

Empirical Analysis Of Permanent Injunction Decisions Following *eBay*

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Background

After initial review of cases, questionnaire created based on list of injunctive factors

SURVEY OF EBAY INJUNCTION FACTORS

Case Name: Commonwealth Scientific & Industrial Research Organisation v. Australian Computer Services Pty Ltd
Case No: 2012/1000000
Case File: 2012/1000000
Case Type: Patent Infringement
Case Status: Final Decision
Case Date: 2012/1000000
Case Outcome: Infringement Found
Case Value: \$1,000,000

PATENTEE

Weight*	Ebay Factor**	Yes	No	N/A
10	Patentee's Reputation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Patentee's Financial Strength	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Patentee's Market Share	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Patentee's Investment in R&D	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Patentee's History of Litigation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Patentee's Ability to Enforce Patents	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Patentee's Willingness to Enforce Patents	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Patentee's History of Settlements	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Patentee's History of Damages	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Patentee's History of Injunctions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Patentee's History of Appeals	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Patentee's History of Reversals	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Patentee's History of Stay Orders	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Patentee's History of Costs Orders	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Patentee's History of Summary Judgment	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Patentee's History of Default Judgments	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Patentee's History of Stay Orders	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Patentee's History of Costs Orders	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Patentee's History of Summary Judgment	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Patentee's History of Default Judgments	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

ALLEGED INFRINGER

Weight*	Ebay Factor**	Yes	No	N/A
10	Alleged Infringer's Reputation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Alleged Infringer's Financial Strength	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Alleged Infringer's Market Share	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Alleged Infringer's Investment in R&D	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Alleged Infringer's History of Litigation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Alleged Infringer's Ability to Enforce Patents	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Alleged Infringer's Willingness to Enforce Patents	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Alleged Infringer's History of Settlements	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Alleged Infringer's History of Damages	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Alleged Infringer's History of Injunctions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Alleged Infringer's History of Appeals	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Alleged Infringer's History of Reversals	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Alleged Infringer's History of Stay Orders	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Alleged Infringer's History of Costs Orders	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Alleged Infringer's History of Summary Judgment	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Alleged Infringer's History of Default Judgments	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

* 10 = Trademark Infringement, 5 = Copyright Infringement, 2 = Patent Infringement, 1 = Other Infringement

** 10 = Trademark Infringement, 5 = Copyright Infringement, 2 = Patent Infringement, 1 = Other Infringement

Background

➤ Total of 28 factors comprising 3 general categories

- Patentee
- Infringer
- Third parties / public

Background

SURVEY OF EBAY INJUNCTION CASES			
Weight*	Ebay Factor**	PATENTEES	
3	1	Medical Device	Yes
4	1	Software	Yes
3	1	Computer Hardware	Yes
4	1	Biotechnology	Yes
3	1	Chemical	Yes
4	1	Telecommunications	Yes
3	1	Automotive	Yes
4	1	Consumer Electronics	Yes
3	1	Energy	Yes
4	1	Transportation	Yes
3	1	Other	Yes

PATENTEE			Yes	No	N/A
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<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>			
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<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>			

ALLEGED INFRINGER			
Weight*	Ebay Factor**	Yes	No
3	1	<input type="checkbox"/>	<input type="checkbox"/>
4	1	<input type="checkbox"/>	<input type="checkbox"/>
3	1	<input type="checkbox"/>	<input type="checkbox"/>
4	1	<input type="checkbox"/>	<input type="checkbox"/>
3	1	<input type="checkbox"/>	<input type="checkbox"/>
4	1	<input type="checkbox"/>	<input type="checkbox"/>
3	1	<input type="checkbox"/>	<input type="checkbox"/>
4	1	<input type="checkbox"/>	<input type="checkbox"/>

Background

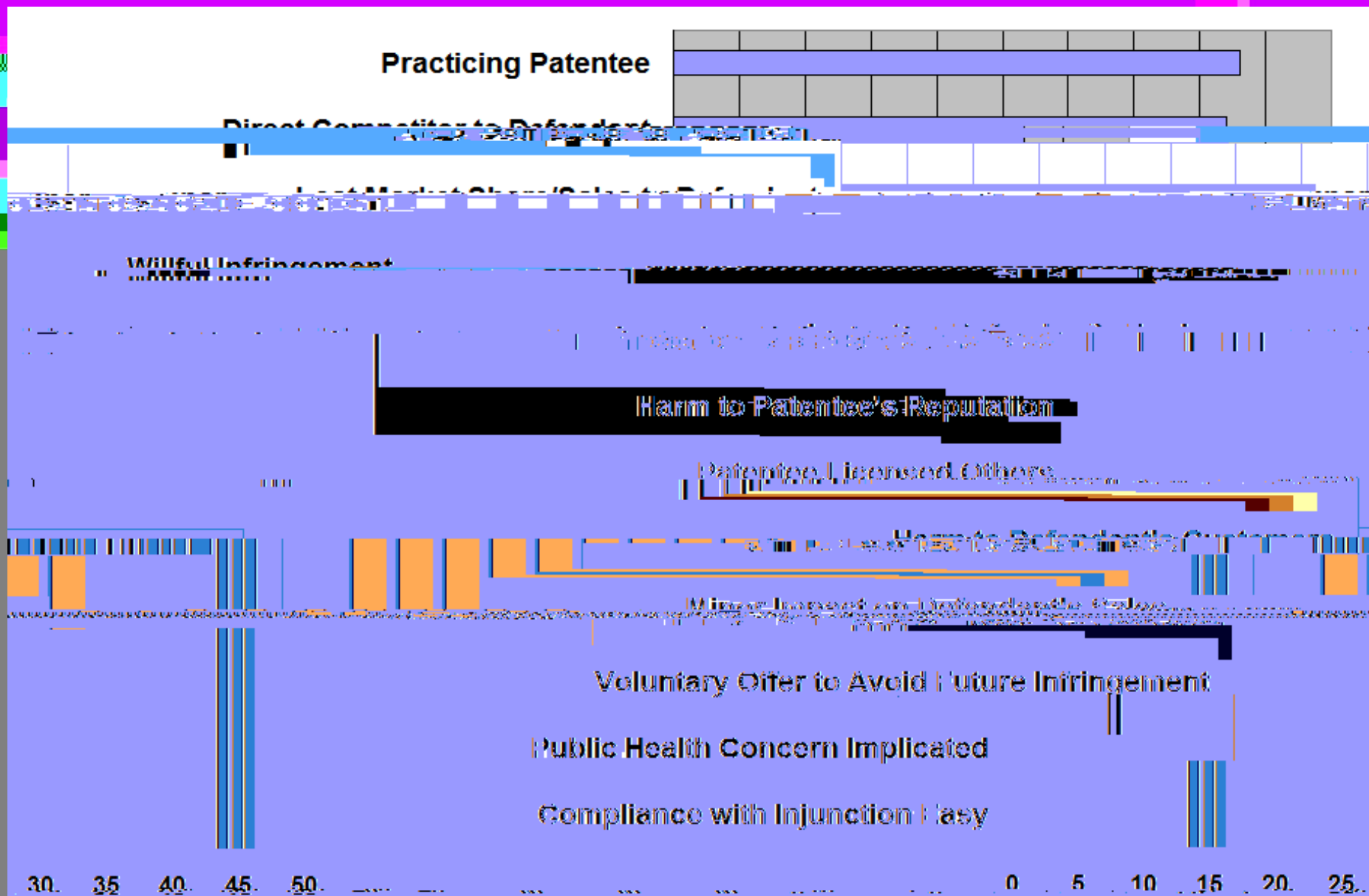
- Basis for inclusion in study
 - 49 cases selected from May 15, 2006 to December 31, 2008
 - “Second pair of eyes” review

