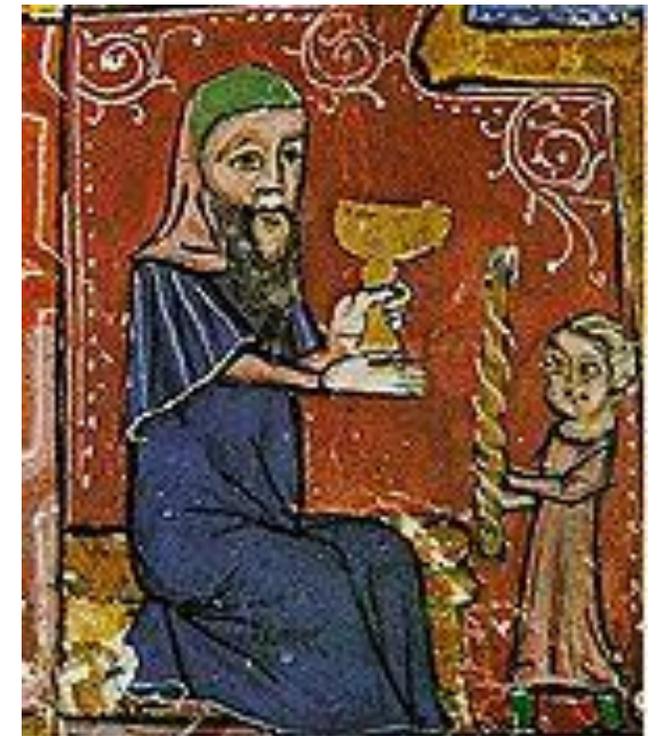


A Cup That Runneth Over: The Changing Environment for Cross-Border IP Litigation With China



你用油膏了我的頭，使我的
杯滿溢。(Psalm 23)

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Berkeley Law
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What is inside the cup that runneth over?

- Markets that don't necessarily follow politics
- Politics that intervene in dispute resolution
- Technology that continues to flow where there are gaps
- Lack of data-driven decision making
- Non-IP doctrines that constrain the ability to commercialize IP rights (eg, export controls, CFIUS)
- A cup that was full of old controversies, with many new ones.

Did we have it that good? Pre-trade war litigation data

- Max Goldberg: [*Enclave of Ingenuity: The Plan and Promise of the Beijing Intellectual Property Court*](#) (May 2017) (100% foreign win rate in Beijing IP Court, 94.25% of decided cases are published or reported) (2015)
 - See also Zhang and Cao: <https://www.cambridge.org/core/journals/china-quarterly/article/how-fair-is-patent-litigation-in-china-evidence-from-the-beijing-courts/903913756B46AA075F610C428834C6B5> (Sept 2019) (2004-2011)
- Renjun Bian: [*Many Things You Know About Patent Infringement in China are Wrong*](#). 2014 foreign invention patent win rates were higher compared to domestic litigants (84.35%/79.84%), as were injunction rates (92.78%/90.05%) and damages (201,620.45 RMB/66,217.93 RMB).
- Brian Love: [*Patent Litigation in China: Protecting Rights or the Local Economy?*](#). (2006-2011, CIELA data, smaller pool)

Brian Love's Data

Table 5: Case Outcomes by Litigant Type

		Defendant						
		<i>Foreign</i>		<i>Domestic Private</i>		<i>Domestic State-Owned</i>		
		Infringement Found	No Infringement	Infringement Found	No Infringement	Infringement Found	No Infringement	
Plaintiff	<i>Foreign</i>	Infringement Found	80% (4)	-	70% (31)	-	-	-
		No Infringement	-	20% (1)	-	31% (13)	-	-
	<i>Domestic Private</i>	Infringement Found	67% (16)	-	57% (224)	-	27% (3)	-
		No Infringement	-	33% (8)	-	43% (168)	-	73% (11)
	<i>Domestic State-Owned</i>	Infringement Found	-	-	100% (1)	-	-	-
		No Infringement	-	-	-	-	-	-
	<i>HMT</i>	Infringement Found	-	-	100% (5)	-	-	-
		No Infringement	-	-	-	-	-	-

Sachs and Kappos Database

- From 8/1/2014-9/27/2017: 17,743 patent applications abandoned or rejected in the US due to final '101 objections.
- Of these, 17,743 patent applications, 1,694 patent applications claiming the same or similar inventions were granted by the EPO, in China, or both.
- Relied upon in Madigan & Mossoff, *Turning Gold Into Lead, How Patent Eligibility Doctrine is Undermining US Leadership in Innovation* (2017).

