



## Software Copyright Litigation in China:

### *How Have Foreign Companies Fared in Chinese Courts?*

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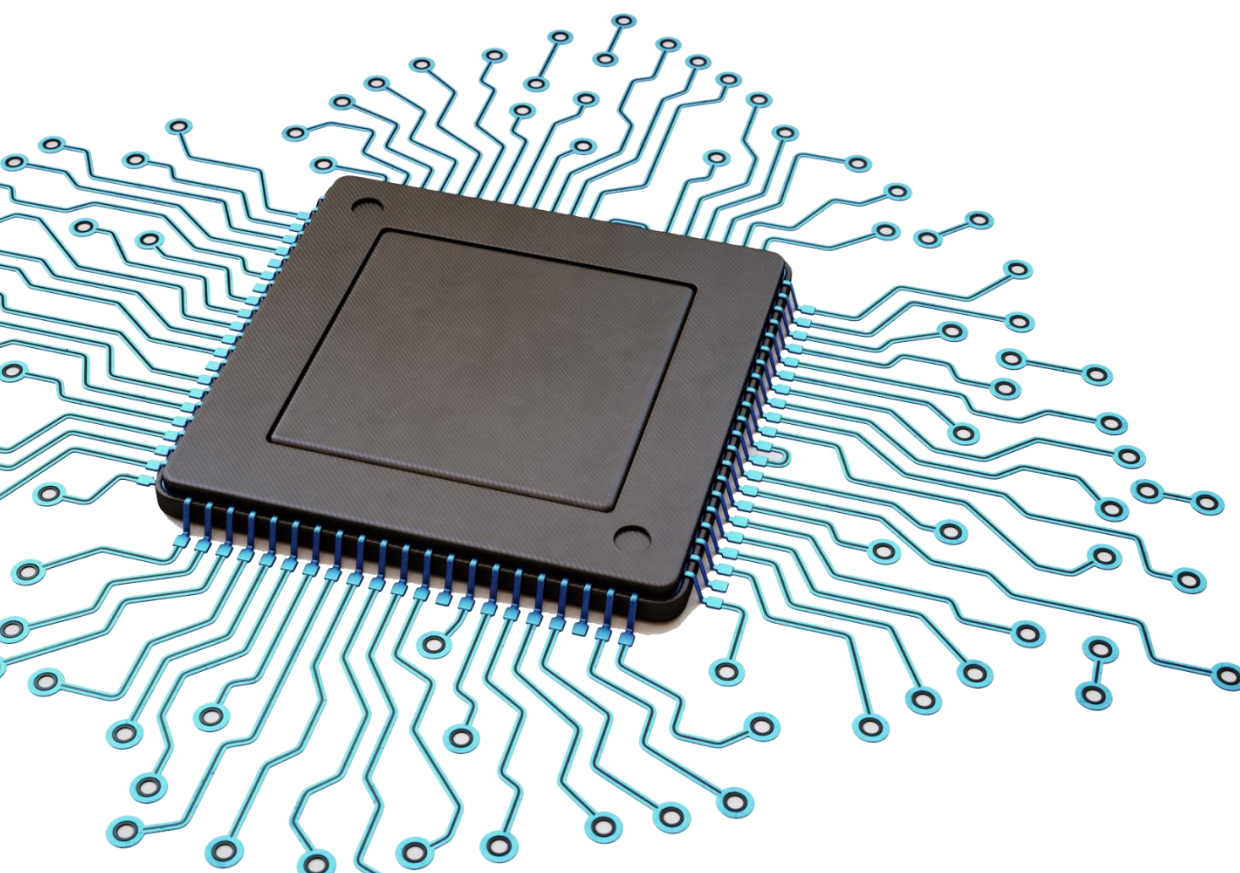
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## INTRODUCTION & KEY TAKEAWAYS

This report looks at software copyright litigation by foreign software licensors in the Chinese courts. Specifically, it focuses on civil claims against end-users of unlicensed enterprise software products such as that used in industrial design, engineering and automation. It is intended as a guideline for software licensors' legal and license compliance teams to inform their litigation strategies in China.

