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Putting Numbers to Feelings: Intellectual Property Rights Enforcement in China's Courts—Evidence from Zhejiang Province Trademark Infringement Cases 2004–2009

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**Putting Numbers to Feelings:
Intellectual Property Rights Enforcement in China's
Courts—Evidence from Zhejiang Province Trademark
Infringement Cases 2004–2009**

Nathan Snyder



Putting Numbers to Feelings: Intellectual Property Rights Enforcement in China's Courts—Evidence from Zhejiang Province Trademark Infringement Cases 2004–2009

By Nathan Snyder*

I. INTRODUCTION

¶1 China is not known for protecting intellectual property rights. Anecdotal evidence of counterfeit products and foreign companies claiming unfair treatment in the country's courts is ubiquitous. Yet there is a dearth of data on the actual events that take place in Chinese courts. This report analyzes the most extensive published survey of trademark infringement court decisions in China. The survey data is a collection of trademark cases from the Zhejiang province during 2004–2009. It suggests that domestic Chinese support the concept of trademarks and trademark litigation with over 76% of disputes being filed by Mainland plaintiffs. Furthermore, this article finds that case outcomes are not affected by litigants' nationalities or locations; in fact, foreign companies were more likely to both win and receive compensation through either adjudication or mediation. The data shows that case outcomes are directly influenced by judges' annual performance reviews and indicates a shift away from adjudication. The author finds that since 2006–2007 there has been a trend toward resolving trademark disputes through mediation and settlement. This article also measures and discusses changes in the speed of litigation during the period studied.

II. BACKGROUND

¶2 China has experienced decades of blistering economic growth despite weak enforcement of intellectual property rights (IPR). The importance of trademarks and branding cannot be overemphasized. Intangible assets, such as IPR, account for an estimated 80% of the total assets of Fortune 500 companies.¹ Yet fewer than 20% of

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¹ Shen Jingting, *Changing Attitude Bodes Well for Pioneers*, CHINA DAILY (Dec. 14, 2010, 11:08 AM),

China's exports currently carry Chinese brand names, and only seven Chinese brands are present in the Global 100.²

The Chinese government's stated goal is for the country's manufacturers to move up the value chain and produce more high-tech, high-margin products.³ History suggests such a transition will require the creation of domestic, Chinese brands. The ability to protect trademarks is a prerequisite to the emergence of such brands. Yet, it is not clear companies believe the courts are currently an effective means to enforce IPR.

In 2011, 70% percent of the American Chamber of Commerce's members ranked China's enforcement of IPR "ineffective" or "totally ineffective."⁴ In 2011, members of the US-China Business Council ranked IPR as their companies' fifth most important issue.⁵ Yet, 82% of these respondents had not brought an IPR-related case in Chinese courts during the past three years. A further 29% responded that China's courts are "not viable" in fighting IPR infringement, with an additional 32% responding courts were viable in only a few cases.⁶ Displeasure with Chinese courts in enforcing IPR is clearly widespread, at least among foreign companies.

Many western scholars and professionals link China's piracy of IPR to cultural heritage and legacy, but this cultural argument is not persuasive. Registrations of patents and trademarks have increased substantially over the past five years.⁷ In 2011, China's intellectual property office granted over 883,000 patents to domestic applicants, a 19% increase over the 740,000 granted in 2010, which itself was a 47% increase over 2009.⁸

Greater filings of patents and trademarks suggest there is a stronger understanding of the importance of IPR within China. It seems the importance of brands is becoming understood by many Chinese. During a trip to the Yiwu wholesale market—a market famous for counterfeit goods—the author found that each shop and supplier had created their own brand.⁹ Meanwhile, luxury brands are resurgent in China, with sales of luxury

http://www.chinadaily.com.cn/bizchina/2010-12/14/content_11699417.htm.

² *WIPO to Present Trademark Awards for Chinese Brands*, CHINA BUSINESS NEWS (Dec. 23, 2010), <http://cnbusinessnews.com/wipo-to-present-trademark-awards-for-chinese-brands/>; Stephan Craig, *Brand Table Exposes Corporate China's Limits*, MARKETWATCH (Dec. 19, 2010, 11:30 PM), <http://www.marketwatch.com/story/brand-table-exposes-corporate-chinas-limits-2010-12-19?siteid=rss&rss=1>.

³ China's 2011 12th Five-year Plan called for the upgrading and restructuring of low-tech manufacturing, while promoting seven "pillar industries," including "(i) energy conservation and environmental protection, (ii) new-generation IT, (iii) bio-tech, (iv) high-end manufacturing equipment, (v) new energy (including nuclear and renewable energy), (vi) new materials, and (vii) new-energy automobiles." Eswar Prasad, *China's Approach to Economic Development and Industrial Policy*, BROOKINGS INSTITUTION (June 15, 2011), http://www.brookings.edu/testimony/2011/0615_china_economic_development_prasad.aspx.

⁴ THE AM. CHAMBER OF COMMERCE IN THE PEOPLE'S REPUBLIC OF CHINA, CHINA CLIMATE BUSINESS SURVEY 2011, 15 (2011), *available at*, <http://www.amchamchina.org/upload/cmsfile/2011/03/22/efb2ab9d3806269fc343f640cb33baf9.pdf>.

⁵ THE US-CHINA BUSINESS COUNCIL, 2011 CHINA BUSINESS ENVIRONMENT SURVEY 1 (2011), *available at* <https://www.uschina.org/info/members-survey/pdfs/uscbc-2011-member-survey-results.pdf> [hereinafter USBC STUDY].

⁶ *Id.* at 16.

⁷ STATE INTELLECTUAL PROP. OFFICE OF THE P.R.C., 2011 PATENT STATISTICS (2011), *available at* <http://www.sipo.gov.cn/ghfzs/zltj/tjyb/tjyb2011/201201/P020120111556603287315.pdf>; *China's Intellectual Protection 2010*, ST. INTELL. PROP. OFF. P.R.C. (Apr. 29, 2011), http://english.sipo.gov.cn/laws/whitepapers/201104/t20110429_602312.html.

⁸ 2011 PATENT STATISTICS, *supra* note 7; *China's Intellectual Protection 2010*, *supra* note 7.

⁹ This statement is based on casual conversations and interviews with market merchants and Yiwu's

goods such as Louis Vuitton and Prada driven by China's newly rich.¹⁰ The combination of increased IPR registrations, brand consciousness, and this study suggest that Chinese appear to have "bought in" to the concepts of branding, trademarks and intellectual property, although legal protection of IPR remains highly imperfect.¹¹

17 Businesses can combat IPR infringement through two avenues: administrative agencies, such as the State Administration for Industry and Commerce, and the courts. Administrative enforcement has historically played a larger role in IPR enforcement, potentially because the Chinese administrative authorities are considered more powerful than the courts.¹² In 2010, administrative authorities were reported to have investigated 56,000 counts of trademark infringement.¹³ The administrative authorities have registered some success in combating IP infringement, and they often take the lead in the country's periodic crackdowns on IP infringers. However, enforcement by the authorities has been inconsistent across regions due to limited resources and local protectionism. They have been plagued by a lack of coordination between the myriad of IP-related organizations,¹⁴ low fines and penalties for infringers, and "vulnerability to corruption and arbitrariness."¹⁵

18 Companies can also choose to directly enforce IPR in China's courts. The People's Courts are organized in four tiers: the Supreme Court, high, intermediate, and local (i.e. basic) courts. Intermediate and high-level courts, and selected courts for trademark and copyright (but not patent) matters, have special IPR tribunals that handle IPR disputes.¹⁶ Government programs, often with the participation of the European Union, have worked to train judges and increase judiciary knowledge.¹⁷ Tribunals are now considered to generally be staffed by qualified judges who possess IPR expertise.¹⁸ Yet, as noted above, some foreign businesses have an unfavorable view of the quality of the courts. The exact quality of IPR-related jurisprudence is unknown.

intellectual property rights enforcement agents.

¹⁰ Luxury retailers have noted sales growth primarily in Greater China. For instance, Prada notes Asia is now the number one market for luxury goods. Fion Li, *Prada First-Half Profit Jumps 74% on New Stores, Demand Luxury for Asia* (Sept. 20, 2011), <http://www.bloomberg.com/news/2011-09-19/prada-first-half-profit-jumps-74-on-stores-asia.html>.

¹¹ See generally USBC STUDY, *supra* note 5.

¹² See JIANQIANG NIE, *THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN CHINA* 183 (2006).

¹³ Xinhua, *Trademark Violations Rise in China*, CHINA DAILY (Mar. 13, 2011, 3:15 PM), http://www.chinadaily.com.cn/china/2011npc/2011-03/13/content_12163695.htm.