2017 Proposal of State Council on Pharma IP

- Proposal 15: Establish a catalog of approved pharmaceutical products – similar to the US Orange Book in the pharmaceutical industry -- and include information about patent protection and regulatory data protection for new drugs.
- Proposal 16: Explore establishing a “patent linkage” system requiring market approval to await court decisions on patent disputes, simile to the US Hatch Waxman regime.
- Proposal 17: Establish a pilot program for patent term extension/restoration to compensate for patent life lost to regulatory delays/clinical trials that shorten the effective patent term
- Proposal 18: Enhance and implement regulatory data protection, including biologics.

Contrariwise

- de Rassenfosse, Gaétan and Raiteri, Emilio, Technology Protectionism and the Patent System: Strategic Technologies in China (July 1, 2016). Available at SSRN: <https://ssrn.com/abstract=2803379> or <http://dx.doi.org/10.2139/ssrn.2803379>
- Discrimination against foreign applications in technology areas of concern to industrial policy/standards essential patents.
- Discriminatory or a change in practice and policy – Huawei v. Interdigital (2013)/IWNComm v Sony (2017/2018)

Arrival of Trump Administration

- “Stakeholders also raised concerns over inadequate IP enforcement mechanisms available in China. Although some stakeholders submit that the legal framework has improved, many reported substantial obstacles to civil enforcement and ineffective and inconsistent criminal and administrative enforcement by the government of China. Stakeholders further stated that enforcement problems are exacerbated by insufficient governmental coordination, insufficient political will by Chinese officials, and inadequate resources and capacity to address IP problems.” (Section 301 Report, March 22, 2018, footnotes omitted)

US IP Case Publishing of All Types – Jan 2014-June 2019 (purple is patents)

筛选条件:

国籍: 美国 ×

裁判日期 >= 2014-01 ×

裁判日期 <= 2019-06 ×

案例时间

案例地区

案例类型

行政案由

裁判结果

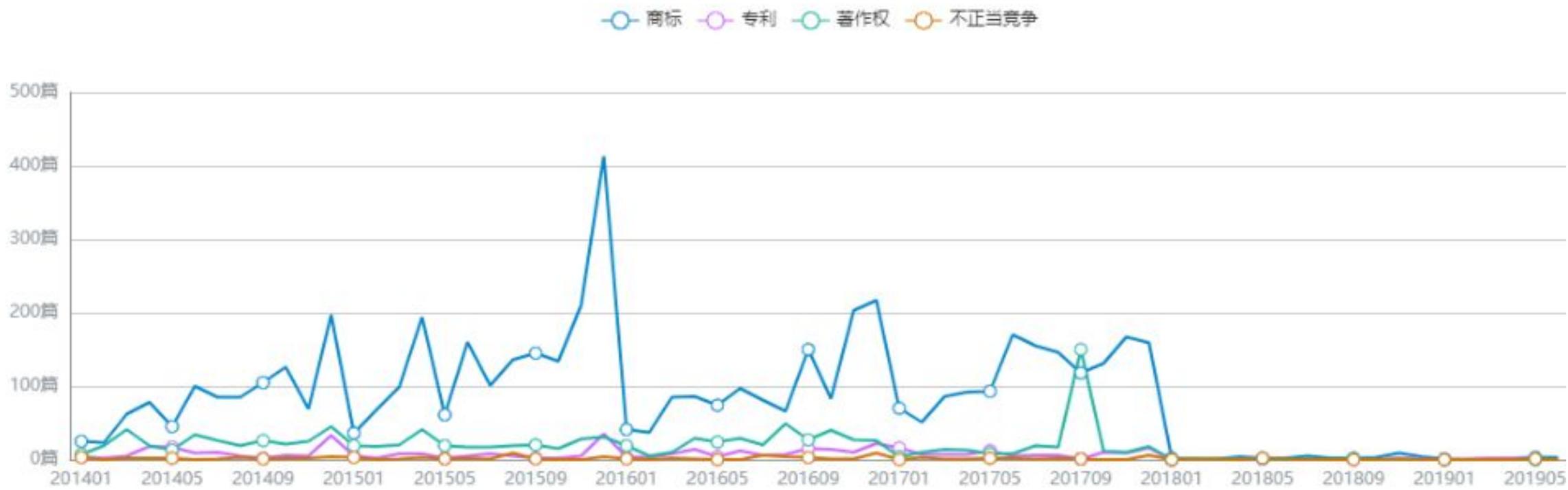
裁判金额

诉讼时长

涉外情况

角色分析

案件时间分布



Overall the Published Chinese Docket has Continued to Grow for China During 2014 - /6/2019 Period

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裁判日期 >= 2014-01

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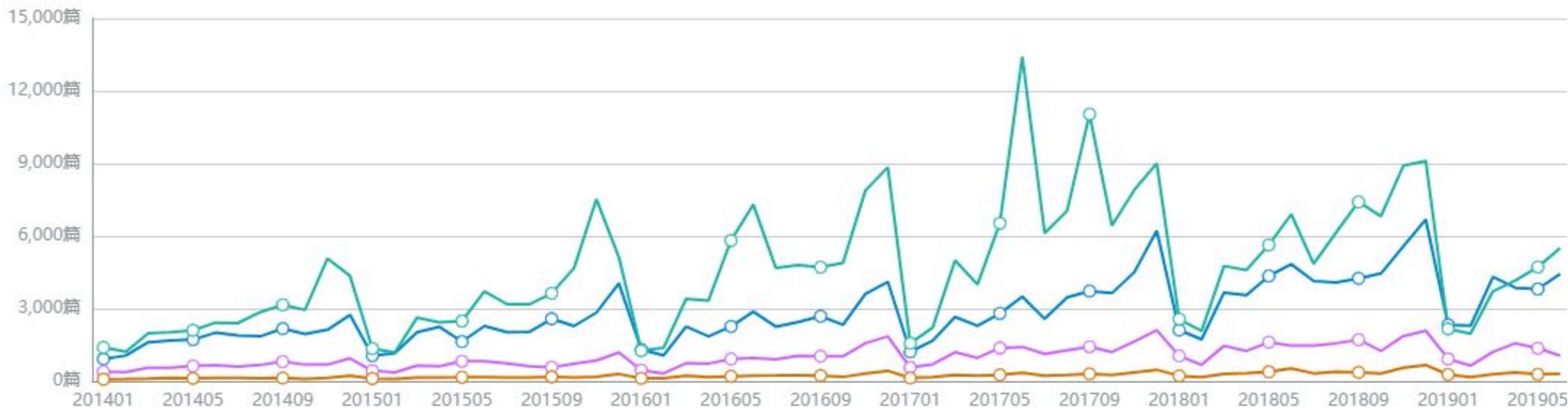
诉讼时长