The report comprises two sections: [Section 1](#) is a statistical summary, while [Section 2](#) looks at some highlight cases and provides commentary. Our report is based on records in the CIELA intellectual property (IP) litigation database. CIELA is a database of IP cases published by China's civil courts between 2006 to 2019, which now totals over 50,000 records. CIELA, which is owned and operated by Rouse, provides free, searchable statistics on [www.ciela.cn](http://www.ciela.cn), as well as customized research for in-house counsel and licensing executives. Details of CIELA's data collection, methodology and terminology is contained in the Appendix. For more information on CIELA's research services, contact [ciela@rouse.com](mailto:ciela@rouse.com).

This report analyses all published cases in CIELA involving foreign software copyright owners between the years of 2010 and 2019. This time period allows for a relatively long perspective to observe trends, yet is recent enough to be representative of what an IP owner may expect from China's courts today.

Some key findings of the report:

### **The number of foreign software companies litigating in China is small.**

Out of 1,303 first instance cases in CIELA during this period, cases brought by foreign plaintiffs at first instance number 285. By comparison, for patent litigation there are 13,923 total first instance cases in the same period, of which 612 cases are brought by foreign patent owners. This indicates that software publishers appear to be filing significantly fewer cases.

This may reflect the smaller number of global enterprise software licensors who may count China as a key market. It may also reflect the fact that enterprise software licensors often have in-house compliance programs to pursue un-licensed or under-licensed users and convert them to customers. Thus negotiation, and not litigation, is the preferred strategy.

Nevertheless, anecdotal accounts from software compliance professionals indicate that China is a jurisdiction where many have been hesitant to litigate, and the relatively small list of foreign companies that appear in our dataset bears this out. Given that software piracy rates in China, according to the BSA's latest survey<sup>1</sup>, remain at 66%, this suggests that software licensors who do not make use of all available enforcement tools are missing out on significant revenues. As our report shows, most of those that have brought cases to the Chinese courts have enjoyed marked success.



<sup>1</sup> Business Software Alliance, 2018 BSA Global Software Survey, at [https://gss.bsa.org/wp-content/uploads/2018/05/2018\\_BSA\\_GSS\\_Report\\_en.pdf](https://gss.bsa.org/wp-content/uploads/2018/05/2018_BSA_GSS_Report_en.pdf)



### **Win Rates are high, but the most prolific filers have had poorer results.**

The win rate for foreign plaintiffs is 85.3%. While this is high, it is in fact lower than the win rate for domestic software plaintiffs. Our analysis shows that this average is brought down by two of the most prolific plaintiffs in our dataset, who filed “bulk lawsuits” and received a markedly lower win rate. Several other plaintiffs filed far fewer cases but enjoyed 100% success rates.

### **Compensation awarded by the courts is high compared with other types of IP case.**

Mean compensation awards in our dataset are CNY 501,195 (approx. USD 71,600). Again, comparing with patent cases, where the figures are CNY 205,176 (approx. USD 29,300), foreign software plaintiffs enjoy significantly higher awards, and comparison with domestic software plaintiffs the difference is stark – domestic plaintiffs received only CNY 39,111 (approx. USD 5,600) mean compensation.

The averages are driven up by some very large individual awards which rank amongst the highest in the whole CIELA database – the highest award was CNY 20,000,000 (approx. USD 2.9M at current exchange rates), and all the top 5 awards were all over CNY 7,000,000 (USD 1M). In the context of China’s generally low compensation awards, and given the relatively few software cases, these results are impressive.

### **Cases proceed quickly, which is typical for Chinese civil procedure.**

The average duration of proceedings at first instance for the foreign plaintiffs in our dataset was 9.1 months. This is consistent with all foreign-related cases in the CIELA data as a whole, and demonstrates how quickly cases move through the civil process once commenced. For software license compliance managers who are hoping for litigation to quickly result in a monetary award or settlement, this is a positive feature of the Chinese court system.