¹⁴ There are simply too many agencies tasked with protecting IPRs. These agencies are: State Intellectual Property Office, State Administration for Industry and Commerce, Press and Publication General Administration, State Copyright Bureau, Ministry of Culture, Ministry of Agriculture, State Forestry Administration, Ministry of Public Security, General Administration of Customs, Supreme People's Court, and Supreme People's Procuratorate.

¹⁵ See NIE, *supra* note 12, at 217–221; Tan Loke Khoon, *Managing Intellectual Property Rights Disputes*, in *MANAGING BUSINESS DISPUTES IN TODAY'S CHINA: DUELING WITH DRAGONS* (Michael J. Moser ed., 2007).

¹⁶ See NIE, *supra* note 12, at 232, 235, 235 n.84–87, 262.

¹⁷ Ian Harvey, *Myths and Legends*, CHINADIALOGUE (Nov. 14, 2008), <http://www.chinadialogue.net/article/show/single/en/2557-Myths-and-legends>.

¹⁸ Peter Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in *INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA* 173, 221 (Daniel J. Gervais ed., 2007).

A. Method

¶9 In order to better understand the extent to which courts in China's most developed regions are being used to defend and enforce IPR, the author compiled and analyzed 1,270 trademark infringement cases in Zhejiang province during the years 2004–2009.¹⁹ Cases from 2004–2009 were selected to reduce selection bias. The year 2004 was the first year of data available. The end date of 2009 allowed a sufficient time-lag to make certain all cases filed in 2009 were resolved and posted to court websites prior to the beginning of collection and analysis in the spring of 2011. While the study could now be updated to include 2010 data, based on statistics released by the Ministry of Commerce of the People's Republic of China (MOFCOM),²⁰ the author does not believe the inclusion would materially change this study's results, but would only confirm and strengthen the findings presented in this article.²¹

¶10 Zhejiang province is an excellent survey location because it is one of China's richest and most developed provinces. The province is known for its entrepreneurs and it has three main industrial cities: Hangzhou, Ningbo, and Wenzhou. Wenzhou is the birthplace of China's laissez-faire capitalism, and provides a model of individual entrepreneurship that clashes with the state-run capitalism model observed in Jiangsu and Shanghai.²² Because the province is full of successful entrepreneurs, Zhejiang is likely to be on the forefront of any trend toward greater acceptance and enforcement of IPR.

¶11 Zhejiang is a hotbed of IPR creation and registration. In 2009, Zhejiang companies filed and received the third most patents of any Chinese province.²³ In 2010, enterprises in Zhejiang filed and were granted the second most trademarks of any province.²⁴ The province is also home to some of China's most well-known brands, including Internet business group Alibaba and beverage giant Wahaha.

¹⁹ Cases can be found online at *China IPR Judgments & Decisions*, SUPREME PEOPLE'S COURT PEOPLE'S REPUBLIC CHINA, <http://ipr.court.gov.cn/> (last visited Mar. 8, 2012). The author surveyed only trademark cases tried within Zhejiang province. In total, 1,270 cases were analyzed and sorted by year, case type, original location, whether the case was a first instance or appeal, appeal location, plaintiff name and home country (where foreign companies are defined as either foreign companies incorporated outside of China or Chinese subsidiaries of foreign companies incorporated in China), plaintiff's headquarter location by province within China (with cases involving multiple plaintiffs categorized by the first plaintiff listed in the case text), industry, date filed, date first heard, date resolved, the outcome, and compensation awarded in terms of damages.

²⁰ MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA, <http://english.mofcom.gov.cn/> (last visited Mar. 8, 2012).

²¹ Based on data compiled and supplied to the author by Allen & Overy LLP using MOFCOM statistics, found at *Zhejiang Zhishi Chanquan Guansi Jingwai Qiye Shengsu Lü 96.85%* (浙江知识产权官司境外企业胜诉率 96.85%) [*Foreign Corporations Wins 96.65% in Zhejiang Intellectual Property Lawsuits*], MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA: SPECIAL COMMISSIONER'S OFFICE IN HANGZHOU (Apr. 15, 2011, 16:00 PM), <http://hztb.mofcom.gov.cn/aarticle/shangwxw/201104/20110407500373.html?2296520076=1252348470> (last visited Mar. 8, 2012).

²² See YASHENG HUANG, CAPITALISM WITH CHINESE CHARACTERISTICS: ENTREPRENEURSHIP AND THE STATE (2008).

²³ STATE INTELLECTUAL PROP. OFFICE OF THE P.R.C., ZHUANLI TONGJI NIANBAO-2009 (专利统计年报-2009) [2009 PATENT STATISTICAL YEARBOOK] 5 (2009), available at <http://www.sipo.gov.cn/tjxx/2009.pdf>.

²⁴ STATE ADMIN. FOR INDUS. & COMMERCE, ZHONGGUO SHANGBIAO ZHANLUE NIANDU FAZHAN BAOGAO 2010 ((中国商标战略年度发展报告 (2010)) [ANNUAL DEVELOPMENT REPORT ON CHINA'S TRADEMARK STRATEGY 2010] 116 (2010), available at <http://www.saic.gov.cn/zwgk/ndbg/201104/P020110421498353114920.pdf>.

¶12 The Zhejiang courts system should also exhibit a relatively high, representative set of rulings within China. Lawyers and legal scholars consider the richest and most industrialized regions of China to have the best-educated and highest quality judges and courts.²⁵ The courts in Beijing and Shanghai are generally regarded as best, while courts in Guangdong, Jiangsu, and Zhejiang are expected to be of relatively high quality.²⁶

¶13 Unlike in the U.S., the courts are not legally required to publish cases. However, the Supreme People’s Court has pushed to have more cases made public. The surveyed cases were collected in Chinese from the courts’ respective websites. The vast majority of cases are from the Supreme People’s Court of China website, and a few additional cases were compiled from local court websites.²⁷ This online collection of cases is likely incomplete, but the extent to which it is imperfect is unknown. It may be that Chinese courts are more likely to publish cases that cast judges and courts in a favorable light and demonstrate judicial competency. It also appears that IPR cases are more likely to be published because such cases are less likely to be classified as “state secrets” compared to other cases. Indeed, not a single criminal case is posted on the Supreme Court’s website. Despite the potential for a skewed sample, the database created and analyzed is the most complete selection of cases to date.²⁸ This study should be indicative of experiences in China’s developed regions.

B. Case and Plaintiff Distribution

¶14 The entire sample consisted of 1,269 cases during the years 2004–2009. The vast majority of cases were infringement cases. A small subset of cases involved claims of both infringement and unfair competition, but these cases have been declining since 2004. Only thirty-seven cases (Table 1 below) dealt with trademark assignment or licensing disputes. These cases were not included in the analysis below.

TABLE 1. NUMBER OF CASES BY TYPE

Case Type	No. of Cases	Percentage
Infringement (商标专用侵权)	1,082	85
Infringement (商标专用侵权) and Unfair Competition (不正当竞争)	150	12
Assignment disputes (商标转让合同纠纷)	16	1
Licensing disputes (许可使用合同纠纷)	21	2
Total	1,269	100

²⁵ This statement is based on the author’s discussions with both Chinese and western lawyers and legal scholars.

²⁶ Harvey, *supra* note 17.

²⁷ See generally *China IPR Judgments & Decisions*, *supra* note 19.

²⁸ To access IPR consulting firm Rouse’s similar database, see CIELA CHINA IP LITIG. ANALYSIS, <http://china.ciela.cn/> (last updated Mar. 4, 2011).

FIGURE 1. PERCENTAGE OF UNFAIR COMPETITION CASES PER YEAR

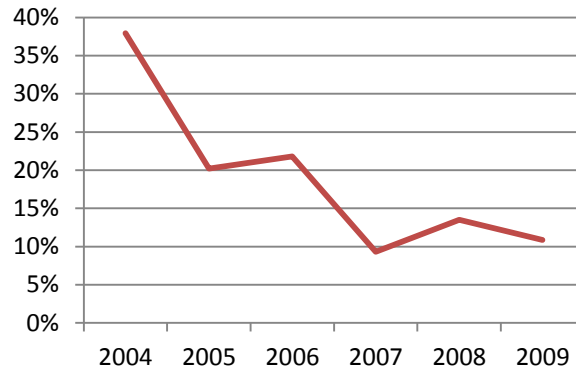


FIGURE 2. TOTAL CASES BY YEAR

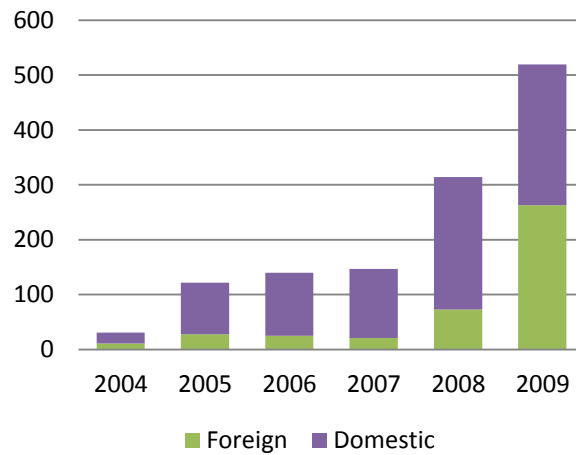


FIGURE 3. TOTAL CASES BY YEAR (EXCLUDING PUMA)