Background

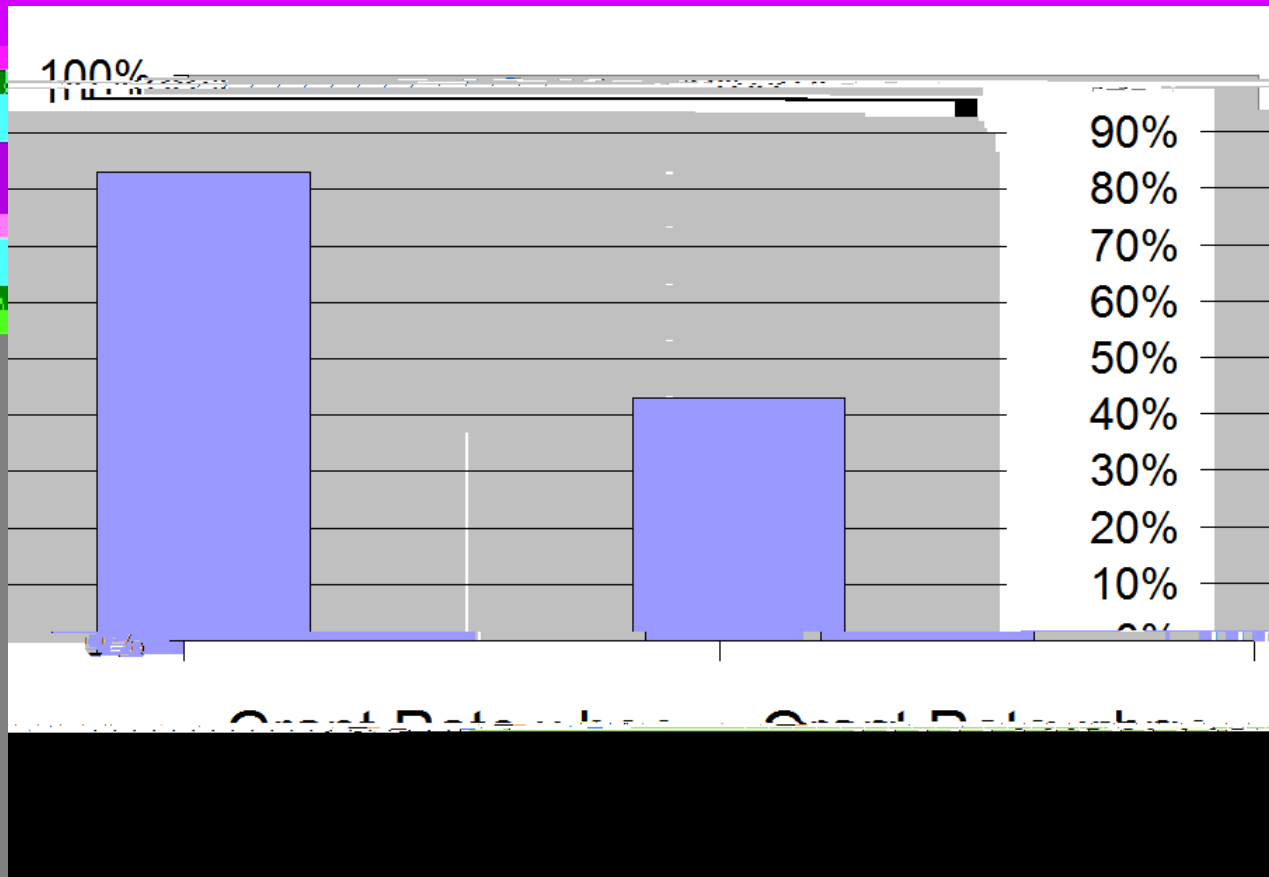
➤ Relevance of data

- Frequency of mention in cases
- Percent difference in Yes vs. No

Frequently Considered Factors



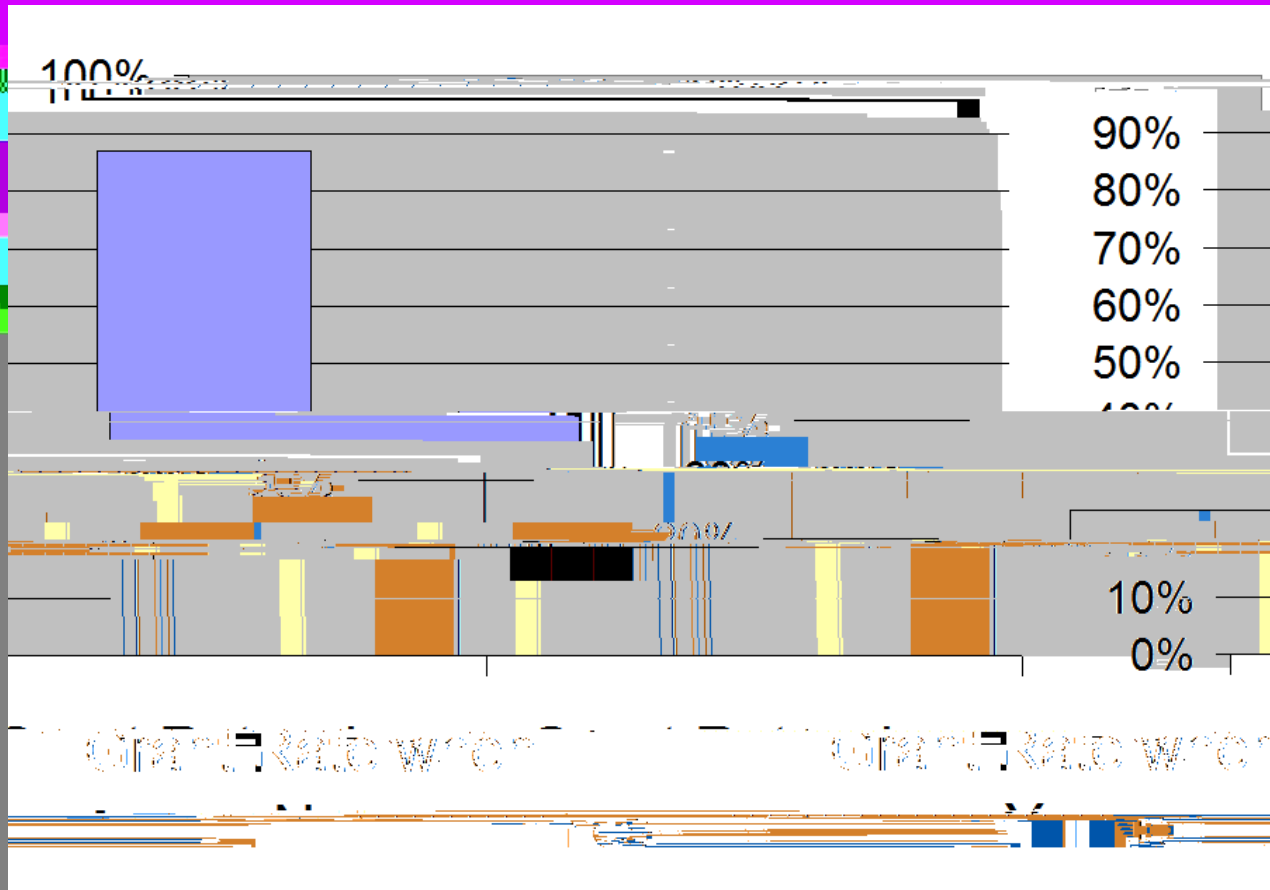
Practicing Patentee



Mentioned
in 43 of 49
cases

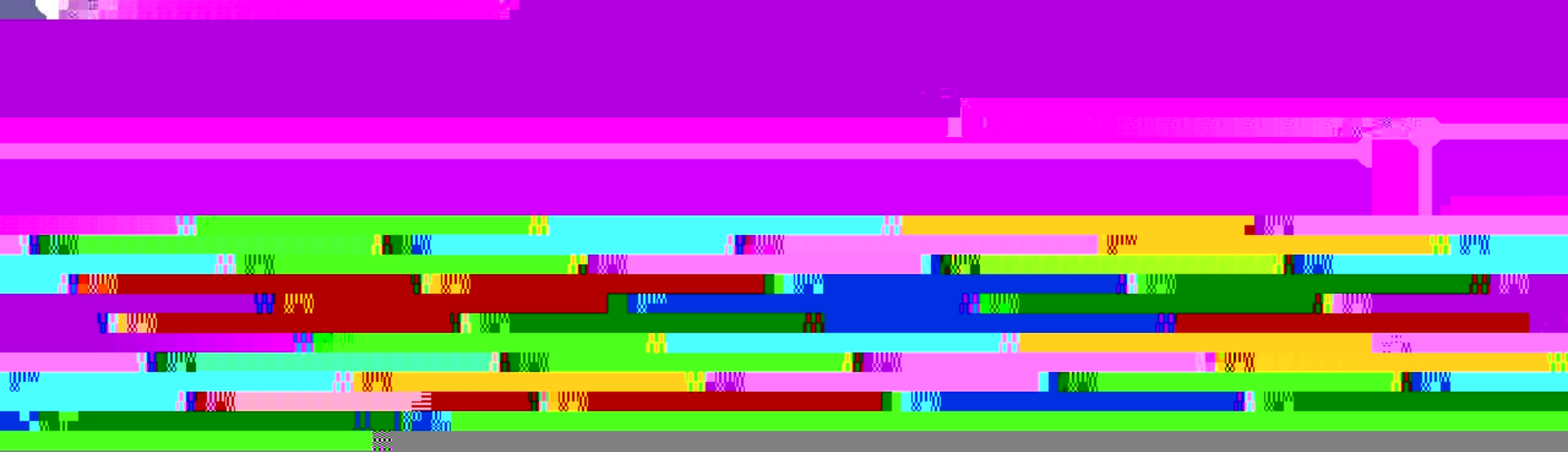
Difference in grant rate: **40%**

Direct Competitor to Defendant

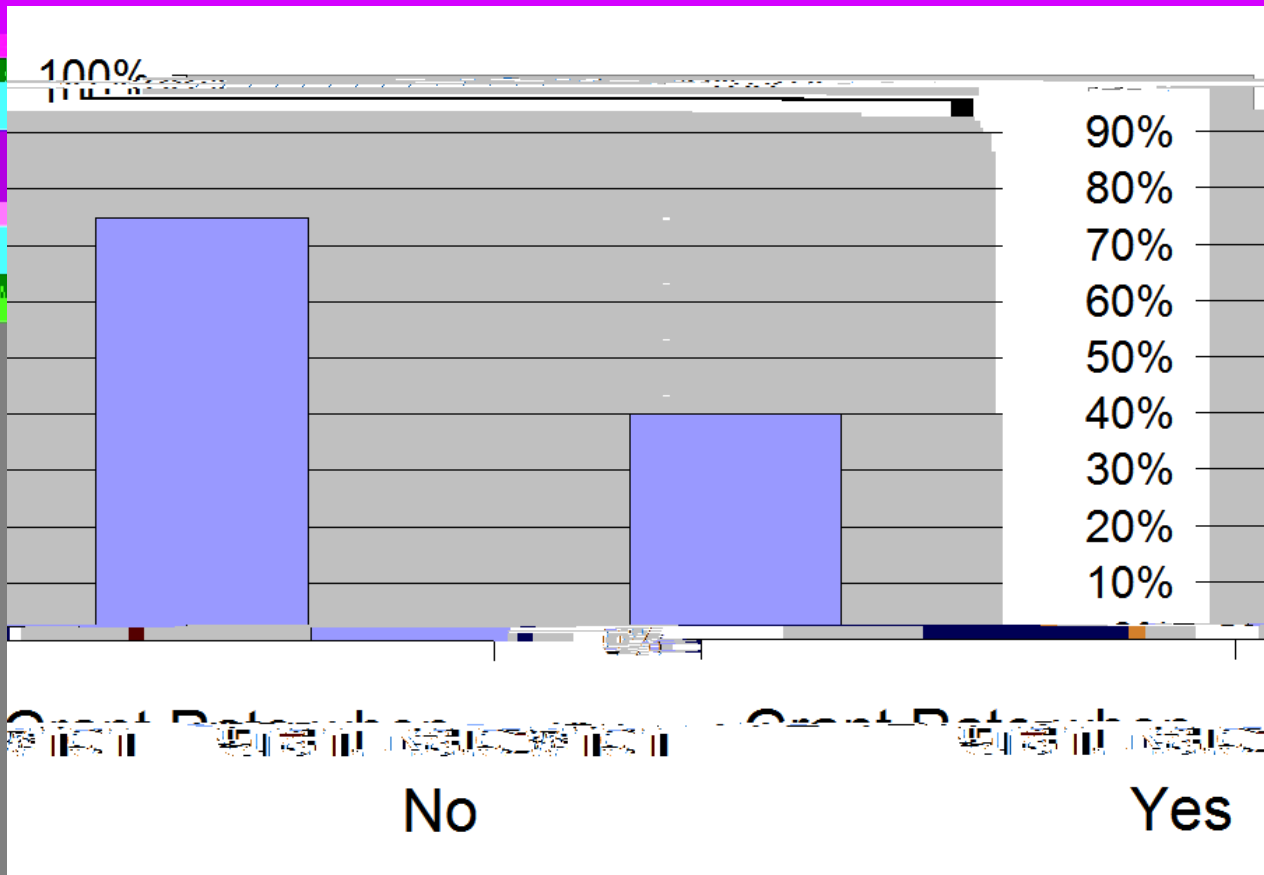


Mentioned
in 42 of 49
cases

Difference in grant rate: 62%