### **Evidence of the scale of infringement is of primary importance.**

Given that end-user piracy is an activity that happens behind closed doors, obtaining evidence of infringement is the primary factor in success or failure of a case. In Section 2, our deep-dive analysis of cases shows that the most decisive outcomes went to plaintiffs who obtained

Evidence Preservation Orders (i.e., ex-parte search orders) from the Court.

Given that such orders require time and cost to prepare, our report also questions whether in future, courts in China will be more willing to accept reports from usage tracking anti-piracy technologies, such as from Cylynt or Revulytics, as the primary evidence of infringement. New Evidence Rules issued by the Supreme People's Court which took effect on 1 May 2020 ("2020 Evidence Rules") have given the courts greater power to admit electronic evidence and make adverse inferences meaning that courts may in the future be willing to rely on such evidence.

### **New Copyright Law amendments should be a boon to plaintiffs.**

At the same time as the publication of this report, China has published long-overdue draft amendments to the Copyright Law for public consultation. These amendments will provide considerable support for plaintiffs, mainly in the following three areas:

- A tenfold increase of statutory compensation from CNY 500,000 to CNY 5,000,000 (approx. USD 714,000), to bring the Law into line with other IP laws;
- Possibility for up to five times punitive damages for willful infringement;
- Shifting of the burden onto the defendant regarding evidence of damages.

Based on the normal legislative timetable, the amendments may be passed within 2020.

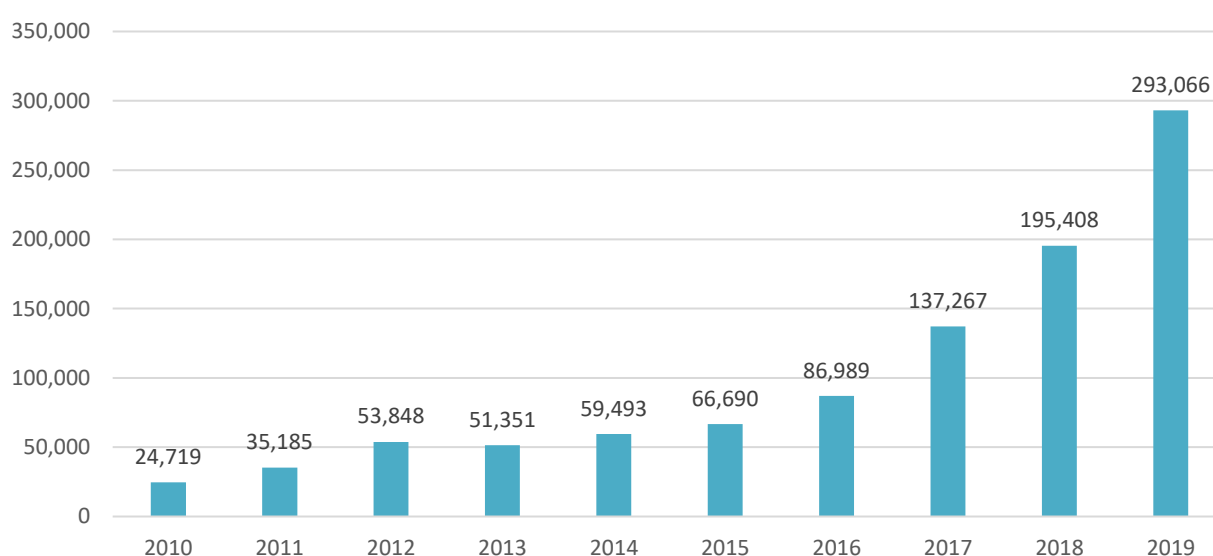


## SECTION 1 – STATISTICAL OVERVIEW

This section provides a statistical overview of the software copyright cases in the CIELA database, focusing on those brought by foreign plaintiffs.