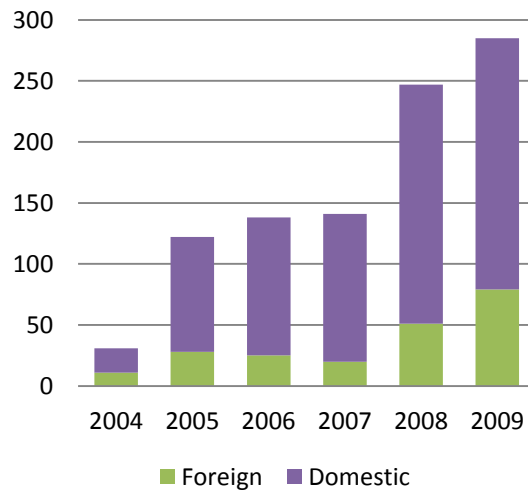


TABLE 2. TOP LITIGATORS BY COMPANY

Company	No. of Cases	Industry
Puma	299	Shoes
Guangzhou Flashlight Industrial Corp	32	Flashlights
Shanghai Sachs Huizhong Shock Absorber Co., Ltd.	25	Auto parts
Adidas	23	Shoes
Nike	20	Shoes

¶15 The number of cases filed has grown substantially year on year. The charts above illustrate the annual growth of cases, differentiated by foreign and domestic plaintiffs. German shoe company Puma is excluded in Figure 3. This exclusion is the result of Puma being an institutional outlier. As illustrated in Table 2, Puma filed 299 cases during 2004–2009, with the majority of cases filed in 2009. In order to eliminate data imperfections, the analysis below is based on only initial (known in China as “first instance”) cases, not appeals, disputing trademark infringement or unfair competition, which were not filed by Puma. Exceptions are noted.

¶16 Inclusion of 2010 data further illustrates the rapid increase in IP case filings. In 2010, 979 trademark-related cases were filed in Zhejiang, a 49% increase.

TABLE 3A. INFRINGEMENT CASES OVERVIEW: FIRST INSTANCE CASES

	Including Puma	Excluding Puma
Ruled Upon	844	627
Adjudicated	234 ²⁹	222
Infringement	207	191
No Infringement	29	29
Mediated (调解)	252	224
Settled (和解协议)	360	187
Withdrawn (撤诉)	244	167
Declined (驳回)	18	16
Declined for nonpayment of court fees (未预缴受理费)	10	7
Total Filed	1,120	821

²⁹ Total cases adjudicated is two more than the sum of infringing and non-infringing cases because two cases analyzed did not include a final ruling within the text of the case.

TABLE 3B. INFRINGEMENT CASES OVERVIEW: CASES ON APPEAL

	Including Puma	Excluding Puma
Upheld (维持原判)	44	40
Infringement	39	35
No infringement	5	5
Mediated	13	13
Settled	15	12
Declined	11	10
Upheld—declined	1	1
Upheld—appeal declined, finding infringement	2	2
Declined—nonpayment of court fees	16	15
Reversed (撤销)	9	9
Remanded to lower court	2	2
Infringement	6	6
No infringement	1	1
Total Appeals Filed	112	102

TABLE 4A. OVERVIEW OF ASSIGNMENT DISPUTE CASES

	No. of Cases
First Instance Cases Filed	14
Adjudicated	4
Plaintiff won, contract upheld	2
Plaintiff won, transfer/sale—no effect (行为无效)	2
Mediated	1
Settled	3
Withdrawn	4
Declined	0
Appeals	2
Transfer/Sale Upheld	2

TABLE 4B. OVERVIEW OF LICENSING DISPUTE CASES

	No. of Cases
First Instance Cases Filed	19
Adjudicated	8
Plaintiff won, permit upheld	6
Plaintiff won, transfer/sale—no effect	2
Mediated	6
Settled	4
Withdrawn	1
Appeals	2
Upheld—infringement	1
Settled	1

TABLE 5. DISTRIBUTION OF FIRST INSTANCE CASES BY COURT

Court	No. of Cases	Percentage
Ningbo Intermediate Court	213	25.9
Hangzhou city Intermediate Court	150	18.3
Wenzhou city Intermediate Court	112	13.6
Yiwu city Court	65	7.9
Jinhua city Intermediate Court	60	7.3
Taizhou city Intermediate Court	42	5.1
Shaoxing city Intermediate Court	36	4.4
Huzhou city Intermediate Court	31	3.8
Jiaxing city Intermediate Court	28	3.4
Yuyao city Court	16	1.9
Jinahua city Wucheng District Court	16	1.9
Lishui city Intermediate Court	10	1.2
Ruian city Court	9	1.1
Huzhou city Intermediate Court	8	1
Liqing city Court	7	0.8
Cixi city Court	5	0.6
Yuhuan County Court	4	0.5
Hangzhou Xihu District Court	2	0.2
Ningbo city Beilun District Court	2	0.2
Ningbo city Yinzhou District Court	2	0.2
Zhoushan city Intermediate Court	1	0.1
Jiaxing city Nanhu District court	1	0.1
Hangzhou city Binjiang District Court	1	0.1
Total	821	99.6

¶17 First instance cases were primarily filed in large, industrial cities. Table 5 illustrates that the plurality of cases were filed in the port city of Ningbo's Intermediate Court, followed by Hangzhou and Wenzhou Intermediate Courts. The primacy of Ningbo is contrary to the expectation that there is a "flight to quality," that is, the idea that plaintiffs purposefully litigate in capital cities where courts are expected to be of the highest quality.³⁰ Ningbo's top spot could reflect a belief that courts within Zhejiang's cities are equal, but is more likely a reflection of the manufacturing and port facilities in Ningbo. If all illicit goods were located only within Ningbo, plaintiffs would have no choice but to file within the city.

¶18 There are slight variations between the courts in which foreign and domestic companies filed cases. Compared to domestic companies, foreign firms were 28% more likely to file in Ningbo. Domestic companies were 3% more likely to file in Hangzhou and nearly 5% more likely to file in Yiwu. It is possible the difference may be the result of a greater probability of exporting counterfeit foreign branded goods, while domestic branded counterfeits likely remain in China.

¶19 The courts were primarily used by domestic Chinese companies. The majority, 76% of cases, were filed by companies based in the Greater China area (Table 6). Foreign companies are defined as either foreign companies incorporated outside of China, or Chinese subsidiaries of foreign companies which are incorporated in China.

¶20 The majority of companies filed only one case, while a few companies utilized the court system repeatedly. It is important to note that unlike in the U.S., some Chinese courts require separate cases to be filed on separate items. In other words, a plaintiff wishing to file a case against a counterfeiter involving multiple infringing items must often file multiple, distinct cases.³¹

¶21 In total, 394 distinct companies filed cases within the Zhejiang courts. Of these companies, 275 filed only a single case. An additional sixty companies filed only two cases, while fifty-nine companies filed three or more cases. Domestic companies comprised the majority of repeat users, which suggests domestic companies view the courts as a valuable avenue of enforcing IPR.

¶22 The majority of litigants were small and medium-sized private enterprises. Of the 490 plaintiffs, twenty-five were individuals litigating under their own name, unattached to any company. This phenomenon of Chinese companies' and many individual entrepreneurs' frequently using the courts suggests there is a growing legal consciousness in China's business community.

³⁰ This statement is based on the author's discussions with multiple Chinese and international intellectual property lawyers practicing within Mainland China.

³¹ See, e.g., Yingte Laige Gongsi Su Kegao Tianjin Wanju Youxian Gongsi, Beijing Shi Fuxing Shangye Cheng Qinfan Zhuzuo Quan Jiufen An (英特尔格公司诉可高天津玩具有限公司、北京市复兴商业城侵犯著作权纠纷案) [Opinion of the Copyright Infringement Lawsuit of Swiss Interlego A.G. against Tianjin Kegao Toy Co. and Beijing Fuxing Commercial City] (Beijing High People's Ct. Dec. 18, 2002) (China), available at <http://www.shlaw.com.cn/ReadNews.asp?NewsID=2792>.

