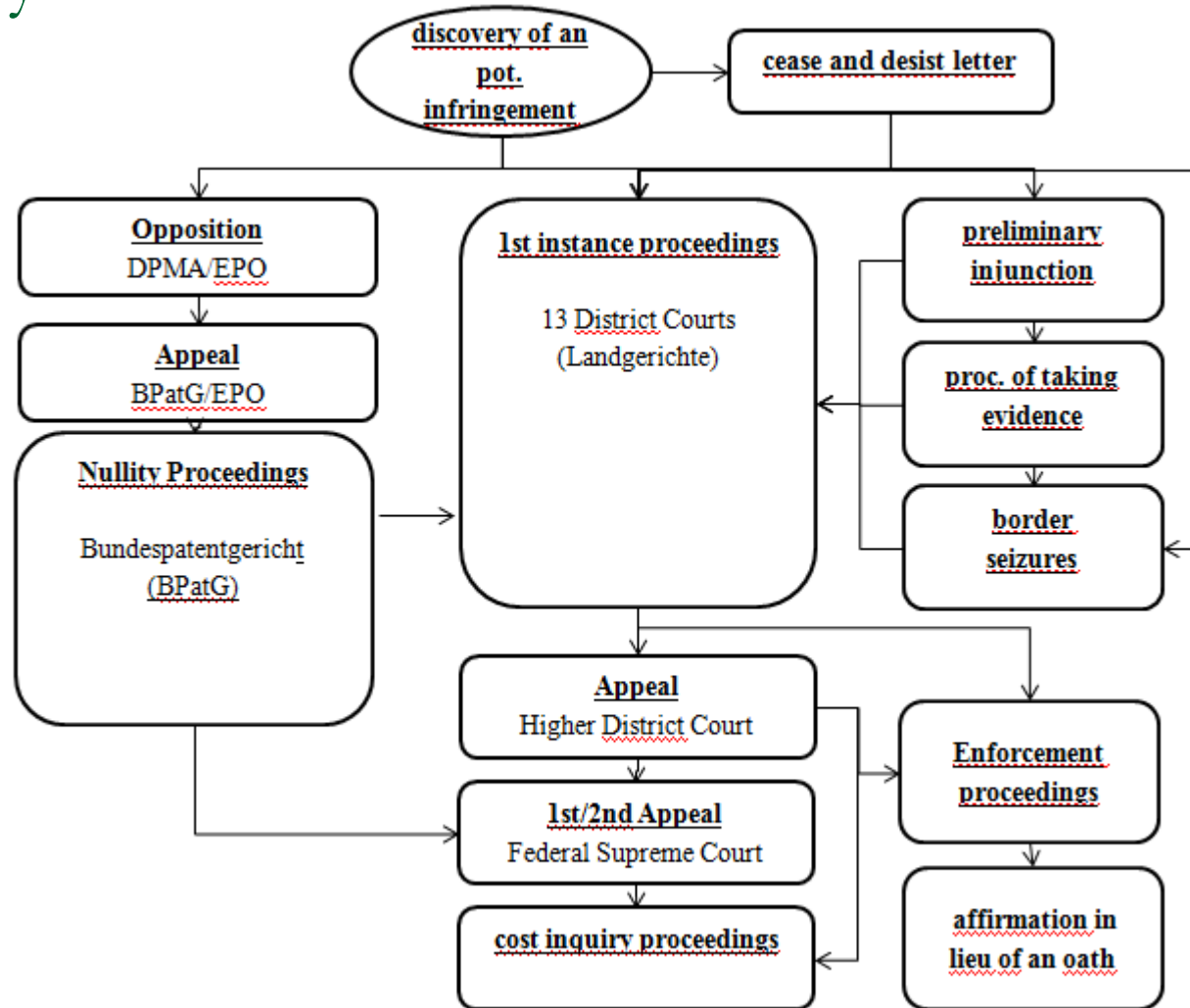
# Anecdotal Evidence from Germany (4/4)