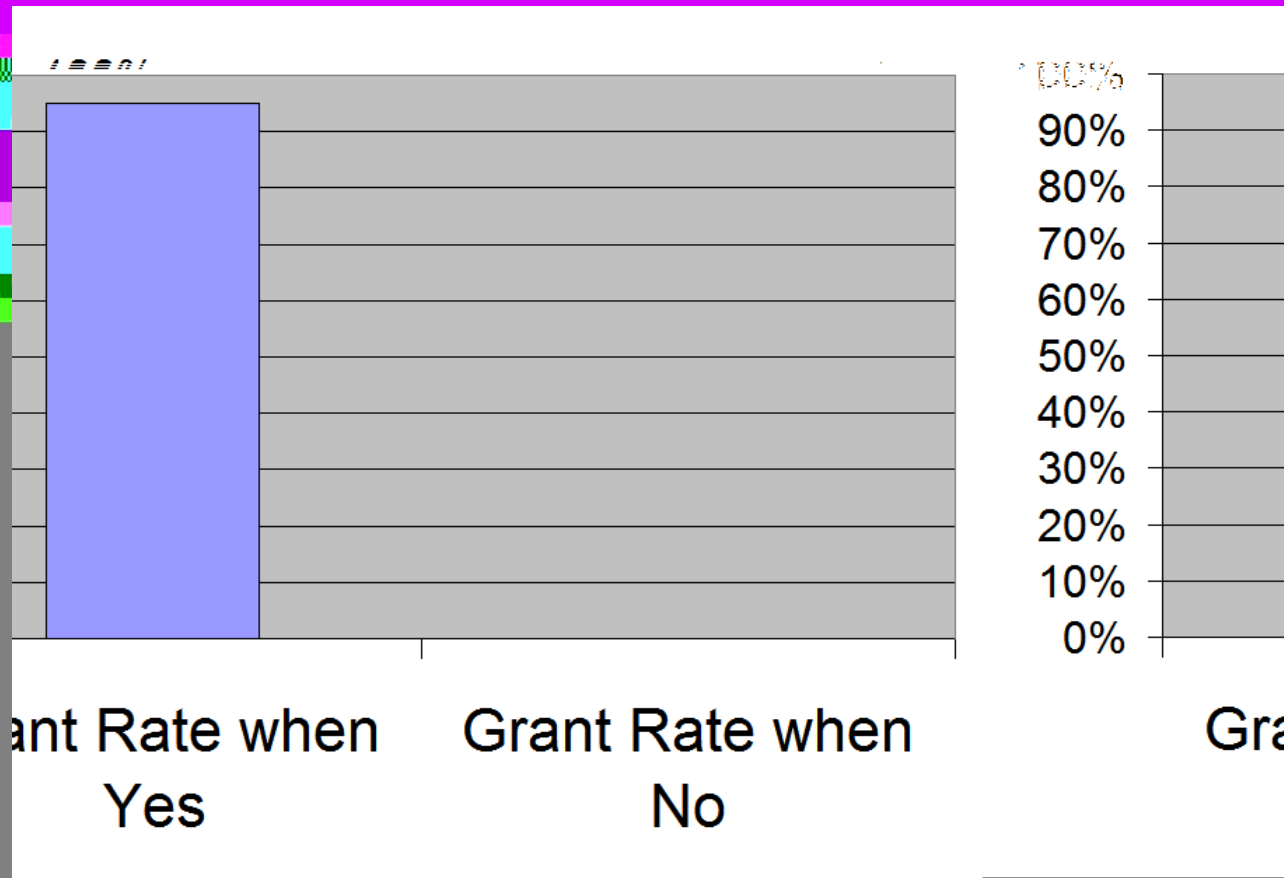
Willful Infringement



Mentioned
in 25 of 49
cases

Difference in grant rate: 35%

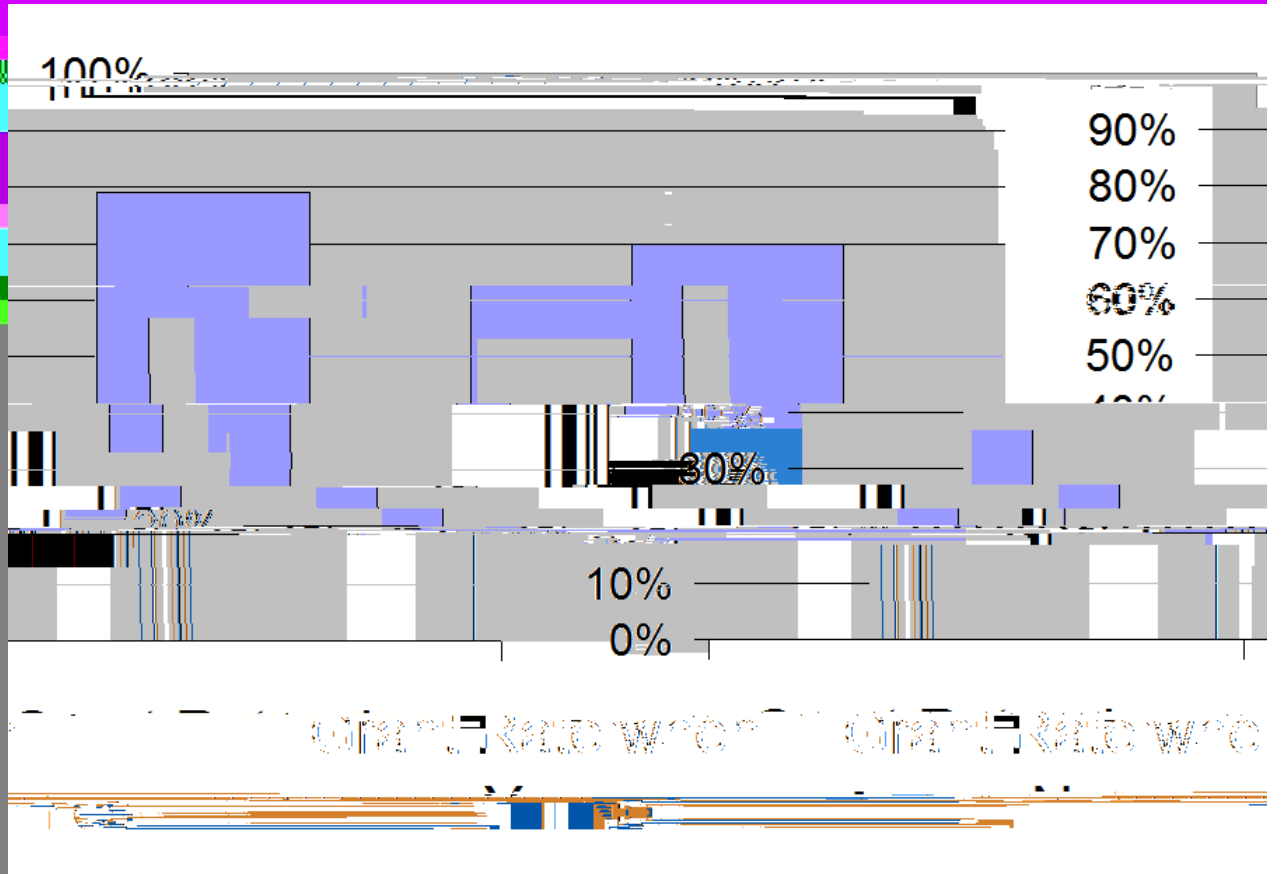
Harm to Patentee's Reputation



Mentioned
in 24 of 49
cases

Difference in grant rate: 95%

Impact On Defendant's Business

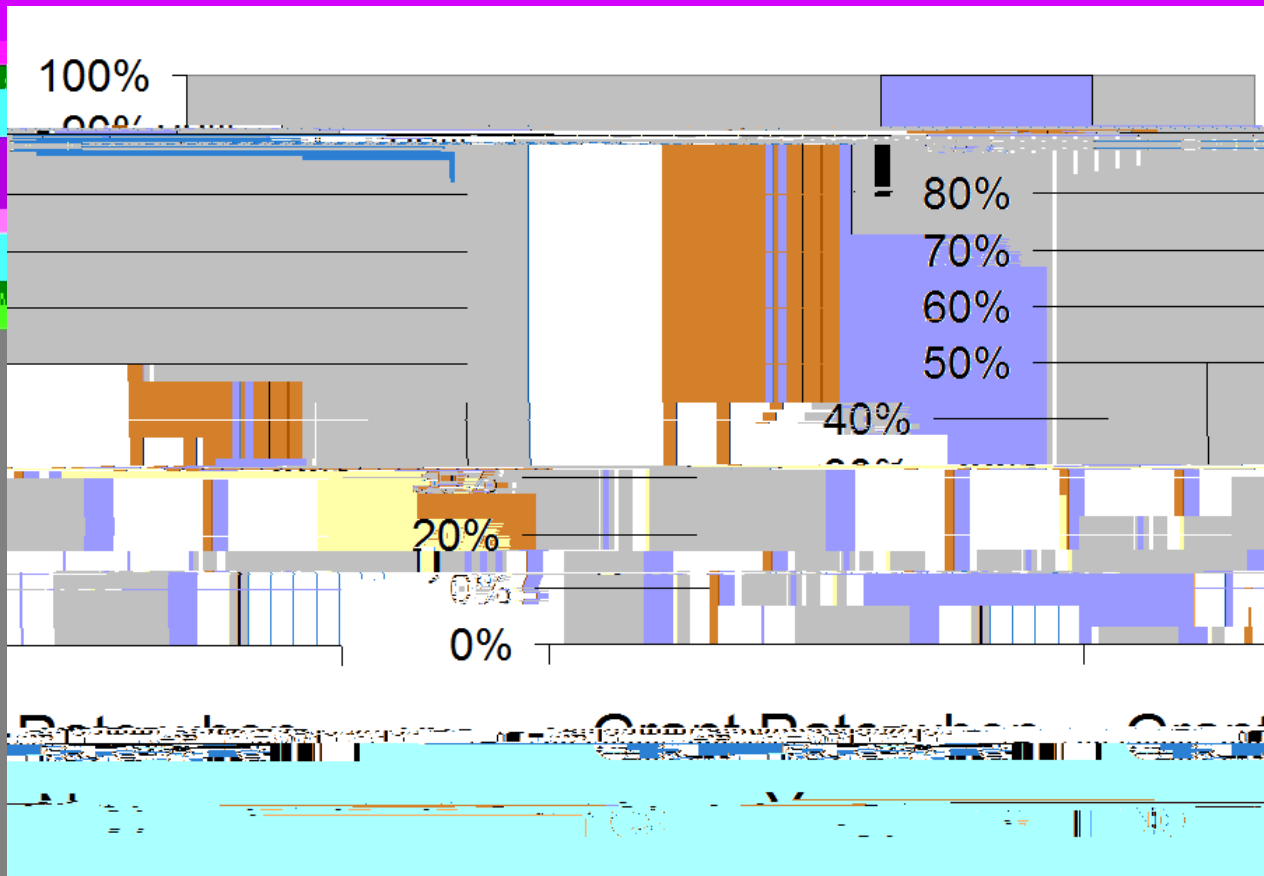


Mentioned
in 24 of 49
cases

Difference in grant rate: 9%

Patentee Licensed Others

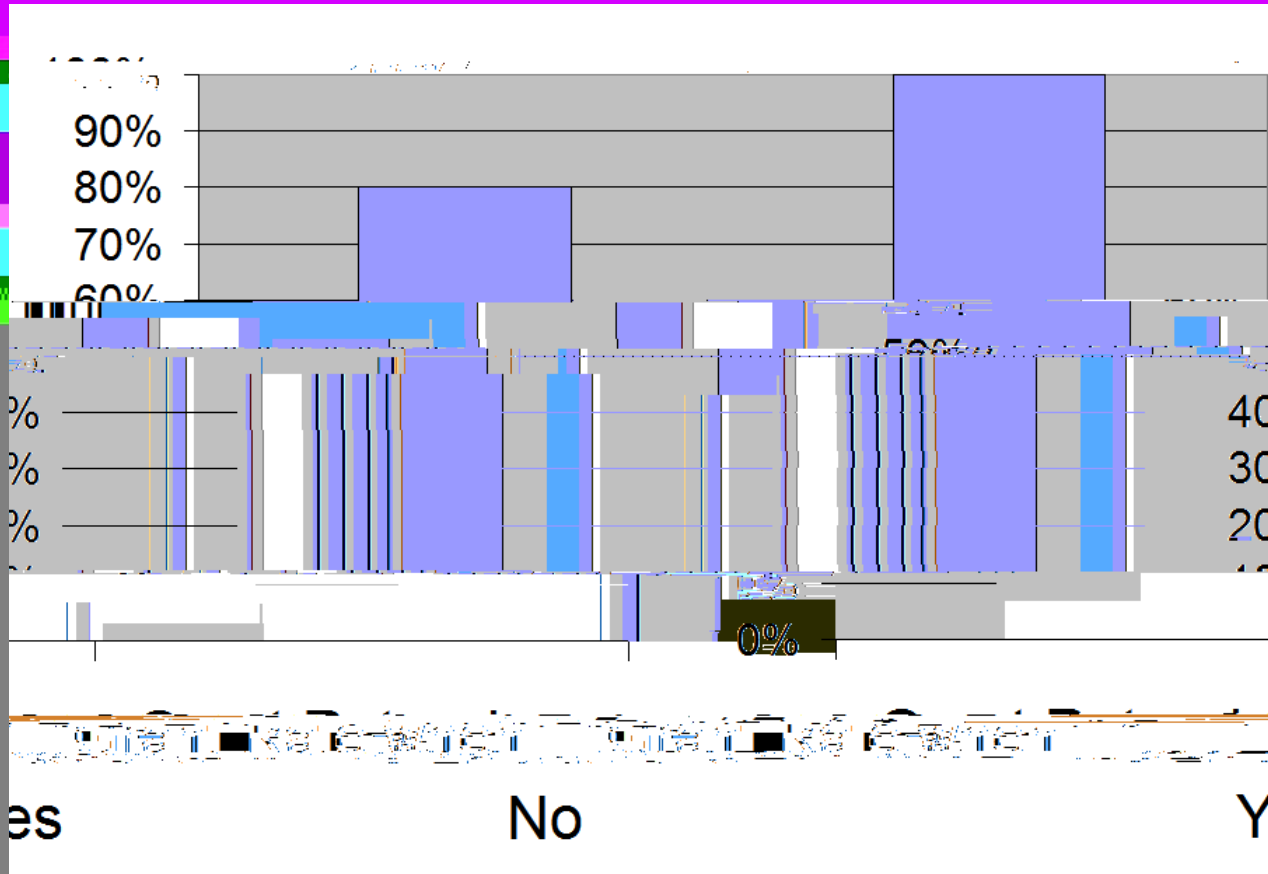
Harm To Defendant's Customers