TABLE 6. PLAINTIFF LOCATION BY COUNTRY

Country	No. of Cases	Percentage
Mainland China	624	76
Hong Kong	13	1.6
Taiwan	4	0.1
United States	51	6.2
Germany	43	5.2
France	26	3.2
The Netherlands	20	2.4
Japan	18	2.2
Switzerland	7	0.9
Great Britain	6	0.7
Singapore	2	0.2
Italy	2	0.2
Indonesia	1	0.1
Sweden	1	0.1
Turkey	1	0.1
Cayman Islands	1	0.1
Total	821	99.3

TABLE 7. PLAINTIFF LOCATION WITHIN CHINA

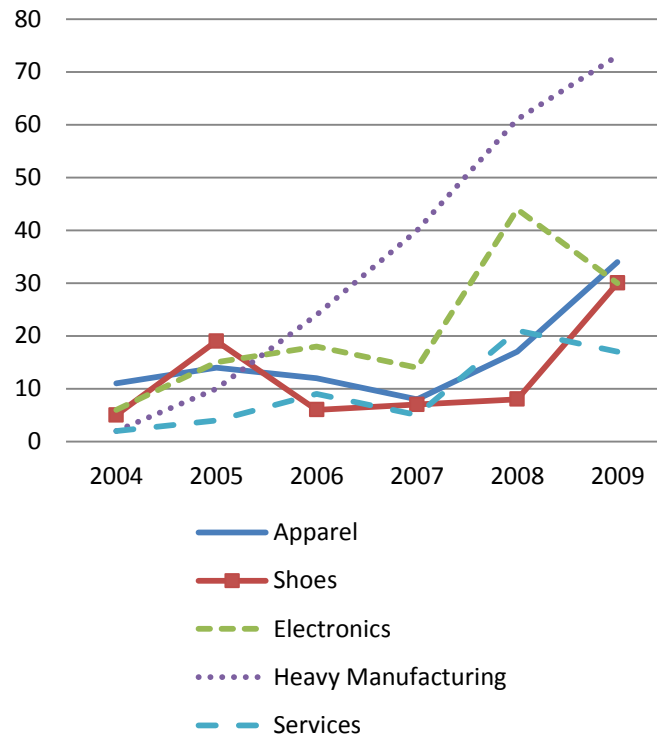
Province	No. of Cases	Percentage
Zhejiang	323	50
Shanghai	111	17
Guangdong	80	13
Jiangsu	26	4
Fujian	23	4
Shandong	21	3
Liaoning	6	0.9
Anhui	6	0.9
Jiangxi	5	0.8
Hunan	5	0.8
Beijing	4	0.6
Chongqing	3	0.5
Guangxi	3	0.5
Hebei	2	0.3
Hubei	1	0.2
Tianjin	1	0.2
Sichuan	1	0.2

Province	No. of Cases	Percentage
Guizhou	1	0.2
Heilongjiang	1	0.2
Yunnan	1	0.2
Total	624	97.5

¶23 Despite the government’s goal of decreasing the economy’s share of manufacturing and movement toward a more service-oriented economy, the data illustrates steady increases in cases filed by manufacturers. Figure 4 illustrates that there has been a continued, increasing trend of litigation by plaintiffs engaged in low-end manufacturing. Shoes and clothing manufacturers were particularly litigious. Puma, Adidas, and Nike were major litigators, as were Chinese apparel brands September Wolves and Red Dragonfly.

¶24 One group of businesses is distinctly absent from the courts: state-owned businesses. It is possible that large, state-owned companies are not experiencing infringement. But state-owned companies may be able to use their status and power more effectively to stop infringement through administrative actions.

FIGURE 4. INDUSTRY COMPOSITION BY YEAR



III. FOREIGN–DOMESTIC BIAS?

¶25 Although many foreign companies suggest they are targets of discrimination, the data does not support such a claim. The cases surveyed do not exhibit any obvious foreign–domestic bias. Indeed, foreign companies are more likely than domestic companies to win cases and receive compensation. Foreign companies are 4% more likely to win cases that are adjudicated and 22% more likely to receive compensation from winning adjudicated cases or entering mediated agreements.

¶26 The higher likelihood of foreign companies to win and receive compensation can likely be attributed to foreign companies’ higher quality legal teams and preference to litigate only when financially advantageous. One Chinese lawyer I spoke to stated that some Chinese companies are more likely to ignore financial costs and expected gains, preferring to instead try to make a statement through litigation.

¶27 Overarching statistics from 2010 support this study’s findings of high win rates for foreign plaintiffs. Of the 4,673 intellectual property cases adjudicated in Zhejiang during 2010, 476 intellectual property cases involved foreign companies, and foreigners won 97% of the time.³²

TABLE 8. CHANCE OF WINNING (BASED ON CASES ADJUDICATED)

	Percentage
Domestic Companies	85.5
Foreign Companies	89.5

TABLE 9. CHANCE OF RECEIVING COMPENSATION (WON OR MEDIATED)

	Percentage
Domestic Companies	67
Foreign Companies	89

³² Based on data compiled and supplied to the author by Allen & Overy LLP, using MOFCOM statistics found at MINISTRY OF COMMERCE OF THE PEOPLE’S REPUBLIC OF CHINA: SPECIAL COMMISSIONER’S OFFICE IN HANGZHOU, *supra* note 21.

FIGURE 5. DOMESTIC CASE OUTCOME BY YEAR

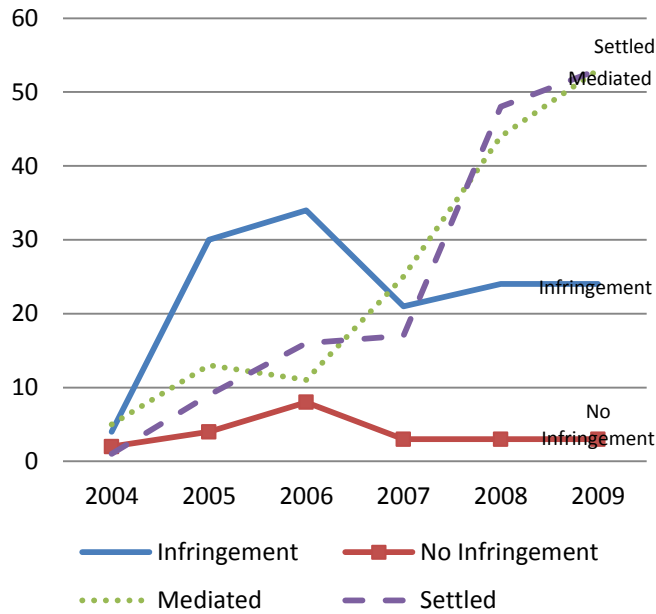
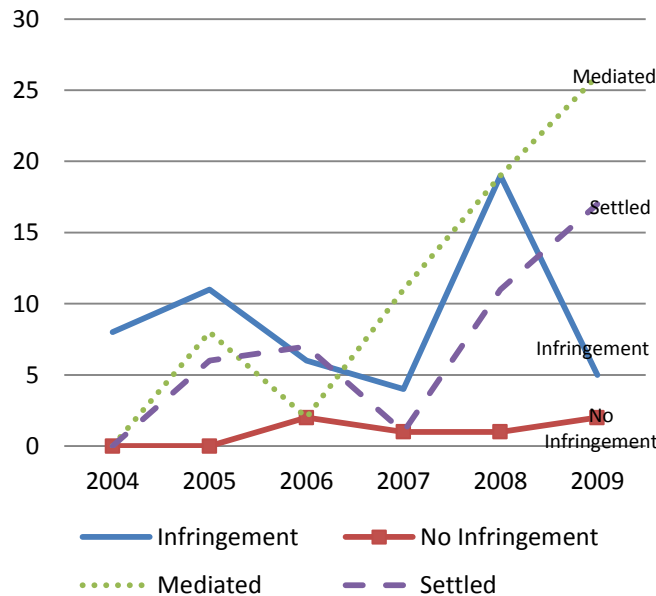


FIGURE 6. FOREIGN CASE OUTCOME BY YEAR



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In terms of case outcomes, the experiences of foreign and domestic companies generally mirror one another. Since 2006 or 2007, the majority of cases have been resolved through mediation and settlements. Few cases were resolved through formal court decisions. Those that were resolved through judges' rulings usually favored the plaintiff.

¶29 The movement toward meditations and settlements may be the result of policy considerations. Recent studies have also shown a movement away from litigation in criminal cases.³³ In the past few years, the Supreme People’s Court has released statements directing courts to promote “social harmony” by resolving IPR cases through mediation and out-of-court settlements.³⁴ Alternatively, the trend may reflect the difficulties in building a strong case against infringers. Therefore, plaintiffs are left with no choice but to settle or mediate an agreement.

¶30 The data on case outcomes runs counter to cultural stereotypes claiming Chinese avoid open disputes and prefer back room discussions. In the cases surveyed, foreign companies actually mediated 12% more often than Chinese businesses. Furthermore, foreign companies mediated or settled cases at nearly the same rate as domestic firms, 80% compared to 86%, respectively.

