

trials, found 38% upheld, of 239 cases. Latest data of Mayers²² indicates about 28% of patents being preserved in force by the Circuit Courts of Appeals, with perhaps a small rise since 1942, visible also in Federico's table,²⁰ but only 13% in 1955.²³

[40] TABLE 2.—*Fate of litigated patents, 1929-54*

[Adapted from Federico, Evans, Lang & Thomas, as per the citational notes. "Percent upheld" refers to the patents held valid and infringed, in the remaining cases the patent having been either invalidated, or held not to be infringed; unknown or split cases are excluded from the comparison]

	1929-34 ²⁴		1936-41 ²⁵		1940-44 ²⁶		1945-49 ²⁶		1948-54 ²⁰		
	Pat- ents	Per- cent up- held	Opin- ions	Per- cent up- held	Opin- ions	Per- cent up- held	Opin- ions	Per- cent up- held	Suits	Pat- ents	Per- cent upheld
Supreme Court.....	22	21	15	0	15	15	10	30	7	7	20
Circuit courts.....	871	31	462	19	602	18	256	22	310	449	18
District courts.....	1,967	71	-----	n.d.	750	36	311	37	461 p 223 u	664 p 334 ue	30 p ftN ²⁷

p=published decisions, u=unpublished decisions, e=estimate.

"Indications are that complete district court data would show a higher percentage valid and infringed and a lower percent invalid." Federico, N 20, his reprinted p. 241.

[41] An American patent may be invalidated for various reasons, but nearly always the adverse verdict includes "want of invention" or "anticipation." "Want of invention" means that the new idea was too logical or easy to come upon, in view of the "prior art" (what was known before the application date), to be worthy of a patent which would deprive the public of the right it held before, to turn up and use the idea. We shall discuss this principle of the minimum level of patentability, in the following chapter. The remaining invalidations were from discovery of a prior public use or publication of the idea, or from inoperativeness, lack of disclosure, or other defects of procedure.²⁸ A finding that a patent is not infringed, which our statistical sources distinguish from a finding of invalidity, and show to be slowly decreasing, until it is today a third as frequent as invalidity, has much the same effect as invalidity. For it entails that the patent can be avoided by anyone using the same technique involved in the suit, even if not so conveniently. A finding of non-infringement impugns not the Patent Office (unless for accepting an ambiguous claim), but likely the patent system, since it may mean that a method inferior to the best known has been forced into use, and anyway, a useless struggle entailed.

[42] We may note from table 2 that the higher the court the higher the proportion of patents that lose; and observe the slow tendency above referred to since 1925 or earlier, in the courts of all levels, to eye patents more balefully, till three-fourths of all that undergo the ultimate test leave it dead or wrecked. But there may be statistically discernible a slightly more lenient tendency since 1942, perhaps reflecting better patents and fewer suits.

[43] We may note also the high proportion of the cases appealed to the Circuit Courts of Appeal. Few get to the Supreme Court, which is reached only on a writ of *certiorari*, usually granted only when two Courts of Appeal have disagreed about a patent.