Mentioned
in 19 of 49
cases

Difference in grant rate: 50%

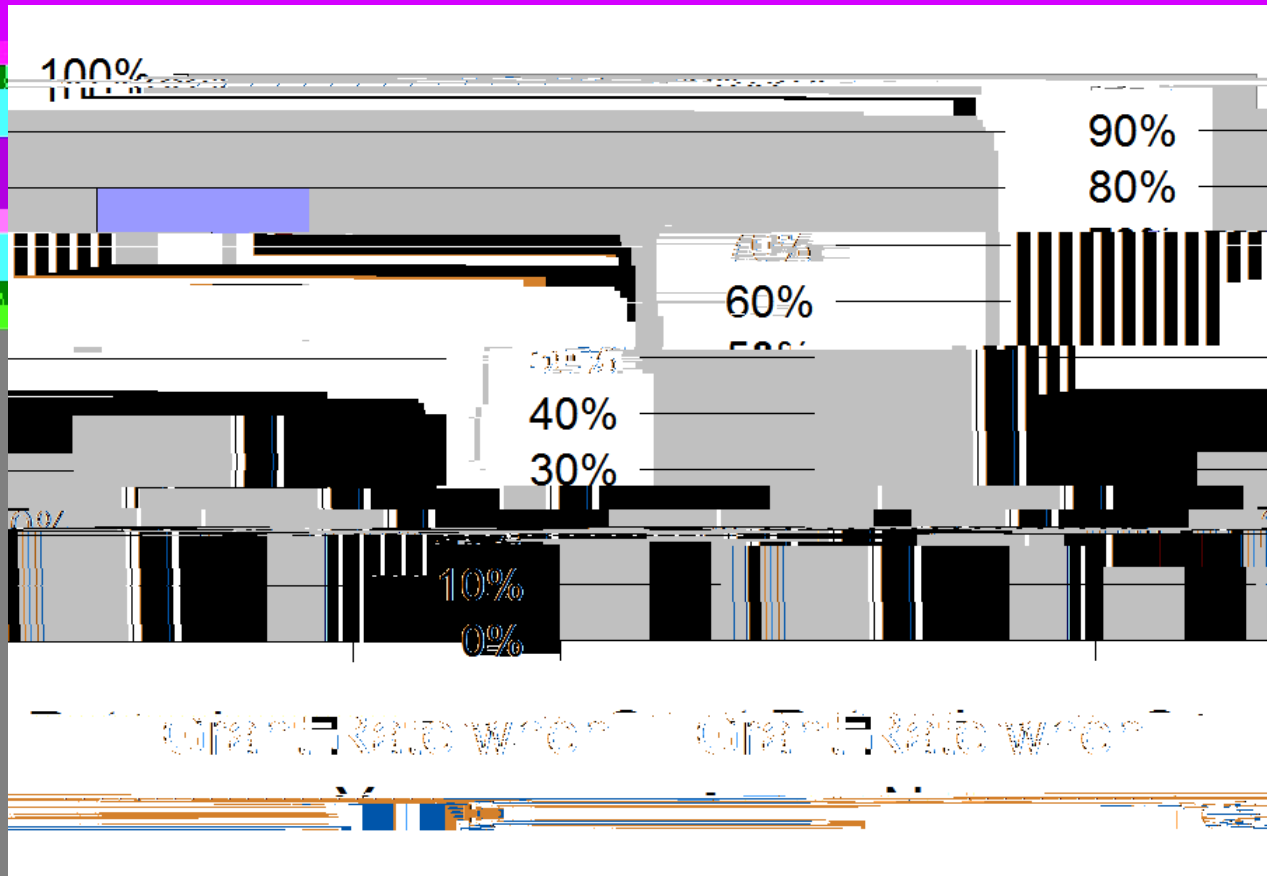
Minor Impact On D's Sales



Mentioned
in 17 of 49
cases

Difference in grant rate: 20%

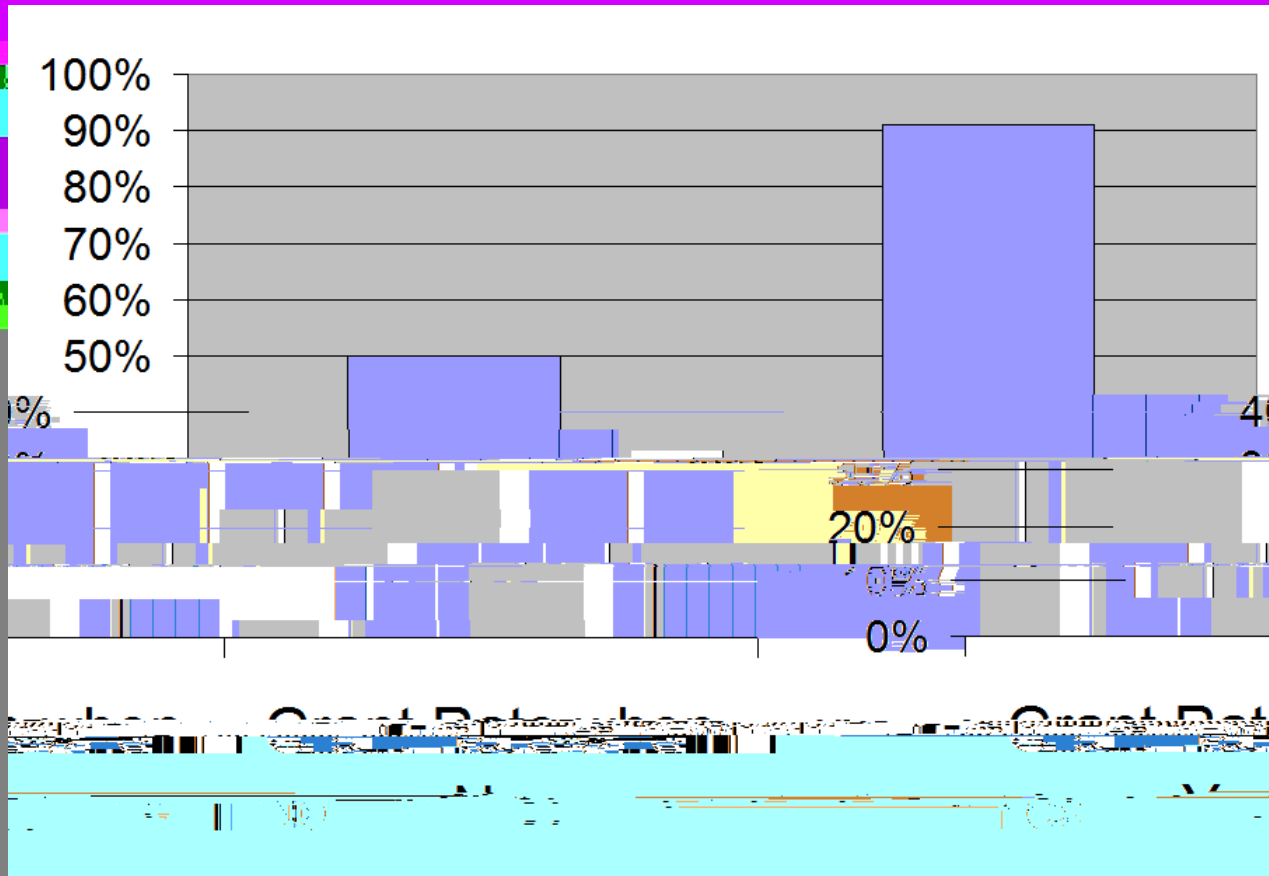
D's Offer To Avoid Infringement



Mentioned
in 15 of 49
cases

Difference in grant rate: 40%

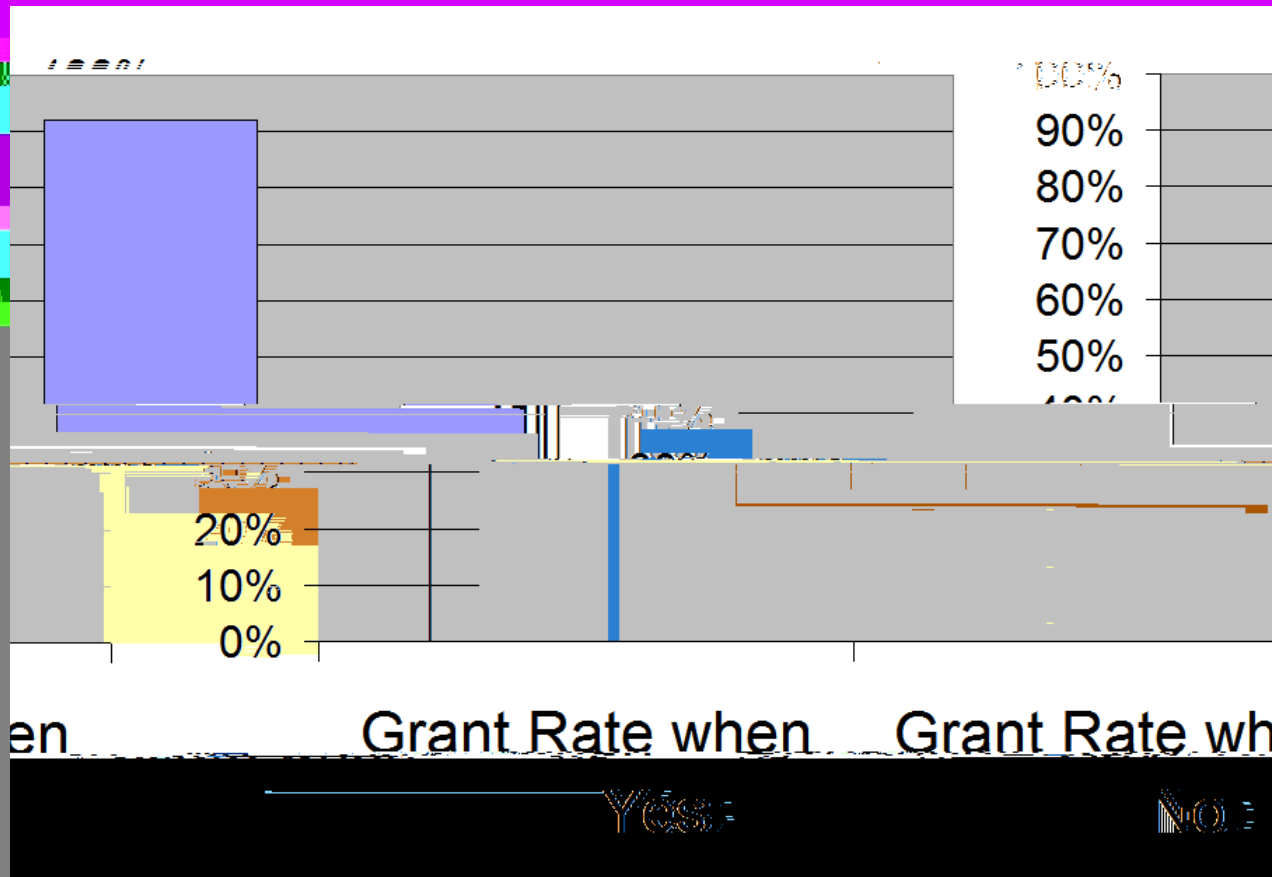
Public Health Concern



Mentioned
in 15 of 49
cases

Difference in grant rate: 41%

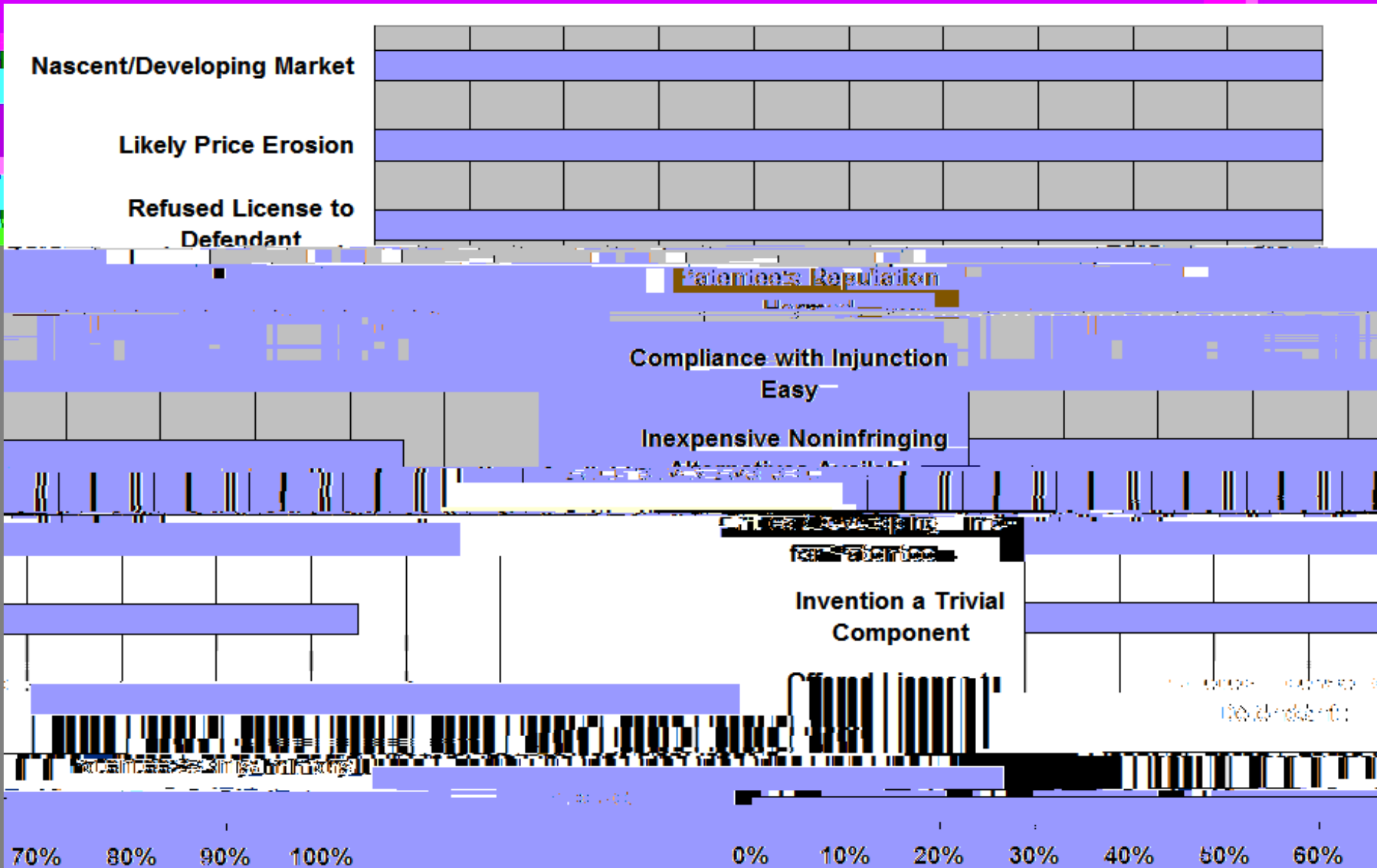