¶31 The high probability of foreign companies pursuing alternative agreements may be a result of additional pressure on foreign companies to mediated or settle cases. However, foreign lawyers informally surveyed suggest that the type of dispute resolution pursued is a result of the quality of the case, not a result of court-induced pressures. Therefore, it seems likely that the high percentage of mediated agreements is a rational, purposeful decision made by foreign companies and their legal teams. The quality of foreign companies’ legal teams may explain the higher probability of foreign companies winning adjudicated cases.

³³ Carl F. Minzner, *China’s Turn Against Law*, 59 AM. J. COMP. L. 935, 945–46 (2011).

³⁴ Zuigao Renmin Fayuan (最高人民法院) [Supreme People’s Court], Zuigao Renmin Fayuan Yinfā Guanyu Jìn Yībù Guānchē Tiáojiē Yóuxiān Tiáopàn Jiéhé Gōngzuò Yuánzé de Ruògān Yìjiàn de Tōngzhī (最高人民法院印发《关于进一步贯彻“调解优先、调判结合”工作原则的若干意见》的通知) [Opinion and Notification from the Supreme People’s Courts on Furthering the Principle of “Mediation as Priority and Combining Use of Mediation & Adjudication”] (June 7, 2010), http://www.court.gov.cn/qwfb/sfwj/yj/201008/t20100811_8489.htm.

FIGURE 7. DOMESTIC OUTCOMES 2009

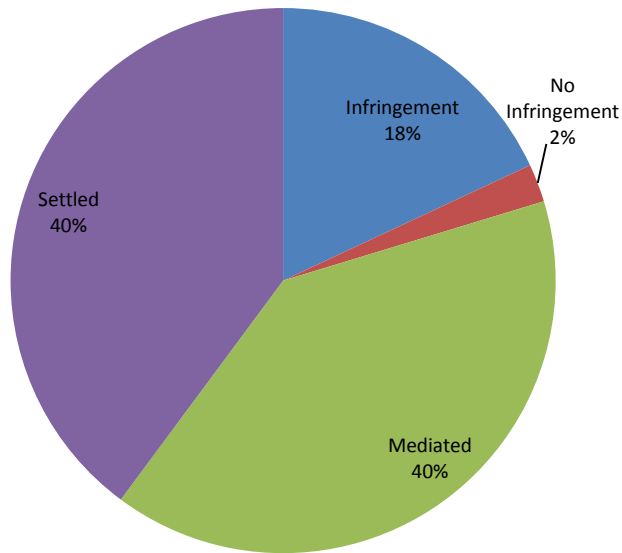


FIGURE 8. FOREIGN OUTCOMES 2009

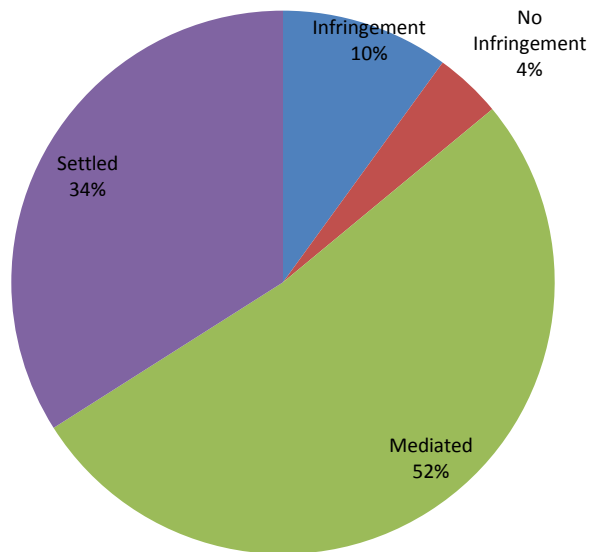


FIGURE 9. AVERAGE COMPENSATION BY YEAR (RMB)

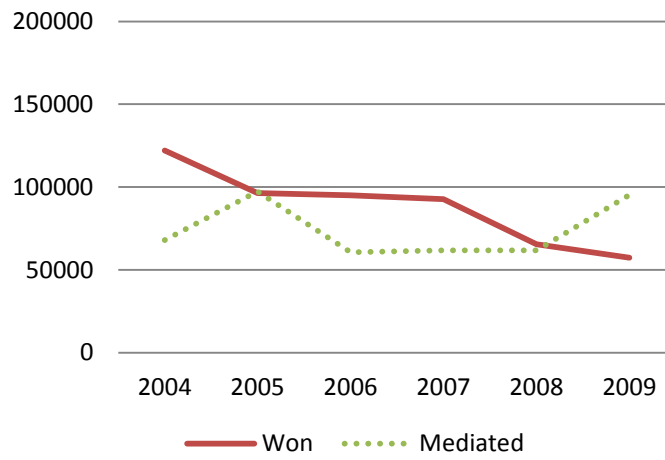


FIGURE 10. DOMESTIC COMPENSATION BY YEAR

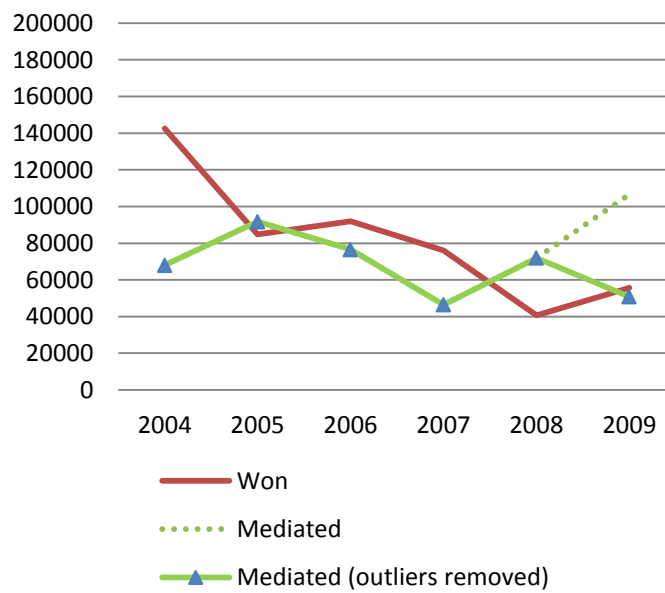
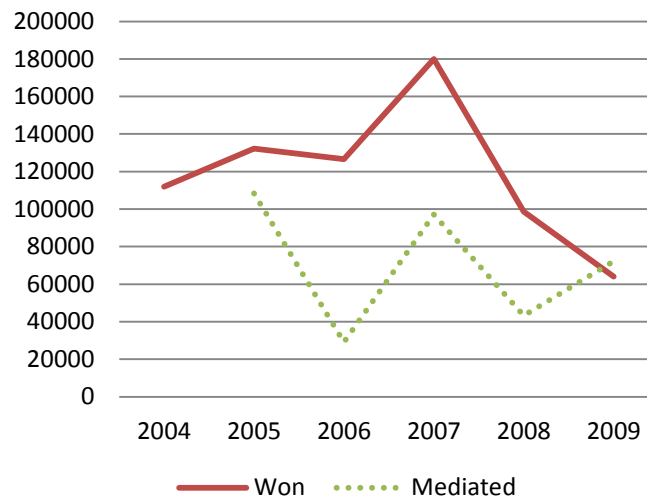


FIGURE 11. FOREIGN COMPENSATION BY YEAR



¶32 Contrary to the perception that compensation and damages awarded have been increasing, the average amount of renminbi (RMB) awarded has been declining over time.³⁵ This survey suggests compensation received in cases resolved through mediation and resolved through judgments has converged under RMB 100,000. In 2009, adjudicated case damages were roughly RMB 57,000 while mediated case damages averaged over RMB 95,000.

¶33 The 2009 mediated average, however, may be misleading. Two Chinese companies (Shanghai Dingling Dianqi Youxian Gongsi (上海鼎玲电器有限公司) [Shanghai Dingling Electric Appliances Co.] and Shanghai Lima Diandongche Zhizao Youxian Gongsi (上海立马电动车制造有限公司) [Shanghai Lima Electric Automobile Manufacturing Co.]) involved in three cases received compensation of RMB 1,000,000.³⁶ Removing these three cases from the sample of 100 total cases greatly

³⁵ Richard Wigley, *Challenging Perceptions: New Statistics from the Supreme People's Court on IPR Lawsuits in the PRC*, CHINA LAW INSIGHT (Dec. 29, 2010), http://www.chinalawinsight.com/2010/12/articles/intellectual-property/challenging-perceptions-new-statistics-from-the-supreme-peoples-court-on-ipr-lawsuits-in-the-prc/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+ChinaLawInsight+%28China+Law+Insight%29.