#	Date	Court	Claimant	Defendant	Patent	Technology	Revocation	
1	24-4-12	DU	IPCom	Nokia, HTC	EP1841268	Telecom	25-4-12	EPO
2	3-2-12	MA	Motorola	Apple	EP0847654	Telecom	Pending	BPatG
3	2009	MA	IPCom	HTC	EP1186189	Telecom	1-12-10	BPatG
4	29-5-08	KA	Eli Lilly	Stada	DE69112895	Pharma	7-11-10	BPatG
5	11-5-10	DU	Lab Physik	na	EP0916074	Electronics	9-12-10	BPatG
6	13-2-07	DU	Datalogic	Sick AG	EP0851376	Barcode	13-3-08	BPatG
7	13-2-07	DU	Pilz	Sick AG	EP1362269	Electronics	21-1-08	EPO
8	31-2-07	DU	Ad-On Durkopp	United Print	EP0852359	Web-to-print	13-11-08	BPatG
9	10-2-07	DU	Adler AG	AMF Reece Hymnen-	DE69019972	Electronics	21-1-10	BPatG
10	30-4-02	DU	Elmag SpA	Hackemack	DE19700636	Process engineering	25-4-02	BPatG

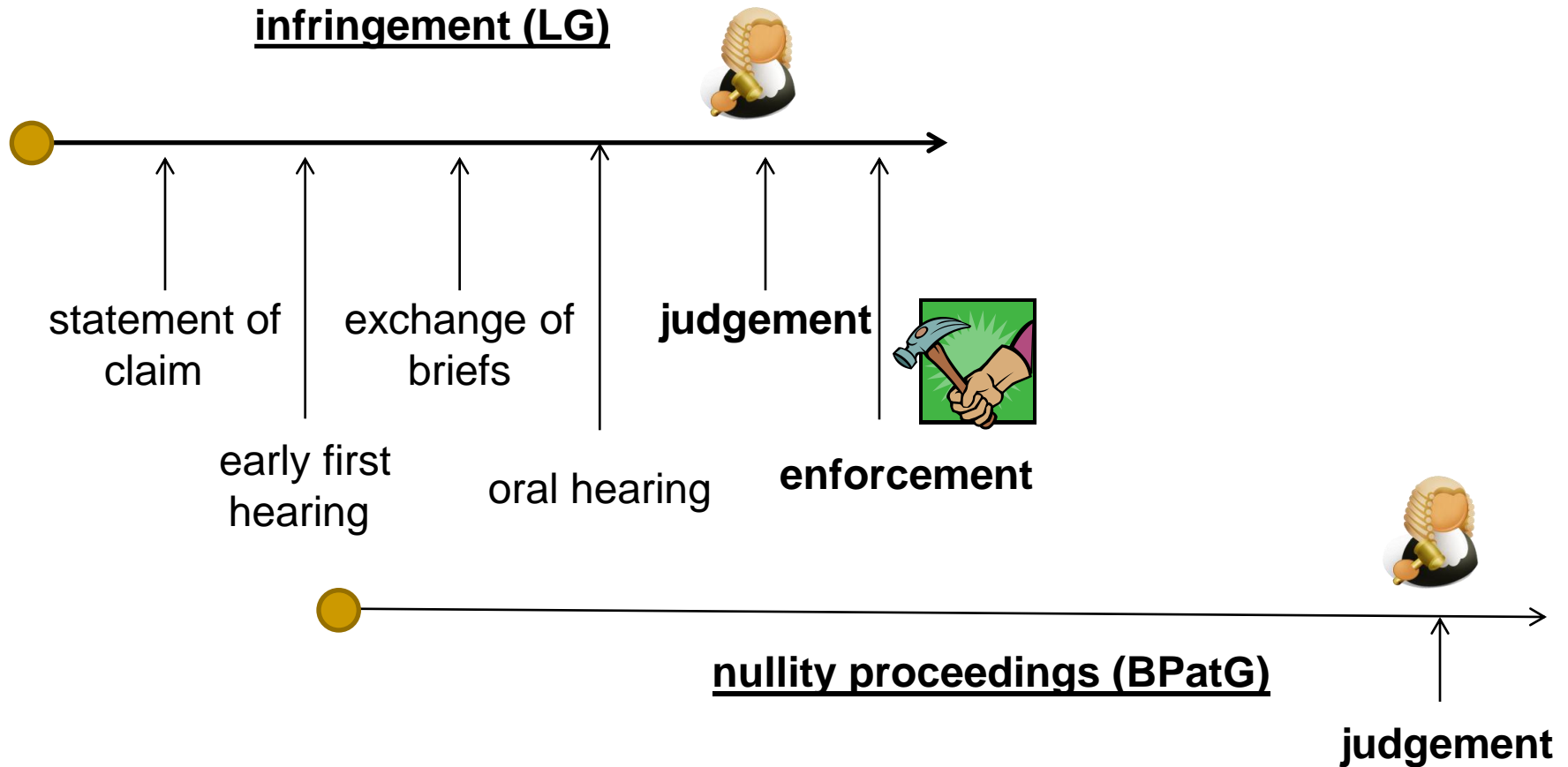
**There are many other anecdotes and reports on cases in which inconsistencies arose. Are they in any way „representative“? What is the error rate of the system?**