Compliance With Injunction Easy



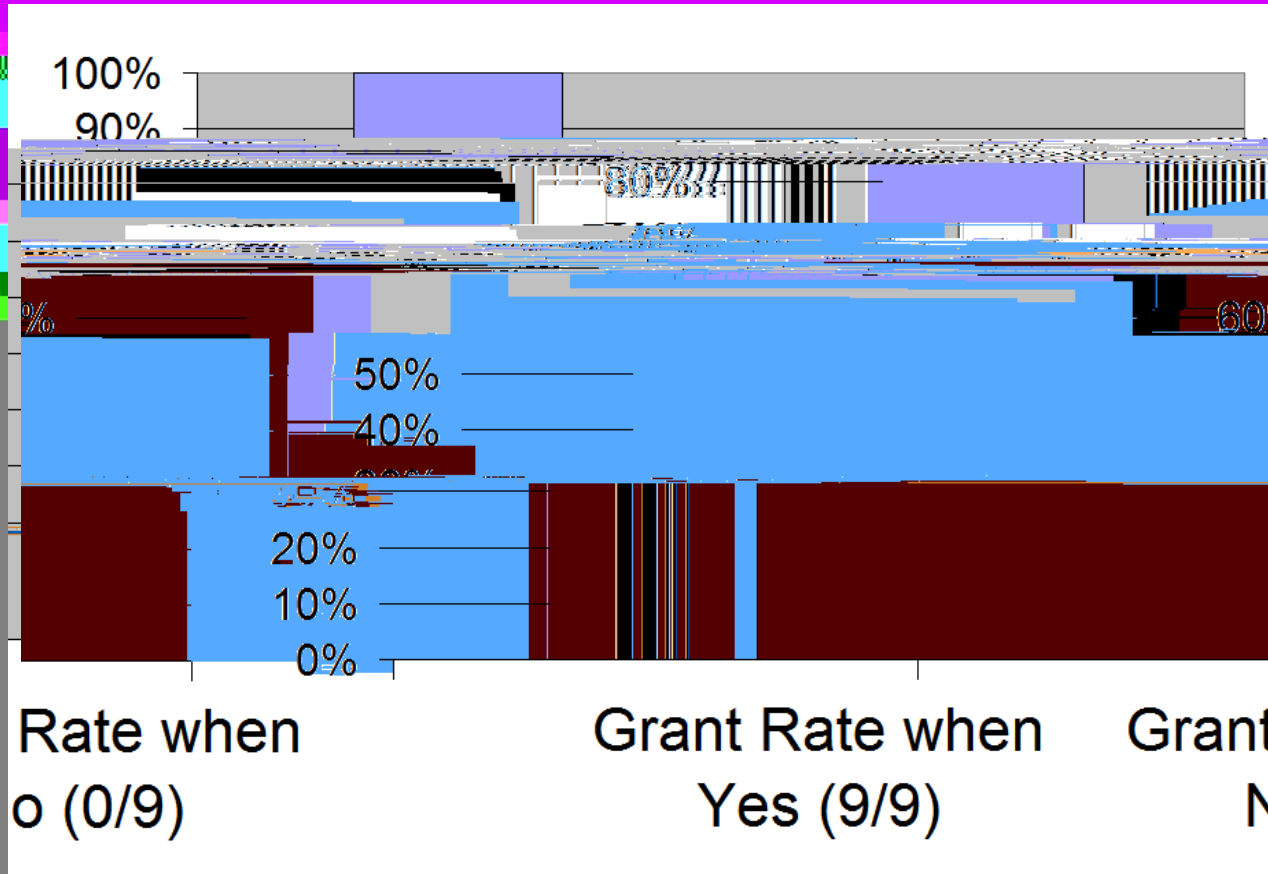
Mentioned
in 13 of 49
cases

Difference in grant rate: 92%

Biggest Differences Between Yes and No



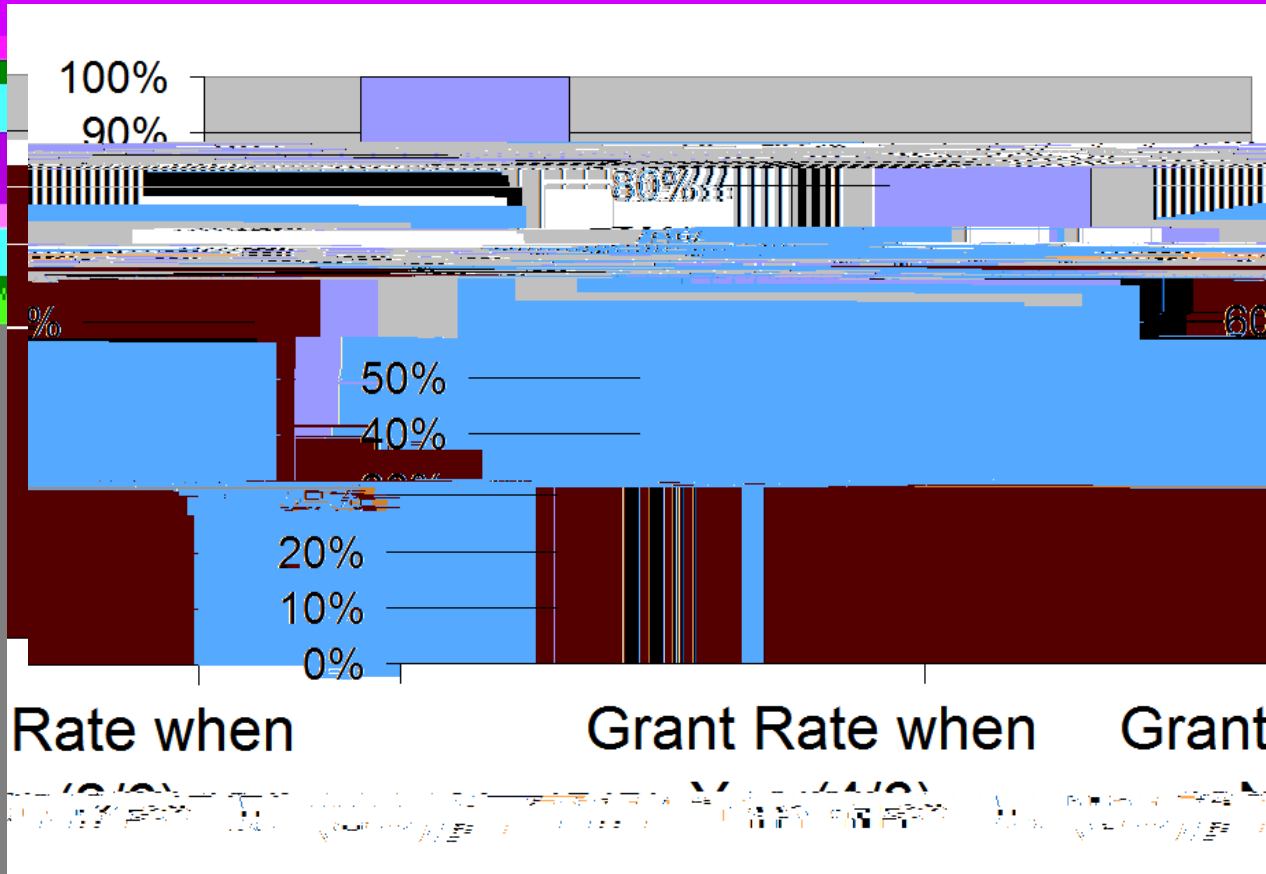
Nascent / Developing Market



Mentioned
in 9 of 49
cases

Difference in grant rate: 100%

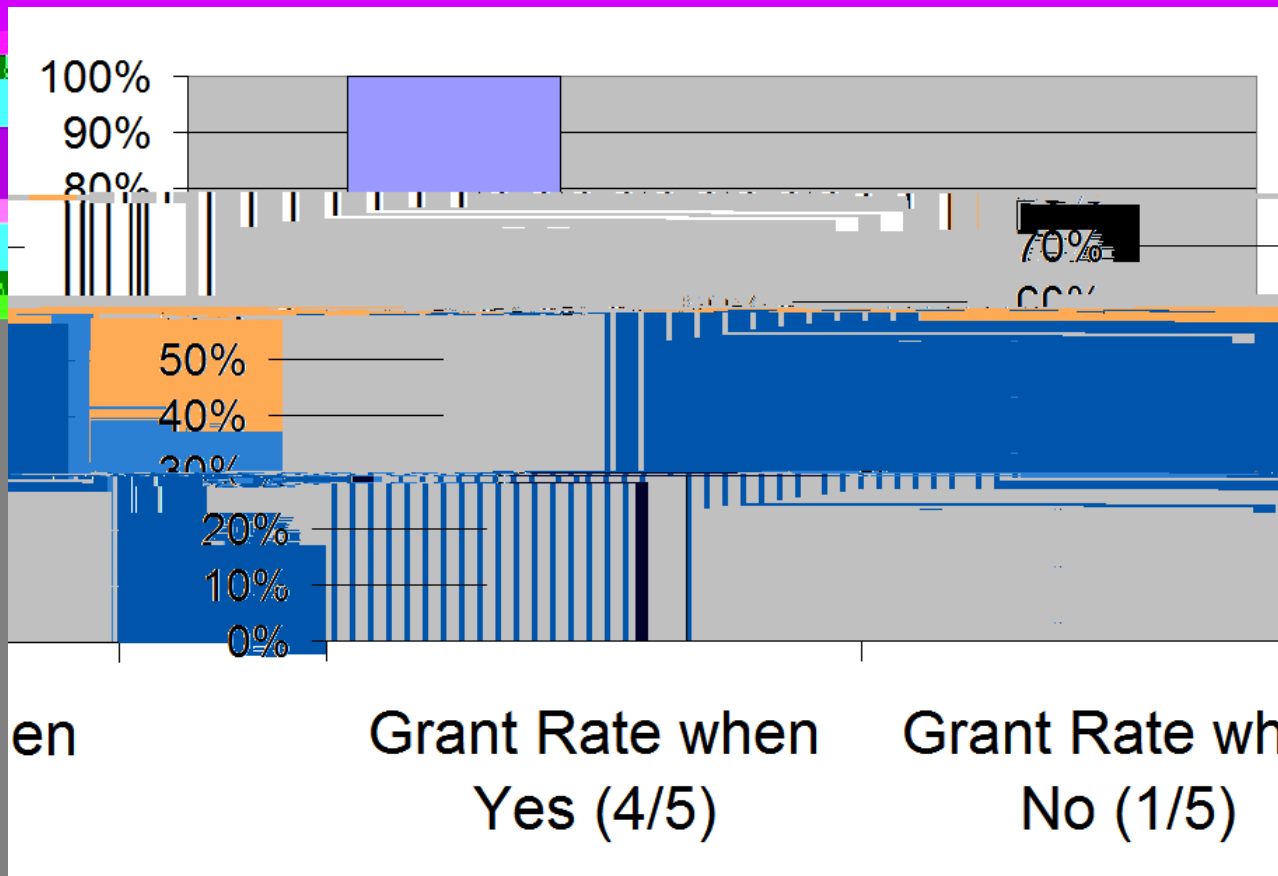
Likely Price Erosion



Mentioned
in 6 of 49
cases

Difference in grant rate: 100%

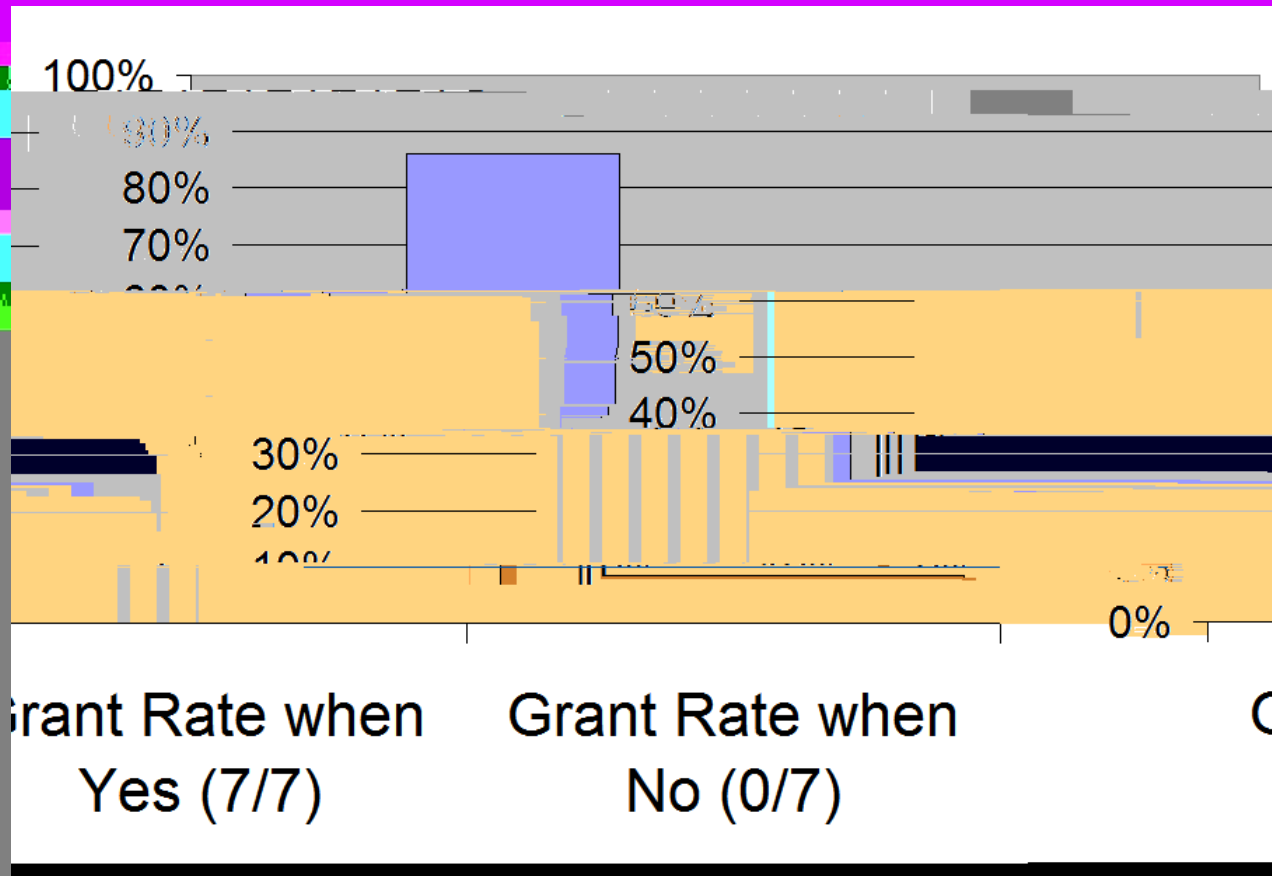