³⁶ These three cases are: Yuangao Shanghai Dingling Dianqi Youxian Gongsi yu Beigao Fang Yinlian Qinfan Zhuce Shangbiao Zhuanyong Quan Jiufen Yian (原告上海鼎玲电器有限公司与被告方银莲侵犯注册商标专用权纠纷一案) [Shanghai Dingling Elec. Appliances Co. v. Yinlian], CHINA IPR JUDGMENTS & DECISIONS (Yiwu People's Ct. Dec. 15, 2009) (China), *available at* http://ipr.court.gov.cn/zj/sbq/200910/t20091020_116941.html; Yuangao Shanghai Dingling Dianqi Youxian Gongsi yu Beigao Zhou Caicha Qinfan Zhuce Shangbiao Zhuanyong Quan Jiufen Yian (原告上海鼎玲电器有限公司与被告周彩茶侵犯注册商标专用权纠纷一案) [Shanghai Dingling Elec. Appliances Co. v. Caicha Zhou], CHINA IPR JUDGMENTS & DECISIONS (Yiwu People's Ct. Dec. 15, 2009) (China), *available at* http://ipr.court.gov.cn/zj/sbq/200910/t20091020_116940.html; Yuangao Ying Guangjie, Shanghai Lima Diandong Che Zhizao Youxian Gongsi yu Beigao Taizhou Shi Yiding Cheye Youxian Gongsi Qinfan Shangbiao Zhuanyong Quan ji Bu Zhengdang Jiufen Yian (原告应光捷、上海立马电动车制造有限公司与被告台州市益鼎车业有限公司侵犯商标专用权及不正当竞争纠纷一案) [Ying, Guangjie & Shanghai Lima Motor Elec. Car Mfg. Co. v. Taizhou Dingyi Auto. Co.], CHINA IPR JUDGMENTS & DECISIONS (Taizhou Interm. People's Ct. Dec. 15, 2009) (China), *available at* http://ipr.court.gov.cn/zj/sbq/201006/t20100601_118484.html.

reduces the average mediated compensation to slightly more than RMB 64,000. Thus, regardless whether the case is adjudicated or mediated, the compensation awarded is roughly equal.

¶34 Local protectionism is not apparent in terms of the ratio of compensation sought and awarded. On average, both foreign and domestic firms were awarded 30% of the amount of damages they sought initially.

¶35 Foreign businesses involved in trademark litigation are receiving levels of compensation only slightly greater than domestic firms. This finding is surprising, since foreign brands are better known and (generally) of greater value than domestic brands.

¶36 The amount of compensation awarded is too little to provide a sufficient disincentive to keep companies from infringing. For counterfeiters, lawsuits and compensation are simply a cost of doing business.

IV. ZHEJIANG PROVINCE COMPARISON

¶37 Although the data does not illustrate any significant foreign–domestic bias, it is sometimes posited that local protectionism at the provincial level may affect case outcomes. In total, 50% of plaintiffs and 89% of the primary defendants were located within Zhejiang province.

¶38 A total 282 first instance cases involved plaintiffs and defendants both located within Zhejiang province. Aggregate outcomes of Zhejiang-Zhejiang cases almost exactly match domestic cases’ outcomes. The only difference is that infringement rulings are made five percent more often in Zhejiang-Zhejiang cases, at the expense of exactly 5% less mediation. The Zhejiang-Zhejiang infringement ratio of 28% is only 1% greater than the infringement ratio involving foreign plaintiffs.

¶39 Given that cases involving multiple litigants from Zhejiang province generally mirror the aggregate outcomes of cases involving domestic plaintiffs, it seems unlikely that once cases are filed local protectionism plays a major role in determining the outcome.

FIGURE 12. ZHEJIANG-ZHEJIANG CASE OUTCOMES

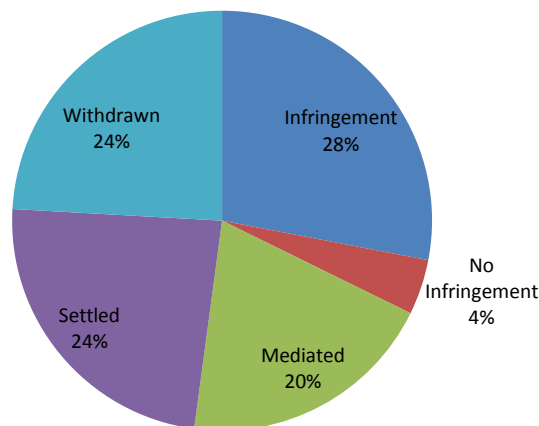


FIGURE 13. DOMESTIC CASE OUTCOMES

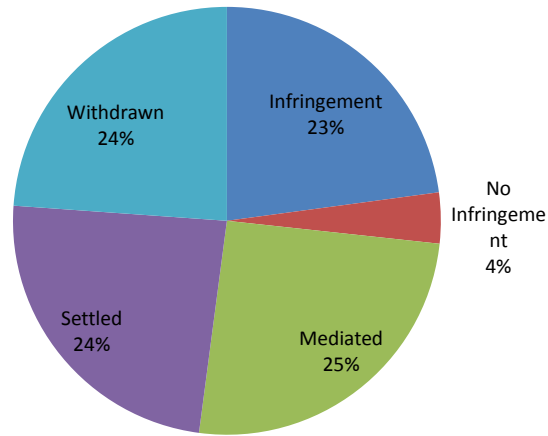


FIGURE 14. FOREIGN CASE OUTCOMES

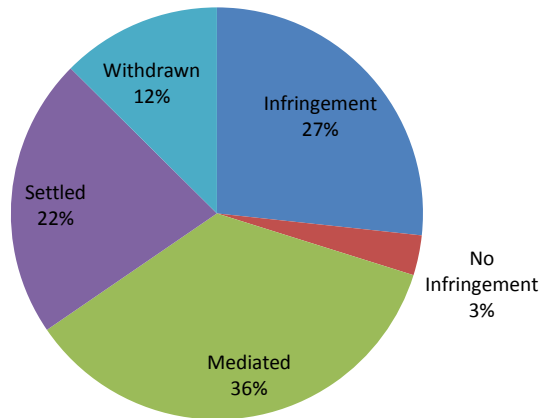


TABLE 10. CHANCE OF WINNING AND RECEIVING COMPENSATION (PERCENTAGE)

	Zhejiang-Zhejiang	Domestic	Foreign
Chance of winning (based on cases decided)	86.8	85.5	89.5
Chance of receiving compensation (won or mediated)	60	67	89

TABLE 11. COMPARISON OF DAMAGE COMPENSATION

	Average Damages Awarded (RMB)	Compensation Sought Versus Awarded (Percentage)
Zhejiang-Zhejiang		
Won	76,953	32.5
Mediated	85,036	34.1
Domestic Plaintiffs		
Won	81,957	33.4
Mediated	76,899	27.2
Foreign Plaintiffs		
Won	118,912	37.5
Mediated	69,994	27.2

¶40 Similar to the distribution of outcomes, cases involving multiple litigants from Zhejiang do not exhibit significantly different probabilities of winning or receiving compensation. Zhejiang plaintiffs suing defendants within the province were slightly more likely to win, as compared to the domestic average. However, they were 7% less likely to receive a damage award through mediation or adjudication.

¶41 When the court awarded damages, cases involving multiple litigants from Zhejiang did not follow the trend. Adjudicated Zhejiang-Zhejiang cases involved damage awards less than the amount awarded to foreign or domestic plaintiffs. However, when damages were awarded through mediation, Zhejiang-Zhejiang cases had the highest amounts of compensation—RMB 85,000—compared to about RMB 77,000 and RMB 70,000 for domestic and foreign plaintiffs, respectively.

¶42 The high damage awards during mediation is also reflected by the fact that plaintiffs in Zhejiang suing defendants in Zhejiang received an average 34% of the damages sought during mediation. This number is 7% greater than the ratio of compensation sought to compensation received for either domestic or foreign plaintiffs. It is possible that mediations involving multiple Zhejiang litigants include issues of “fairness” to a greater extent than negotiations involving companies perceived as outsiders.

V. JURISPRUDENCE QUALITY

¶43 The quality of jurisprudence in IPR cases appears to be improving, or at least quickening; Chinese courts are fast. As shown in the figures below, the average time it

takes for a case to be resolved through a judgment has been reduced from 220 days in 2004 to 115 days. Mediated verdicts have stagnated since 2004, averaging 112 days. Settled cases have also declined over time, averaging ninety-two days in 2009. A single outlier case from 2005 was removed in Figure 15, as it was resolved in 900 days.³⁷ Such a long time until resolution appears quite rare, and likely reflects the judge's unwillingness to adjudicate, thus forcing the litigants to settle out of court.