涉外情况

角色分析

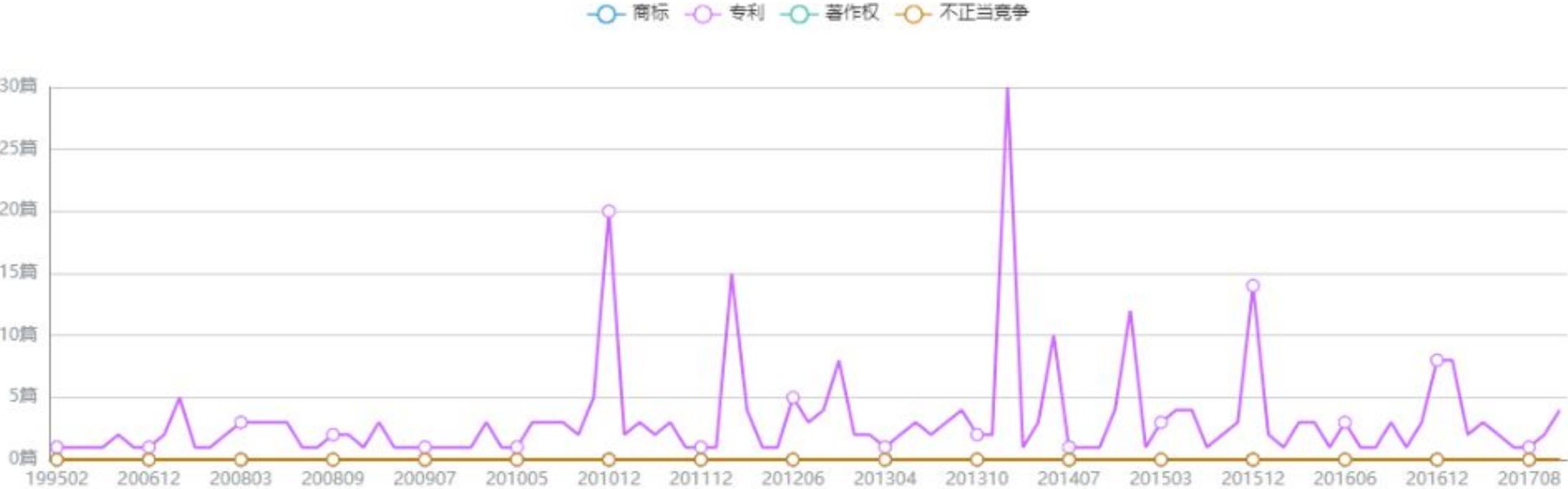
案件时间分布

—○— 商标 —○— 专利 —○— 著作权 —○— 不正当竞争

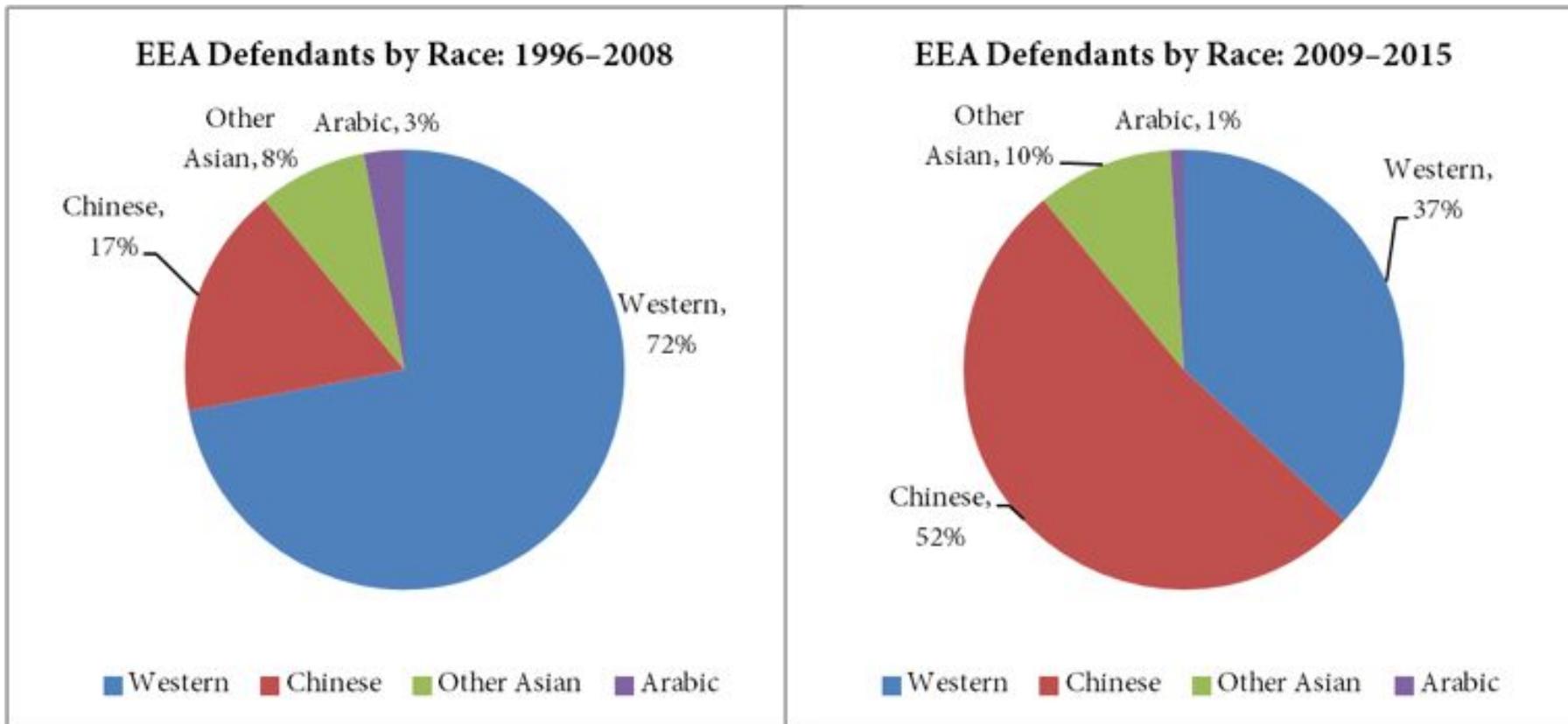


Timeline of Publishing US Cases Involving Semiconductors (芯片)

案件时间分布



US Economic Espionage Act Cases



T-Mobile v. Huawei

Trade Secret Misappropriation:

QUESTION NO. 1: Do you find by a preponderance of the evidence that T-Mobile has proven its misappropriation of trade secrets claim against Huawei Device USA?

YES NO

If you answered "Yes" to Question No. 1, then you must answer Question Nos. 2-3. If you answered "No" to Question No. 1, then you must skip Question Nos. 2-3 and continue on with Question No. 5.

QUESTION NO. 2:

(a) What do you find is the amount of actual damages, if any, that T-Mobile incurred as a result of trade secret misappropriation?

\$ _____

(b) What do you find is the amount of unjust enrichment damages, if any, that T-Mobile incurred as a result of trade secret misappropriation?

\$ _____

Stalled Momentum on Pharmaceutical Regulatory Reform

- Many generics being approved during the remain years of a blockbuster drug -
- Azilsartan, a product originally developed by Takeda that addresses hypertension, and is now produced by Zhaoke Pharma, a wholly-owned subsidiary of Lees Pharma.
- Azilsartan and Esketamine (a Janssen product for treatment-resistant depression) are also now being produced by Jiangsu Hengrui Medicine and others.