Refused License to Defendant



Mentioned
in 5 of 49
cases

Difference in grant rate: 100%

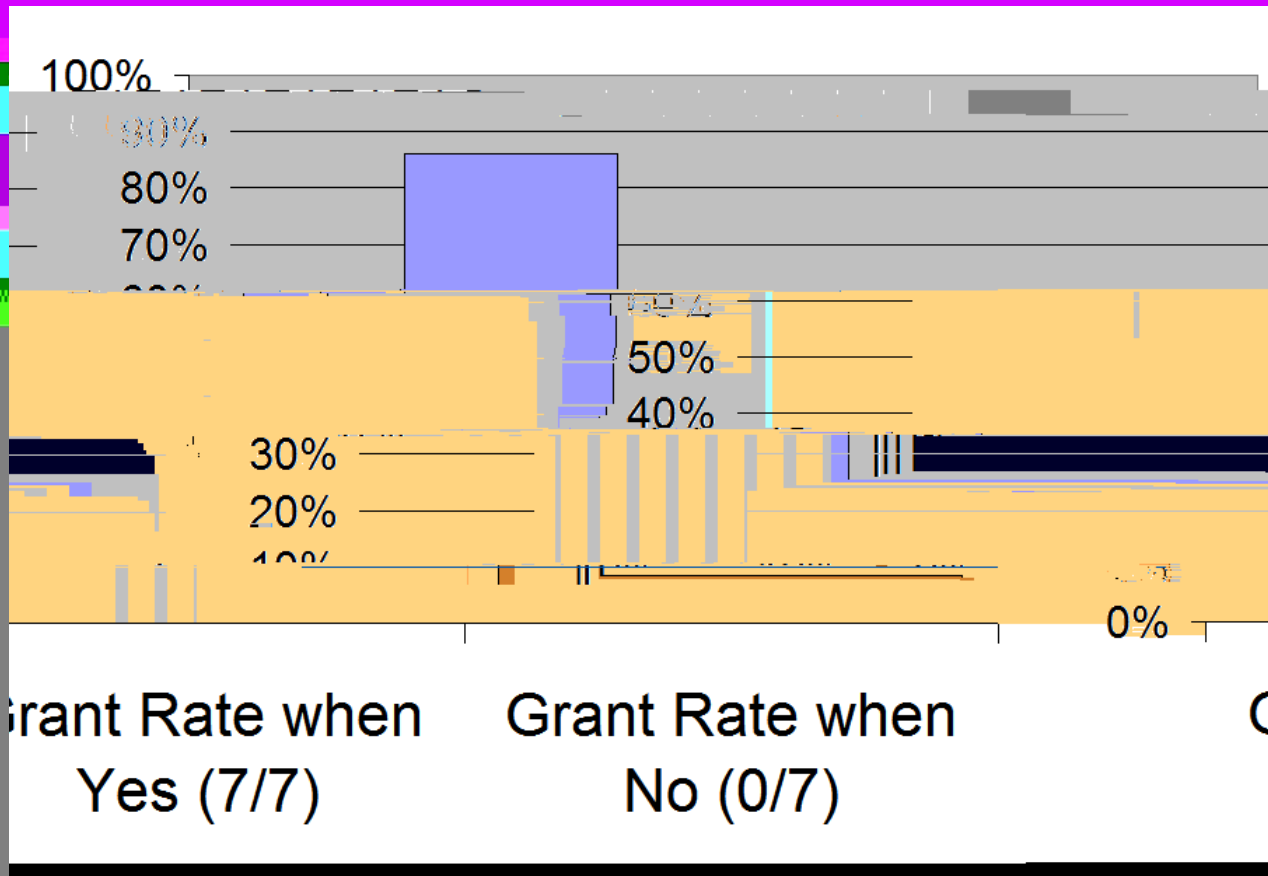
Critical/Developing Time for Patentee



Mentioned
in 7 of 49
cases

Difference in grant rate: 86%

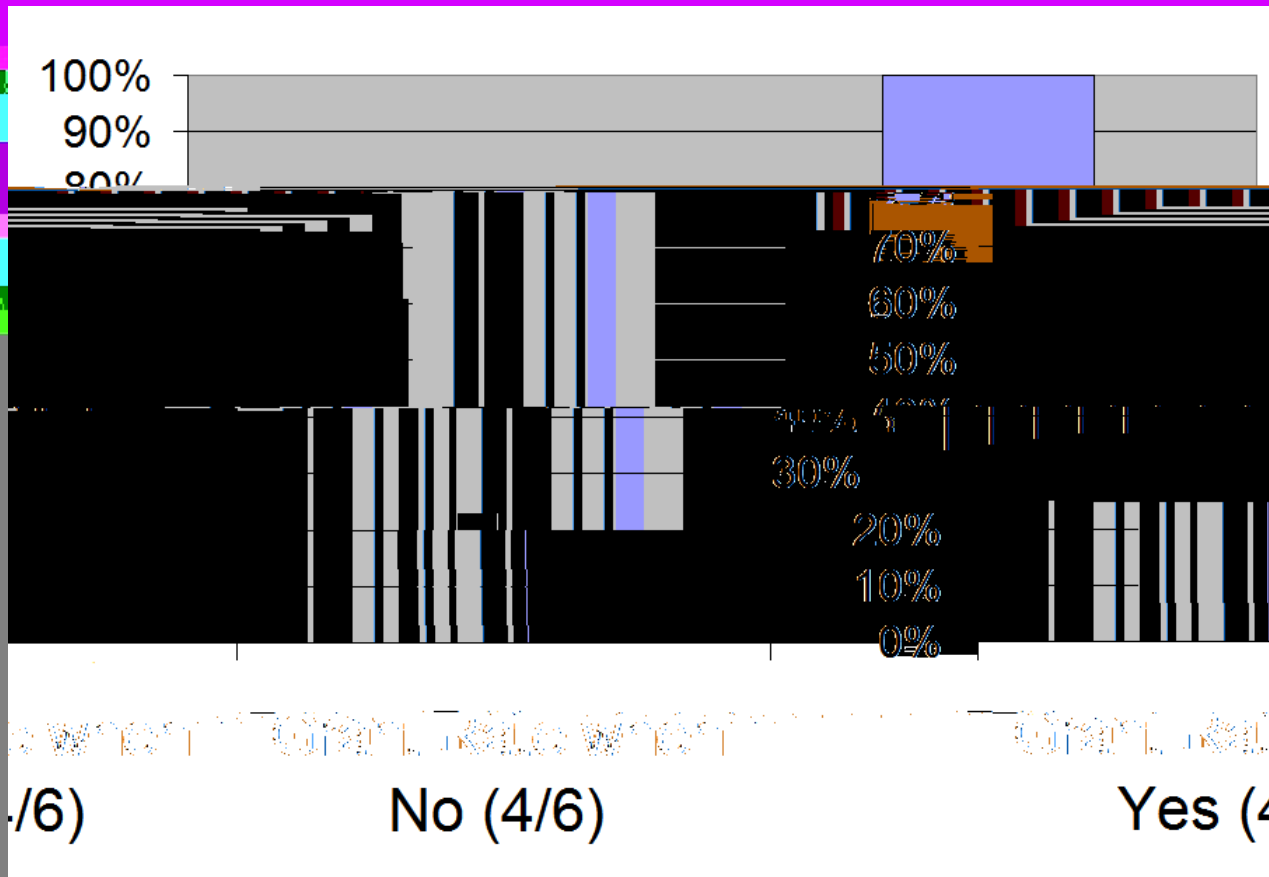
Noninfringing Alternatives



Mentioned in
7 of 49 cases

Difference in grant rate: 86%

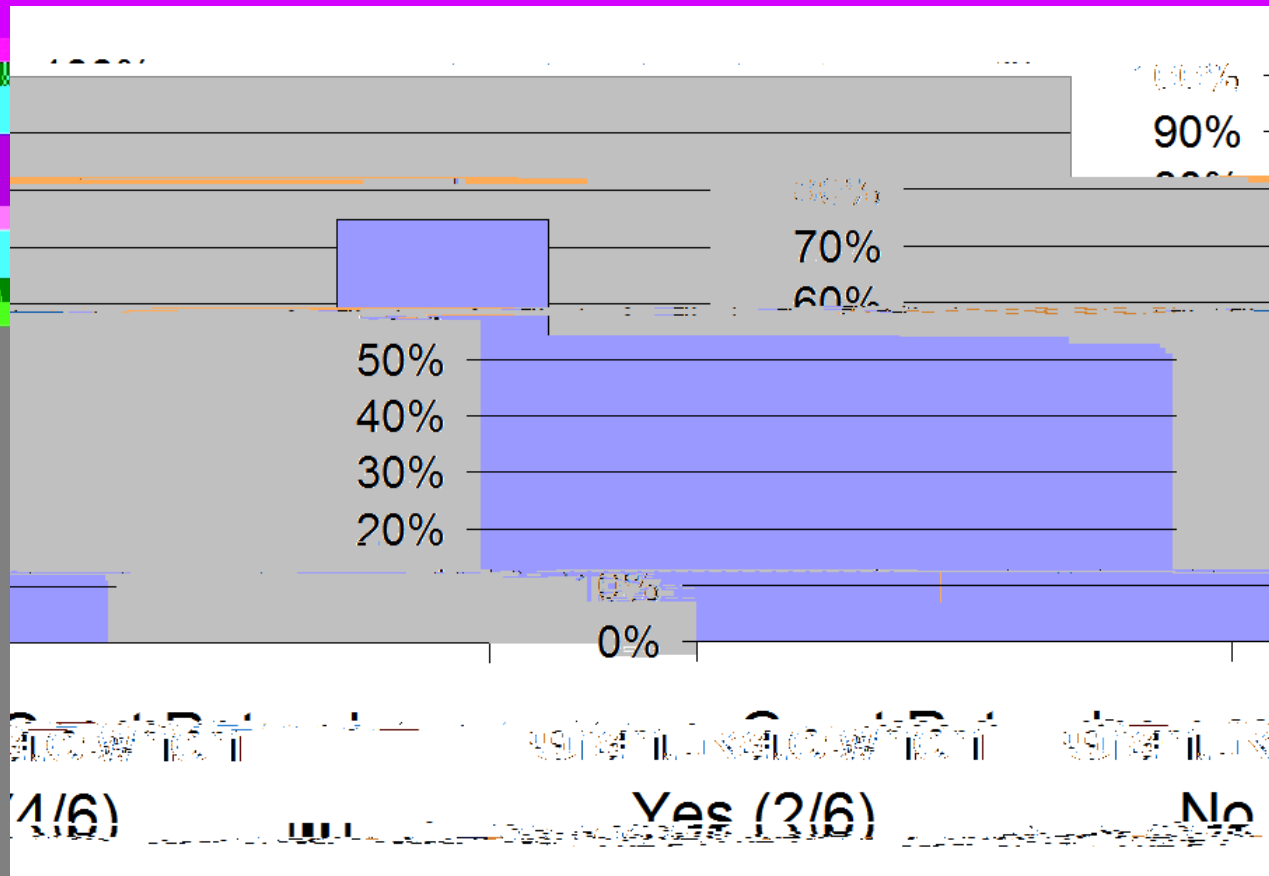
Offered License To Defendant



Mentioned
in 6 of 49
cases

Difference in grant rate: 75%