¶44 Chinese courts deliver rapid verdicts, but the timing of resolutions is irregular. Table 12 displays the percent change of cases resolved, mediated, and settled by month. There is a significant end-of-year spike in adjudicated, mediated, and settled agreements in December.

¶45 The December spike is likely the result of judges' performance reviews. At least until the end of 2010, judges were annually evaluated on a variety of factors, most prominently the number of cases resolved per year.³⁸ Other variables include the number of resolved cases later appealed and number of decisions overturned. The survey data supports anecdotal evidence suggesting judges strive to clear their docket at the end of the year by exerting additional pressure on plaintiffs and defendants to mediate or settle cases at the end of the year. The Supreme People's Court is reported to have recently ended this system of performance evaluation, but, as of the beginning of 2012, no new incentive system has been announced.³⁹

³⁷ The total sample of mediated cases with filing dates is 64 cases, the 2005 subset is only three mediated cases with filing dates. Removed case: Yuangao Hangzhou Pingguo Fuzhi Youxian Gongsu yu Beigao Yang Wenbiao Shangbiao Qinquan Jiufen Yian (原告杭州苹果服饰有限公司与被告杨文彬商标侵权纠纷一案) [Hangzhou Appletree Clothing Co. v. Yang, Wenbiao], CHINA IPR JUDGMENTS & DECISIONS (Hangzhou Interm. People's Ct. Dec. 15, 2009) (China), available at http://ipr.court.gov.cn/zj/sbq/200806/t20080612_113903.html.

³⁸ For additional information on the cadre responsibility and its effect on law, see generally Carl F. Minzner, *Riots and Cover-Ups: Counterproductive Control of Local Agents in China*, 31 U. PA. J. INT'L L. 53 (2009); Carl F. Minzner, *Judicial Disciplinary Systems for Incorrectly Decided Cases: The Imperial Chinese Heritage Lives On*, 39 N.M. L. REV. 63 (2009).

³⁹ Zhenping Cui (崔真平), *Zuigao Fayuan Jiang Quxiao Chuantong de Jiean lü Tongji Fa* (最高法院将取消传统的结案率统计法) [Supreme People's Court Will Abolish Case Closure Rate Statistics Law] (Dec. 20, 2009, 3:56 PM), <http://www.chinacourt.org/html/article/201012/20/439196.shtml>.

FIGURE 15. DAYS ELAPSED BETWEEN FILING AND RESOLUTION, BY YEAR (CORRECTED FOR OUTLIER)

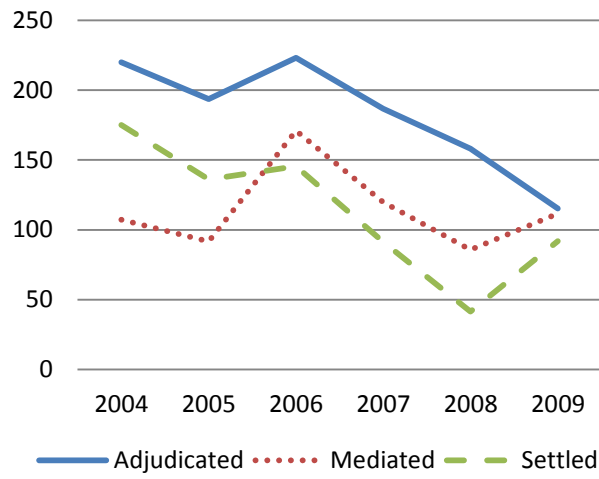


FIGURE 16. FIRST INSTANCE CASE RESOLUTION PER MONTH (JULY INDEX)

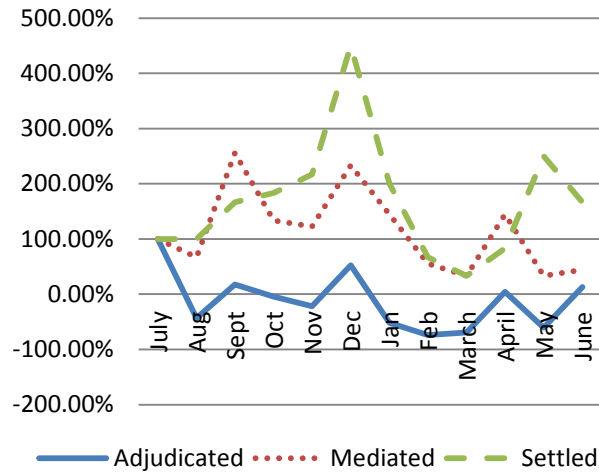


TABLE 12. CASES APPEALED

First Instance Cases Adjudicated	222
Cases Appealed	102
Appeal Ratio	46%

FIGURE 17. APPEALS PER YEAR (PERCENTAGE OF FIRST INSTANCE CASES ADJUDICATED ANNUALLY)

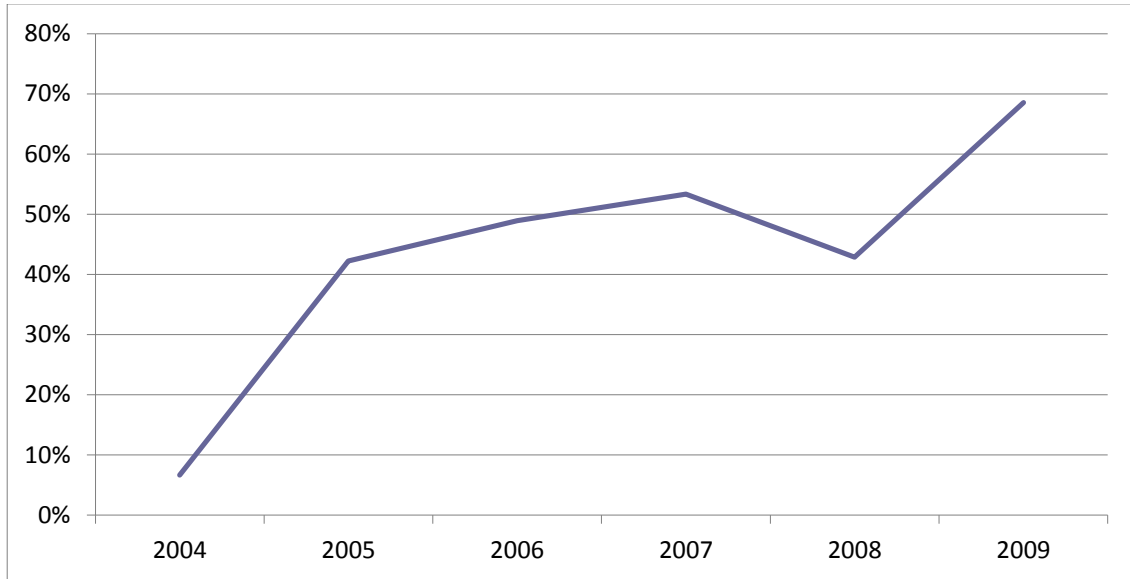
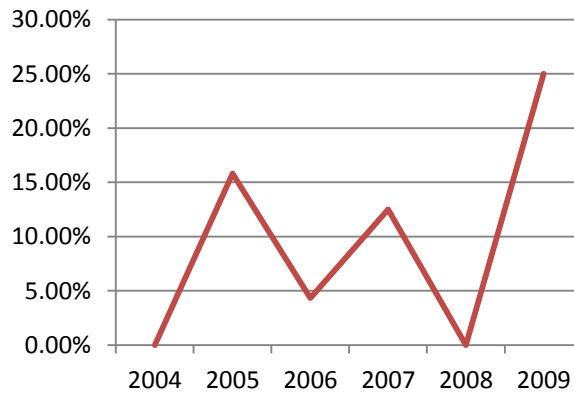


TABLE 13. CASES REVERSED

Cases Reversed	12
Reversal Rate	11.8%

FIGURE 18. CASES REVERSED PER YEAR (PERCENTAGE)



¶46 Two, albeit imperfect, statistics often used to evaluate jurisprudence quality are the ratios of appealed and overturned cases. Only 112 of the 1,273 cases sampled were appeals—only 102 appeals, excluding Puma’s cases. The resultant appeal rate of 46% is perhaps a little lower than the normal range of international standards, but may be the result of more straightforward, “black and white” cases in China. The rate of appeals has been increasing. Excluding 2004, the appeal rate is 50% with nearly 69% of 2009 cases appealed.

¶47 Perhaps this study’s most striking finding is that only nine decisions were reversed upon appeal—a mere 8%. Such a low rate of reversals matches findings from an earlier, limited survey in Guangdong.⁴⁰ Official U.S. statistics on the rate of trademark reversals do not exist, but commonly cited estimates of U.S. patent reversals range from 34 to 47.5%.⁴¹

¶48 Furthermore, while only nine decisions were reversed twenty-four cases were either mediated or settled upon appeal. The Chinese “cadre responsibility system” creates targets and goals for judges and courts in terms of the number of case that may be mediated, reversed, and closed.⁴² It seems likely that judges are purposefully pressuring litigants to mediate or settle appealed disputes. In this way, judges in intermediate and high courts protect the records of their lower-court brethren.