- Pomalidomide, a Celgene-developed product for treating multiple myeloma, is produced by Chiatai Tianqing Pharma.
- Bendamustine, a Teva product for chronic lymphocytic leukemia, is being produced by Nanjing Simcere Pharma. These products have obtained approval priority from CFDA and are expected to be approved by the time the new DAL comes into effect.

Other Concerns

- Detentions of foreigners
 - Meng Wanzhou
 - Kovrig/Spavor
- Passport seizures/refusal to permit foreigners to leave China (Exit restrictions in the context of Chinese civil litigation ([Jasper Habicht](#), Sept. 2019, Asia Pacific Law Journal).
- Entity List/Export Licenses (Huawei/ZTE/AI)
- Chinese Unreliable Parties List
- Rubio/Cornyn “PALS” (Prevent Abuse of the Legal System) Act
- Emergence of “Overseas Practicing Entities”

Positive Developments

- China amended its:
 - Technology Import/Export Regulations (TIER)
 - Foreign Investment Law
 - Trademark Law
 - Trade Secret Law...
- US suspended its WTO case on the TIER/FTT (2019)

A Turning Point – Licensing Data

Percentage of US licensing receipts from the unaffiliated entities	Mainland China	Taiwan
2006	37.3%	80.0%
2007	33.7%	67.7%
2008	36.5%	70.8%
2009	34.1%	89.6%
2010	37.5%	94.2%
2011	36.0%	95.3%
2012	41.6%	95.3%
2013	42.6%	93.6%
2014	42.1%	92.7%
2015	41.4%	93.0%
2016	57.1%	91.9%
2017	61.6%	87.0%