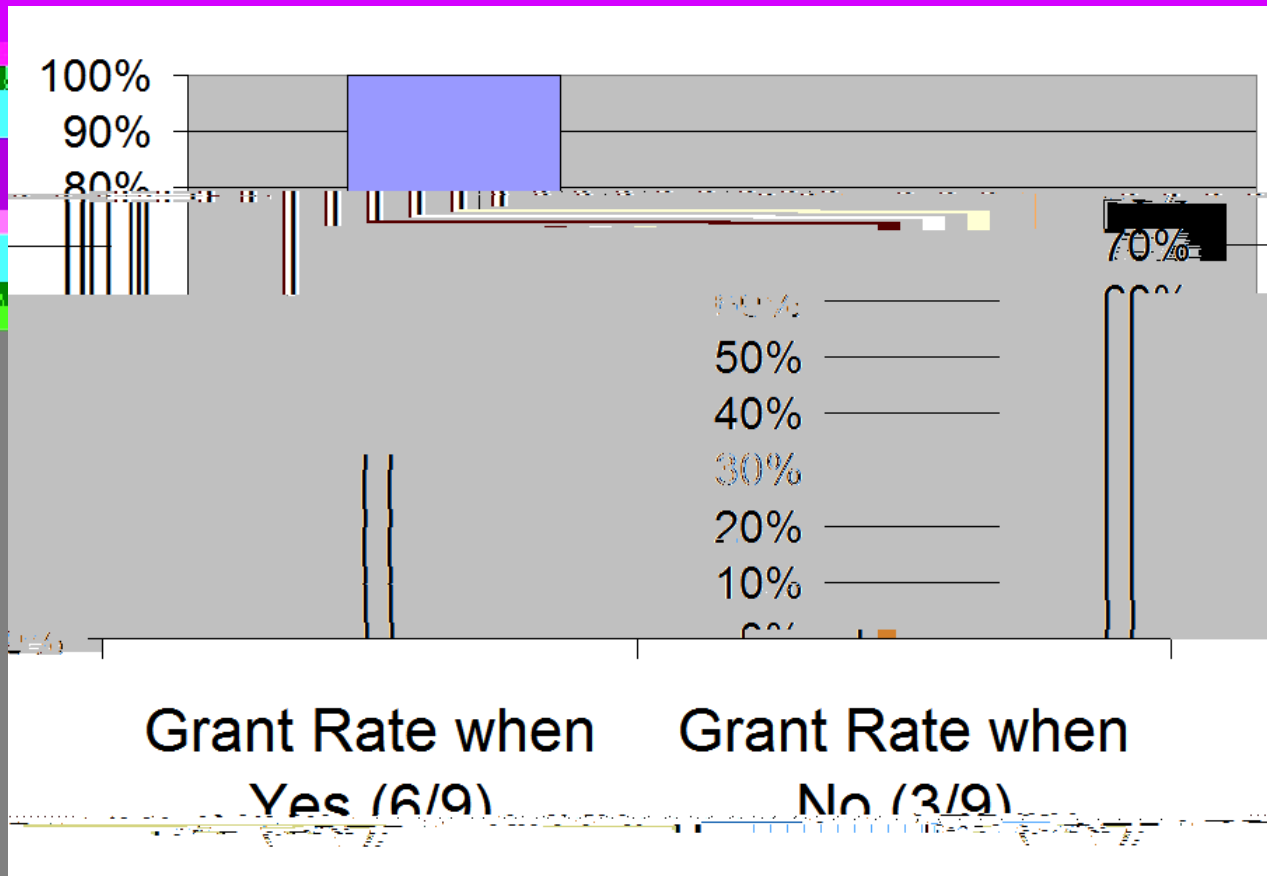
Invention a Trivial Component



Mentioned
in 6 of 49
cases

Difference in grant rate: 75%

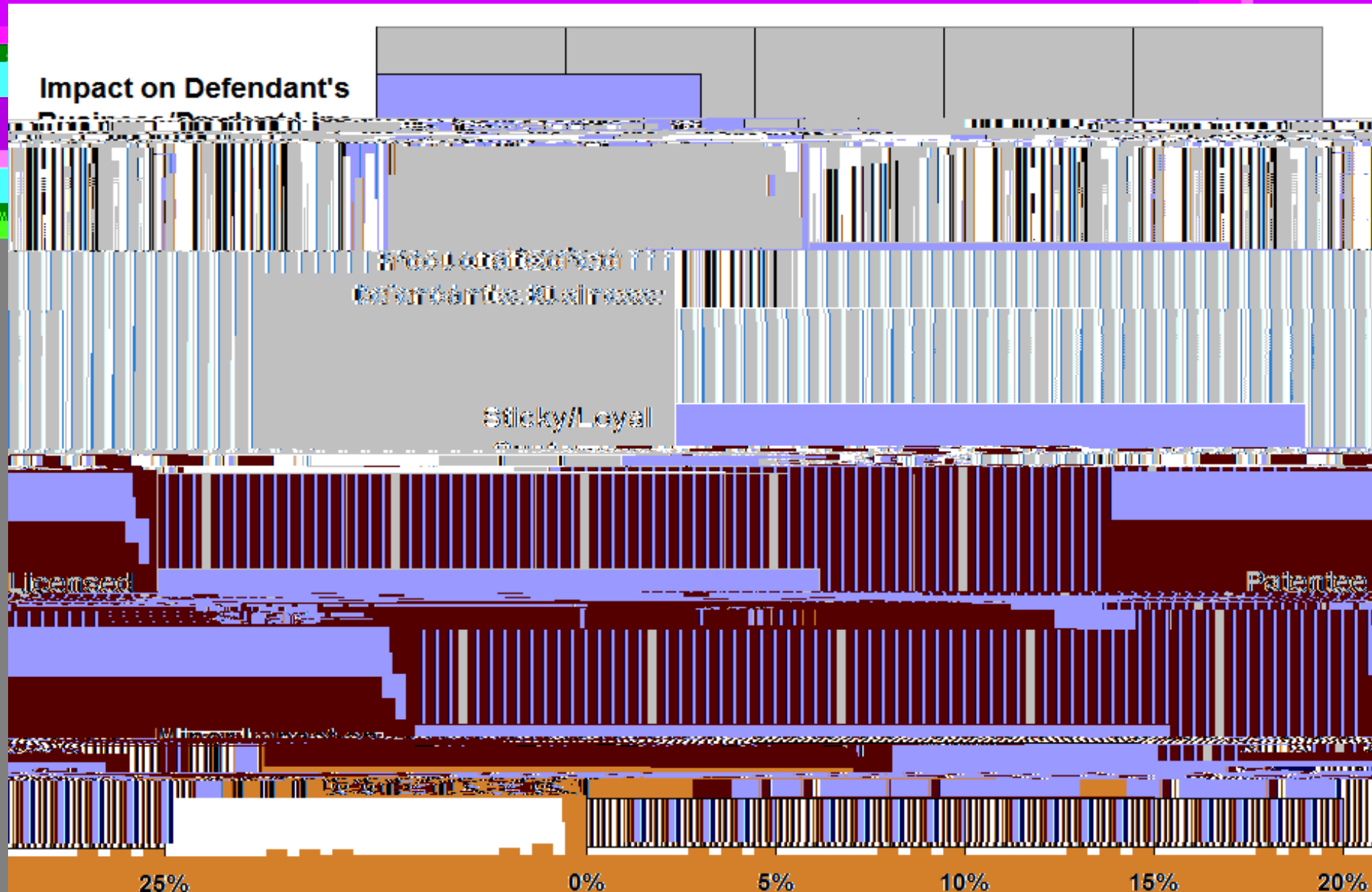
Patentee's Only/Primary Product



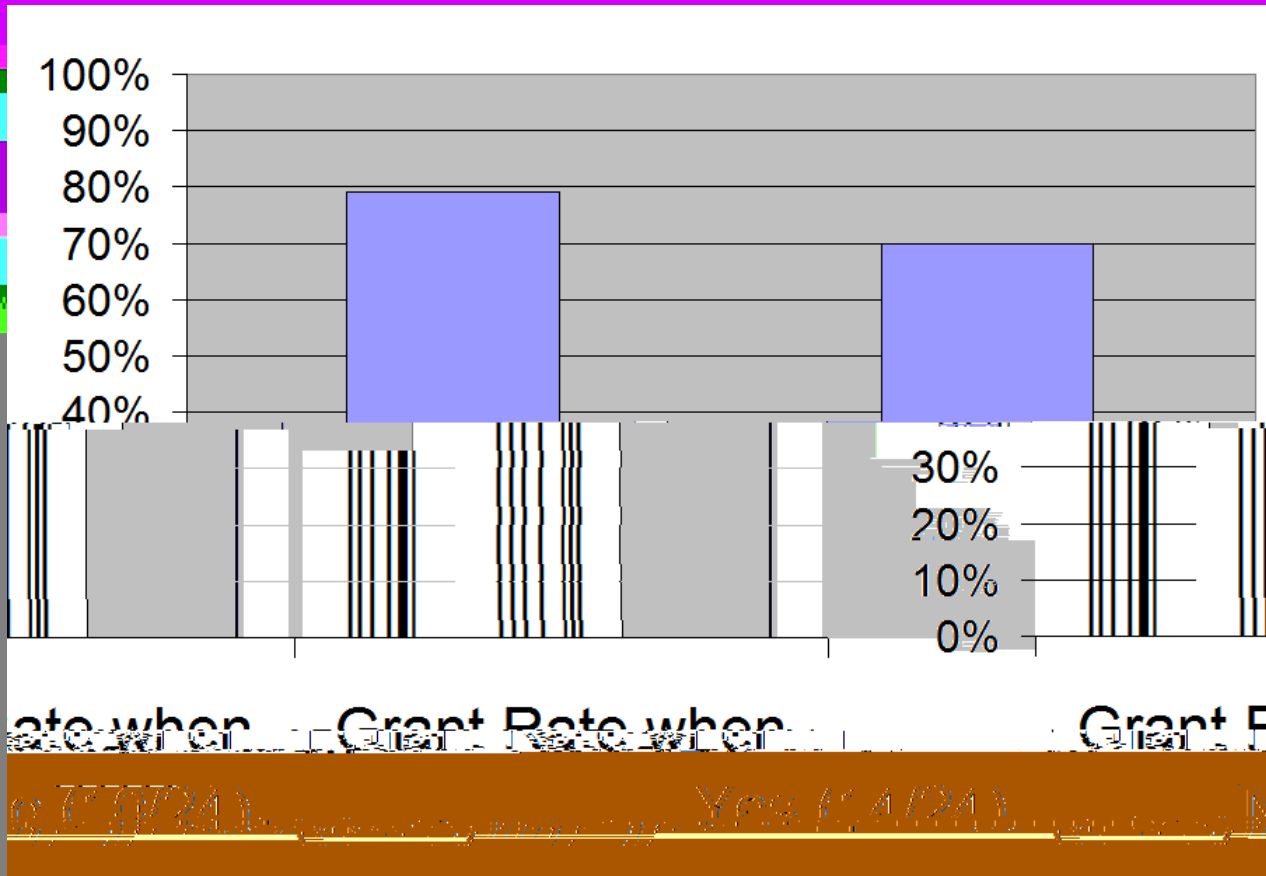
Mentioned
in 9 of 49
cases

Difference in grant rate: 67%

Smallest Differences Between Yes and No



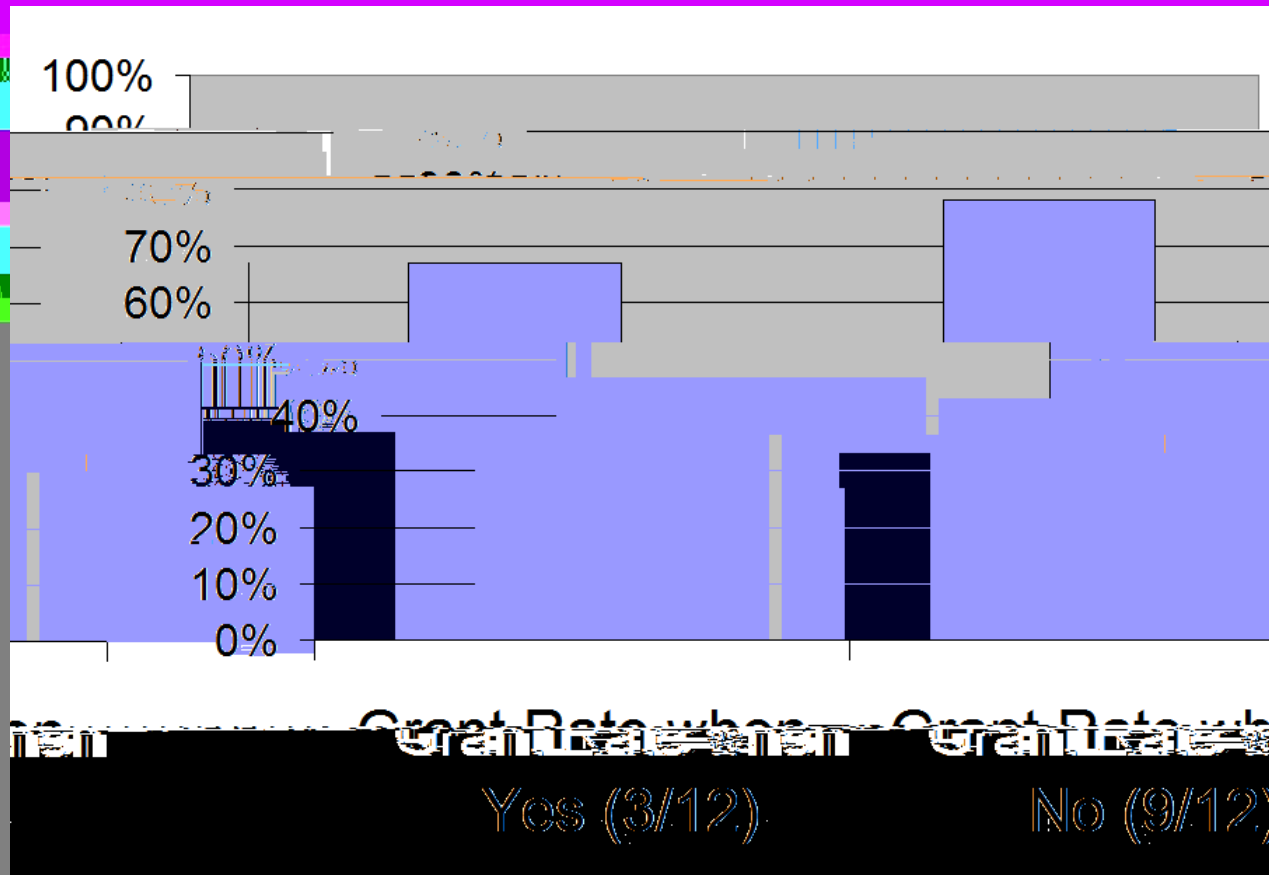
Impact On Defendant's Business



Mentioned
in 24 of 49
cases

Difference in grant rate: 9%