# Institutional Aspects - Annulment in the German Patent System



# Institutional Aspects - Annulment in the German Patent System



# A New Database

- European data collection effort financed under the auspices of ZEW's SEEK project
- data collection in GB, France, Germany, Netherlands
- German Project
  - all patent related cases filed between 2000 – 2008 at District Courts Mannheim, Munich and Düsseldorf
  - start of data collection
    - Mannheim - May 2010
    - Munich - Dec 2010
    - Düsseldorf - Feb 2011
  - conclusion: end of 2011

# A New Database

## ■ Collection Process

- ❑ manual collection guided by pre-selection of relevant cases (utility models, patents, patent-related cases, ...), usually after discussion with the presiding judges of the court
- ❑ performed by “Rechtsreferendare” with legal training

## ■ Information Collected

- ❑ information drawn from claims, correspondence, decisions, etc.
- ❑ kind of claim (e.g. statement of infringement, injunctive relief, disclosure)
- ❑ patents involved (ids, age, technologies)
- ❑ parties (name , address)
- ❑ outcomes (settlement, decisions, claims granted)

# A New Database

- Collection in three specialized courts, yielding a total of patent 4,481 cases  
(DU 2,941 – MA: 1,236 – MU: 302)
- Settlement occurs in about 52% of all cases – much higher rate of adjudication than in the US litigation system.
- Currently observed: 2,286 court decisions (at the patent level)
- We compare first-instance infringement decisions of the respective district court to first-instance validity decisions of the Federal Patent Court (BPatG).

# Comparing Outcomes of Annulment and Infringement Cases

outcome LG	no validity challenge	outcome BPatG			total
		abandoned or rejected	partially revoked	fully revoked	
win	711	306	36	45	1,098
partial win	303	111	20	9	443
lose	487	187	38	33	745
total	1,501	604	94	87	2,286
	65.7%	26.4%	4.1%	3.8%	100.0%

Source: own computations based on German district court and Federal Patent Court case data.

# Comparing Outcomes of Annulment and Infringement Cases

outcome LG	outcome BPatG			total
	abandoned or rejected	partially revoked	fully revoked	
win	306 <i>79.1%</i>	36 <i>9.3%</i>	45 <i>11.6%</i>	387 <i>49.3%</i>
partial win	111 <i>79.3%</i>	20 <i>14.3%</i>	9 <i>6.4%</i>	140 <i>17.8%</i>
lose	187 <i>72.5%</i>	38 <i>14.7%</i>	33 <i>12.8%</i>	258 <i>32.9%</i>
total	604 <i>76.9%</i>	94 <i>12.0%</i>	87 <i>11.1%</i>	785 <i>100.0%</i>

Source: own computations based on German district court and Federal Patent Court case data.

