



Successful European oppositions (part II) *Analysis for the patent information professional*



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ABSTRACT

European patents can be opposed within nine months from grant. The result of a successful opposition can be a complete revocation of a granted patent. The main reason for revocation is lack of inventive step (47%). From the patent information perspective, an opposition search against an EU-patent needs, therefore, to be first be focused on inventive step. The EPO has clear guidelines on how prior art can be used to attack the inventive step and how it is used during examination. Following the Problem-Solution-Approach used by the EPO, an opposition search should follow the same steps.

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1. General information

In a previous study [1] on EPO-oppositions, this author examined all opposition cases granted in 2010 and 2011. In this study data from 2012 to 2013 is now included.

In an old study by Harhoff et al. (2007, page 31) [2] is documented that a total of 7.4% of all granted patents were opposed between 1980 and 2000 (see Table 1).

Later studies mention a total of 5.3% between 2000 and 2008. (See Table 2, Scellato, (2011), page 66) [3].

The continuation of this study to the opposition behavior of the EPO in recent years is showing a steady opposition rate over the last years and the number of opposed patents has stabilized at about 5% over the last five years (2010–2014) (see Table 3) and, that the opposition process affects about 1 out of 20 granted patents.

Different studies have shown that, on average, approximately 30% of opposed patents are eventually revoked after an opposition (see for example: Harhoff and Reitzig, 2004, see page 8, [4]; Harhoff et al., 2007, see page 31 [2]).

At the end of the opposition procedure the chamber may uphold the patent without amendments, or it may amend or even revoke the patent. Patents are revoked in about one-third of all cases [2].

Over the last years (2010–2013) the distribution over the three possible outcomes is still equal (three third each: revoked/amended/unchanged).

When an opposition is filed, this tells you of course something about the importance of the granted patent. And also the opposite can be true, as there has not been filed an opposition then it is probably not of interest to anyone.

By comparing opposed and non-opposed patents there seems to be robust evidence supporting the fact that opposed patents have on average higher economic and technological relevance. (Scellato, (2011) [3]).

The role of opposition as a predictor of patent value is emphasized in Harhoff, Scherer and Vopel (2003) [5]. Their study shows that patents that survived opposition are on average ten times more valuable than comparable patents which were not attacked.

Statistics such as these are very risky taken at face value, however, since we know that a lot of opposition cases are settled before a decision is taken (and mentioned in the database as “opposition withdrawn”).

2. Strategy

The opposition strategy for companies is also very different.

Some companies are very active in filing oppositions, while others do not see any reason to do so. Typically, firms challenge

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Table 1
Opposition frequency 1980–1999.

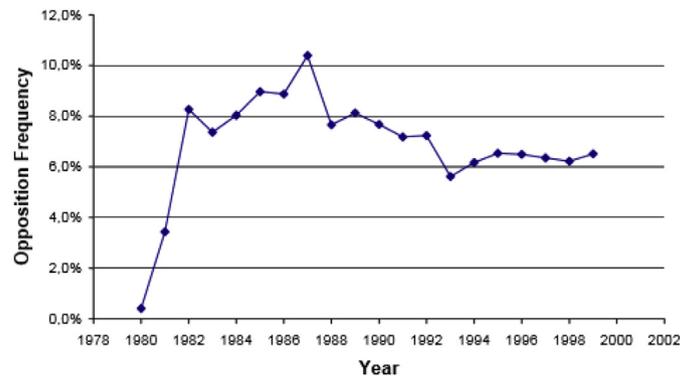


Table 2
Opposition frequency (years 2000–2008).

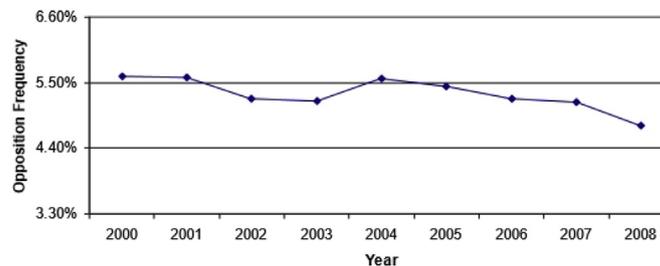
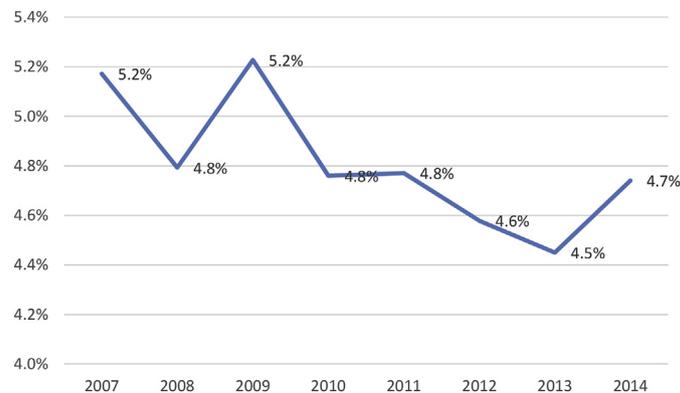


Table 3
Opposition frequency (years 2007–2014).



more valuable patents.

Very often, in small markets with only a few players, you see an active opposition policy. Each player tries to defend his/her own territory and tries to create some room to play.

You can have some doubts whether or not this is wise, or is a waste of money. Maybe more strength can be created by joining forces and making good settlements, respecting each other's Patent-portfolio.

3. Searching

Before starting a search, for documents useful in oppositions, it

is good to have a clear view on the way the EPO is looking to Inventive Step (article 56 [6]).

It is important to consider in this case the way EPO is defining the inventive step:

The point is not whether the skilled person could have arrived at the invention by adapting or modifying the closest prior art, but whether **he would have done so because the prior art incited him to do so** in the hope of solving the objective technical problem or in expectation of some improvement or advantage.

In short words, there needs to be a document describing why the person skilled in the art is incited to do so.

It is a three step process based on the **Problem-Solution**

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