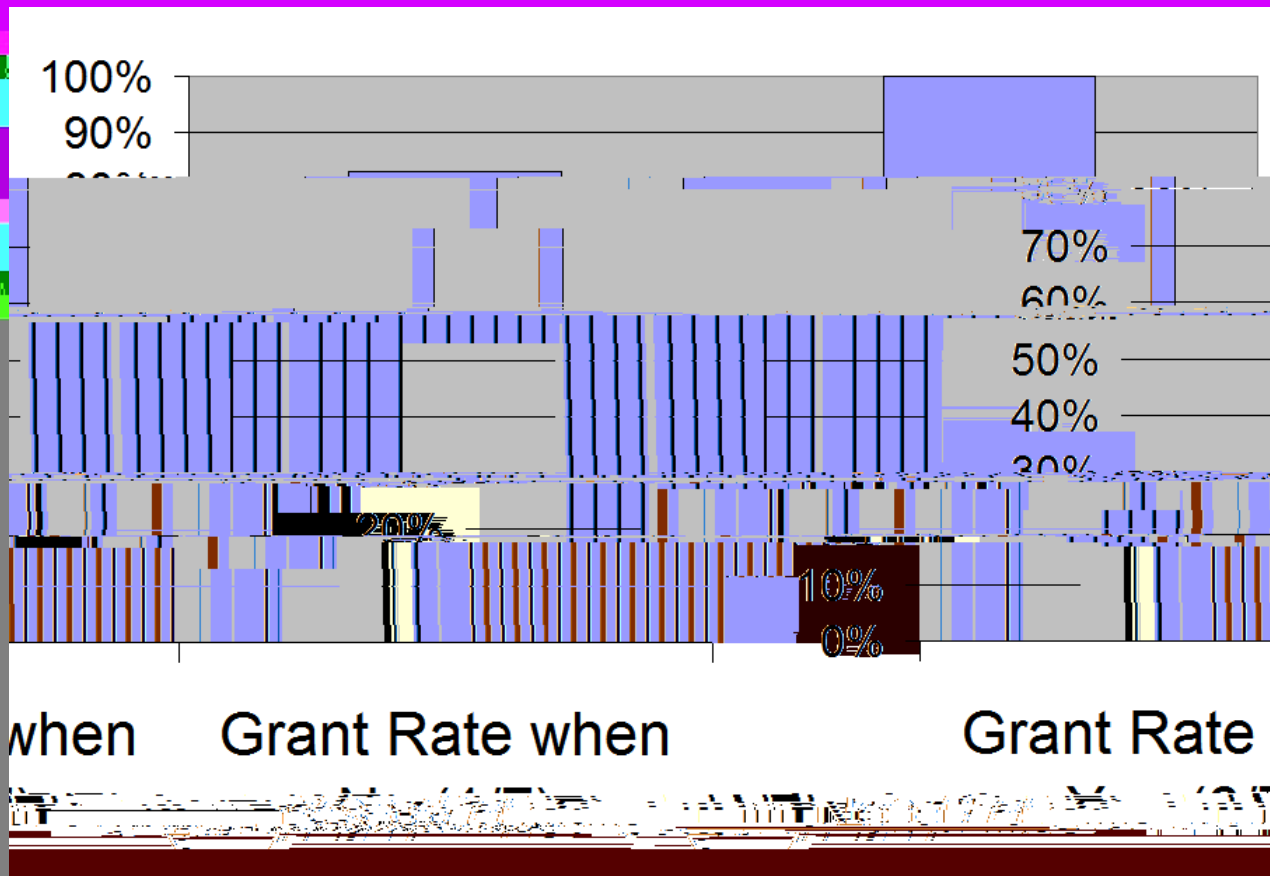
Product At Core Of D's Business



Mentioned
in 12 of 49
cases

Difference in grant rate: 11%

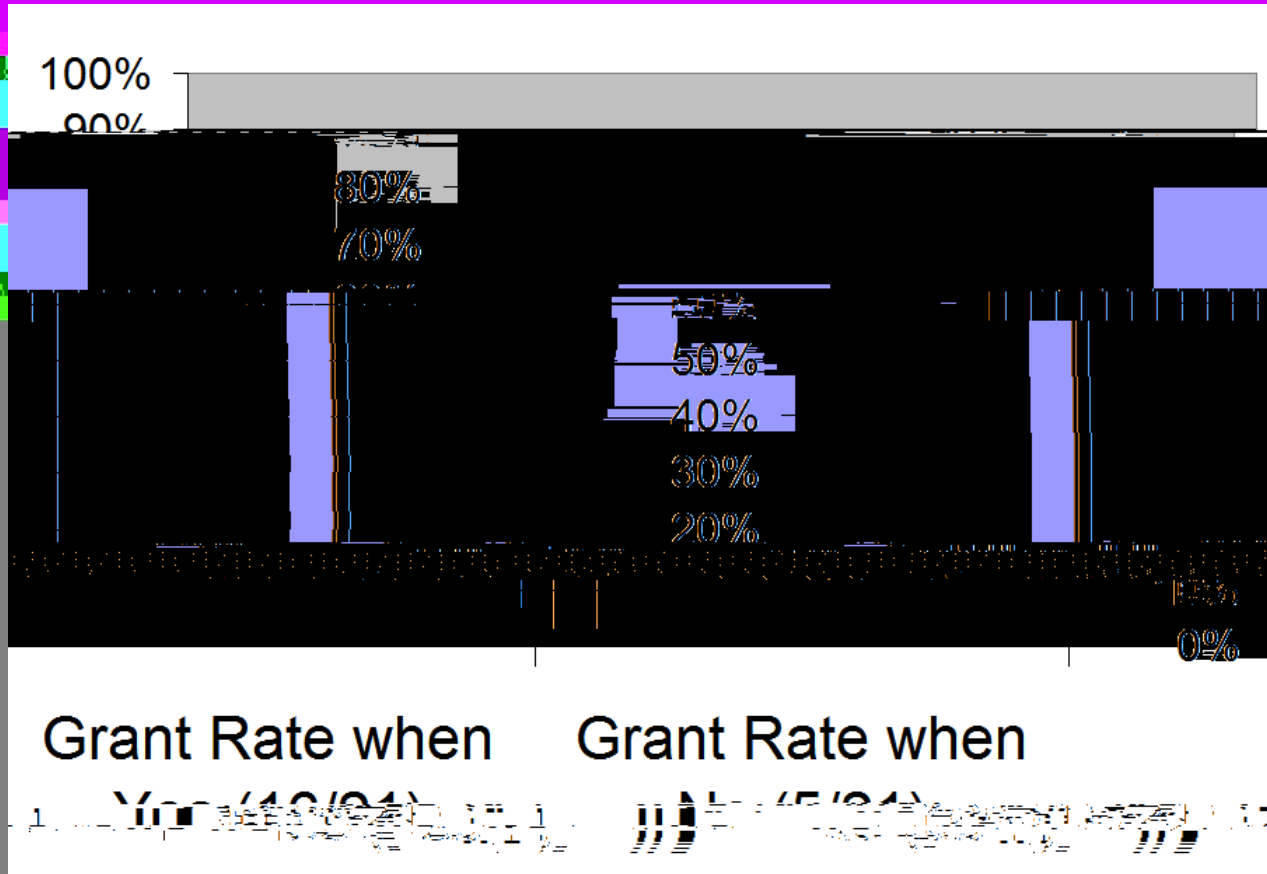
Sticky/Loyal Customers



Mentioned
in 7 of 49
cases

Difference in grant rate: 17%

Patentee Licensed Others



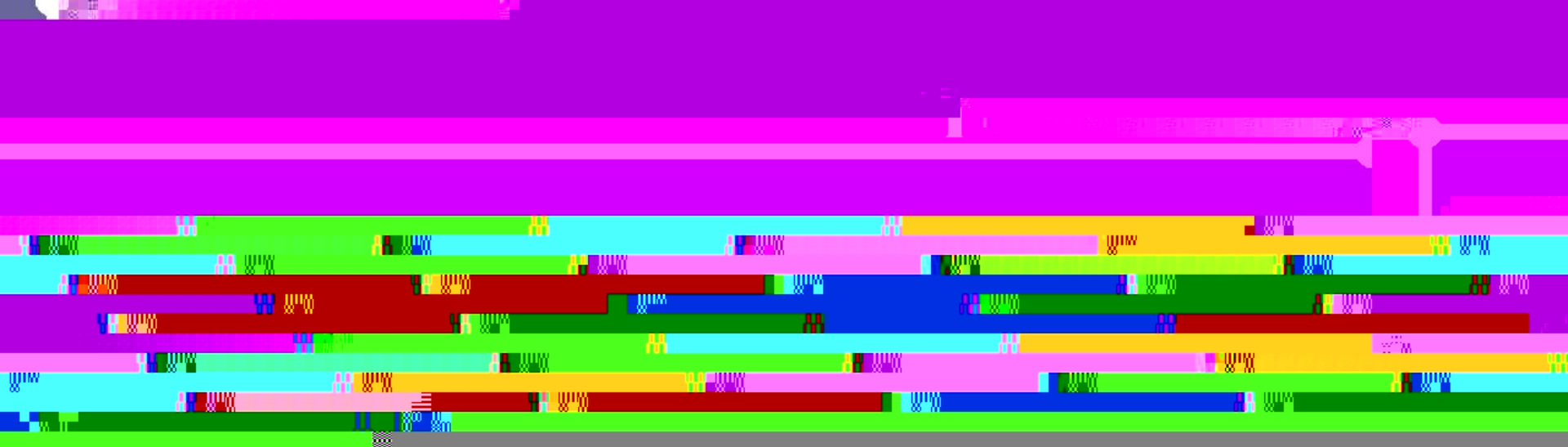
Mentioned
in 21 of 49
cases

Difference in grant rate: 17%

Minor Impact On D's Sales

Mentioned
in 17 of 49
cases

Difference in grant rate: 20%



END