# Angora Cat Problems (1/5)

- Problems related to bifurcation may also arise in cases in which the validity court does *not* revoke the patent.
- The Angora cat problem:
  - At the validity court, the patent holder presents a “wet cat” which looks slim and not very menacing.
  - At the infringement court, the brushed-up cat is presented in order to maximize the likelihood that the claims are infringed.
- Potential outcome: judgement in favor of plaintiff (infringement) may be based on claim construction that would have led to (partial) revocation.
- This is difficult to assess within a given system. We turn to a comparison between UK and German cases.





# Angora Cat Problems (2/5)



- UK data come from British part of the SEEK project.
- To identify parallel cases, we proceed as follows. We first use **patent numbers available for the UK court cases and search for German and EPO equivalents.**
- Because we have patent data for only 63% of UK cases, we also search for parallel cases **by matching names of litigating parties and the time frame** during which court cases took place in the UK and Germany.
- Search is facilitated by data that we collected from UK court records on the **existence of parallel cases outside of the UK**, including Germany. This information is only available when judges refer explicitly to parallel cases in their judgements.

# Angora Cat Problems (3/5)

## Parallel cases DE-UK – Infringements Outcomes

Outcome UK	Outcome DE -- Infringement			total
	infringed	partly infringed	not infringed	
infringed	0	0	1	1
other	2	1	21	24
revoked	3	1	14	18
settled	2	0	13	15
valid, not infringed	5	1	11	17
total	12	3	60	75

Note: 37 UK cases and 73 DE cases



# Angora Cat Problems (4/5)

## Parallel cases DE-UK – Validity Outcomes

Outcome <b>UK</b>	Outcome DE -- Validity			total
	revoked	partially revoked	not revoked	
infringed	0	0	1	1
other	0	0	19	19
revoked	3	3	6	12
settled	2	0	5	7
valid, not infringed	0	0	17	17
total	5	3	48	56

Note: 25 UK cases and 54 DE cases

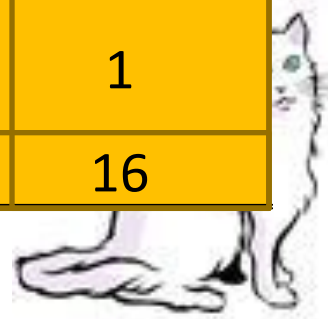


# Angora Cat Problems (5/5)

Parallel cases DE-UK – Patents Revoked\* in UK -  
German Validity & Infringement Outcomes

Outcome	DE -- Validity			total
	revoked	partially revoked	not revoked	
DE -- Infringement				
infringed	0	1	<b>3</b>	4
not infringed	4	2	5	11
partly infringed	1	0	0	1
total	5	3	8	16

Note: UK cases restricted to patents which were a) revoked in UK,  
(b) initial claim of case in UK on revocation, but settled before judgment handed down.



# Conclusions and New Questions (1/2)

- “Invalid but infringed” is a theoretically possible outcome of patent litigation in bifurcated system.
- Several anecdotes have been reported and discussed publicly. So far, there has been no systematic study.
- Given the introduction of bifurcation into the new European system a careful assessment is urgently needed.
- By the most conservative standard: there appears to be an ex post inconsistency in at least 10%, and at most 20% of the patents which were deemed to be infringed.
- The UK-Germany comparison shows that claims construction may differ substantially. We identify a number of cases which are now awaiting detailed case analysis.

# Conclusions and New Questions (2/2)

- Concerns about bifurcation appear to be recent. What happened?
- One possible explanation:
  - Resource constraints at the validity court could have led to delayed judgements – but only weak evidence.
  - Judges at infringement courts have been increasingly impatient and refuse to stay proceedings. Stakes getting bigger?
  - “Philosophical differences” between validity and infringement judges?
- According to our interviews, timing matters greatly and should be optimized in the European system.
- Invalidity proceedings (if separated) need to be fast.
- The problem of divergent claims construction will not be solved by speed alone.