VI. PUMA’S EXCEPTIONALISM: A CLOSER LOOK

¶49 For consistency above, cases filed by Puma were excluded. It appears Puma is pursuing a unique litigation strategy against IPR infringers. Throughout 2004–2009, Puma filed 299 first instance cases in the Zhejiang courts—231 of these cases were filed in 2009. Not only did Puma file many more cases than any other company (the second most litigious company filed thirty-two total cases), but the distribution of case outcomes is significantly different than the aggregate results presented above. As illustrated in Figures 20 and 21, Puma settled 59% of cases, compared to a 28% average settlement rate for foreign companies. Puma’s percentage of mediated cases is one quarter that of other foreign companies’ mediated cases. Puma did not lose a single case.

⁴⁰ Nathan Snyder, *Intellectual Property Rights and China: A Survey of Adjudicated Trademark Dispute Cases from Guangdong Province*, 1 WASH. U. UNDERGRADUATE L. REV. 82, 82–107 (2010).

⁴¹ See generally Christian A. Chu, *Empirical Analysis of the Federal Circuit’s Claim Construction Trends*, 16 BERKELEY TECH. L.J. 1075 (2001). For further discussion on the reversal rate of patent cases, see generally, e.g., Gretchen Ann Bender, *Uncertainty and Unpredictability in Patent Litigation: The Time is Ripe for a Consistent Claim Construction Methodology*, 8 J. INTELL. PROP. L. 175 (2001); Kimberly A. Moore, *Are District Court Judges Equipped to Resolve Patent Cases?*, 15 HARV. J.L. & TECH. 1 (2001); Kimberly A. Moore, *Markman Eight Years Later: Is Claim Construction More Predictable?*, 9 LEWIS & CLARK L. REV. 231 (2005); Michael Saunders, *A Survey of Post-Phillips Claim Construction Cases*, 22 BERKELEY TECH. L.J. 215 (2007); Andrew T. Zidel, *Patent Claim Construction in the Trial Courts: A Study Showing the Need for Clear Guidance from the Federal Circuit*, 33 SETON HALL L. REV. 711 (2003).

⁴² For additional information on the cadre responsibility and its effect on law, see generally Carl F. Minzner, *Riots and Cover-Ups: Counterproductive Control of Local Agents in China*, 31 U. PA. J. INT’L L. 53 (2009); Carl F. Minzner, *Judicial Disciplinary Systems for Incorrectly Decided Cases: The Imperial Chinese Heritage Lives On*, 39 N.M. L. REV. 63 (2009).

FIGURE 19. PUMA FIRST INSTANCE CASES BY YEAR

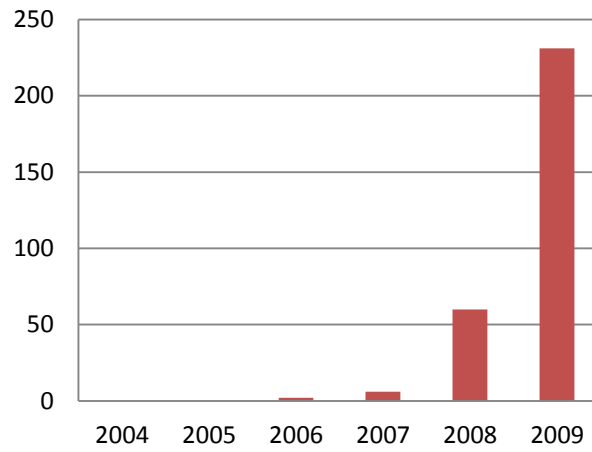


FIGURE 20. PUMA OUTCOMES

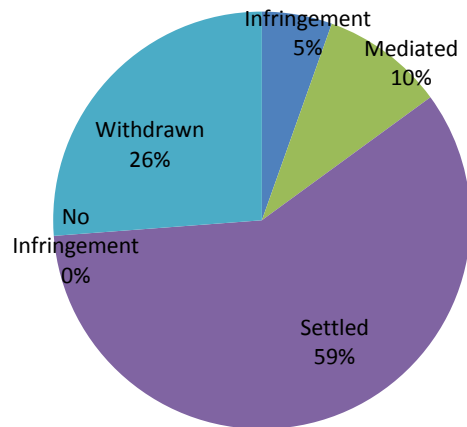


FIGURE 21. FOREIGN AGGREGATE OUTCOMES IN 2009 (EXCLUDING PUMA)

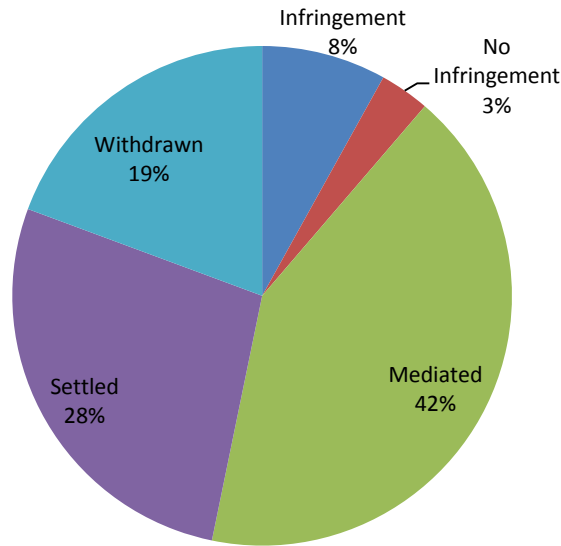


TABLE 14. PUMA COMPENSATION VERSUS FOREIGN AVERAGE (RMB)

	Puma Average	Foreign Average (2009)
All Cases	53,000	83,912
Won	64,167	64,000
Mediated	48,214	72,249

TABLE 15. PUMA INITIAL CASES VERSUS FOREIGN AVERAGE: FILED TO RESOLVED (IN DAYS)

	Puma Average	Foreign Average (2009)
Decided	195	200
Won	132	194
Mediated	104	126
Settled	72	39

150 Puma’s strategy appears to be two-fold: file a plethora of cases and settle quickly—on average in seventy-two days. Puma generally filed its cases simultaneously and en masse, suggesting Puma is filing multiple cases to pursue multiple claims against the same defendant. This type of “scorched-earth policy” sends a strong statement to potential infringers, while settling quickly for less compensation than the aggregate average reduces legal costs. According to the cases surveyed, the company generally relies on only three law firms in Zhejiang province.

VII. CONCLUSION

¶51 Should the case survey data from Zhejiang Province be representative of China's developed regions, it suggests that the jurisprudence trends in court enforcement of intellectual property rights are trending in the right direction.

¶52 The concept of intellectual property rights is not cultural. The Chinese have bought in to trademarks and trademark litigation. Chinese companies are responsible for the bulk of China's trademark applications and lawsuits. The widespread usage of the courts suggests business people believe the courts are relatively effective in resolving trademark disputes.

¶53 Meanwhile, foreign companies are not being treated significantly differently than domestic companies. Foreign companies are winning cases and receiving compensation at higher rates than domestic companies. Cases involving foreign plaintiffs ended in mediation more often than cases filed by domestic companies. This difference in case outcomes likely reflects foreign company preferences and enforcement strategies.

¶54 The location of any plaintiff or defendant does not appear to have an effect on case outcomes. All litigants seem to receive the same treatment in terms of case results. However, cases involving plaintiffs and defendants within Zhejiang province did receive different treatment in terms of mediated compensation. It is possible that this difference is the result of a greater willingness to negotiate "fairly" with insiders—that is companies within Zhejiang—compared to outsiders.

¶55 While cases are resolved quickly in the courts, jurisprudence is negatively affected by judges' incentives. The trend toward increased mediated and settled outcomes instead of adjudicated decisions may be the result of the government's push for a "harmonious society." But, it may also be the result of judges' incentives to keep their performance record clean: mediated and settled judgments cannot be appealed or overturned.

¶56 Potential litigants should carefully weigh the structure of China's courts before pursuing claims against infringers. Puma's scorched-earth strategy and willingness to settle should be considered by foreign companies. Such an approach may suit the goals of many companies in a relatively cost effective way: it sends a clear message to potential infringers and may fit into judges' preferences to settle disputes, although some judges do not look favorably upon efforts to flood their dockets.

¶57 In China's present context, there is no flawless IPR enforcement strategy, but the system is improving. In general, the courts exhibit a trend toward mediation at the expense of adjudication, decreasing levels of compensation, and more rapid case decisions. Foreign and domestic companies alike can effectively limit the impact of infringement by keeping counterfeiting operations small and local through trademark litigation.