In the past 10 years, the number of copyright cases in China of all types has increased sharply, from 24,719 cases in 2010 to 293,066 cases in 2019<sup>2</sup>. Copyright cases are the largest proportion of all types of IP cases heard by the China’s civil courts, as shown in Table 1 below.

*Table 1: Civil copyright cases in China, 1st instance (2010-2019).*



The national-level Supreme People’s Court annual statistics do not break out software copyright cases by reference to particular types of work. However, CIELA data shows that the vast majority of copyright cases do not involve software. Many of the cases are small-scale suits filed in bulk to assert rights in fonts, image libraries, music and literary works.

The number of published copyright cases involving software infringement are a small number of the total – in the CIELA database, there are only 1,303 first instance and 359 second instance civil cases between 2010 and 2019. Out of this total, foreign-related cases (meaning where the foreign party litigant is domiciled outside of China) number 285 at first instance and 125 at second instance. In all of these cases in our records the foreign party is the plaintiff litigating against a domestic defendant. All the software cases in this report involve piracy, either by an end-user or, in a few cases, by a party that reproduces software for sale to others. This sub-set of 410 foreign-related first and second instance software copyright cases is the focus of this report.

<sup>2</sup> CNIPA, Intellectual Property Protection in China

## Win Rates

How did foreign software plaintiffs fare, according to our report? The overall win rate for plaintiffs in the foreign-related cases at first instance is 85.3%, or 239 out of 285 cases where the plaintiff prevailed in one or more of its claims (for definition of “Win Rate”, see Appendix 1 – About CIELA).

This number is encouraging for putative foreign litigants, although not exceptional compared to how foreign plaintiffs fare in other types of case – for example, the win rate for foreign plaintiffs in patent infringement cases at first instance in the same time period was 87%.

As CIELA is a private data collection, this statistic demonstrates convincingly that China’s courts are not biased against foreign parties. However, whereas CIELA shows that win rates for foreign plaintiffs are generally slightly higher than for domestic plaintiffs across most types of IP dispute, in software cases, domestic plaintiff win rates, at 93.2% are actually higher than for foreign plaintiffs, as illustrated in Table 2 below.

*Table 2: Comparison of win rates for all software copyright cases, and comparison of domestic vs foreign plaintiffs (1<sup>st</sup> Instance, 2010-2019, N= 1,303)*



The average win rate for foreign plaintiffs is dragged down by the most prolific litigator, Rhino Software Inc, which appears to have filed cases in bulk (discussed in more detail below). Rhino has a markedly lower win rate than other foreign plaintiffs, several of whom have filed only a handful of cases but have enjoyed 100% win rates. A ranking of all the foreign plaintiffs in our dataset who have filed more than one litigation is found below in Table 3.

*Table 3: Comparison of win rates for selected foreign software copyright plaintiffs (1<sup>st</sup> instance, 2010-2019, N= 271)*

Company Name	Cases	Wins	Win rate
Rhino Software Company	113	83	73.5%
Alt-N Technologies	67	58	86.6%
Microsoft Corporation	63	63	100.0%

Company Name	Cases	Wins	Win rate
Siemens Product Lifecycle Management Software Inc	12	12	100.0%
Autodesk, Inc	10	10	100.0%
Dassault Systèmes	6	6	100.0%

## Appeals

The above win rate data is for first instance cases. It is important also to look at second instance cases, i.e., appeals. Unlike the US and most other common law systems, in China's civil code, the right to appeal is automatic and an appeal stays enforcement of the first instance judgment. The data show that for foreign-related cases, appeals were more common than for domestic cases - of 285 first instance cases, a total of 125 went to second-instance, or 44% of cases, compared with 35% of cases involving domestic parties. Appeals are most often brought by the losing side looking to either overturn the decision on infringement or the amount of compensation. Given that foreign software copyright plaintiffs were awarded significant compensation (see further below), this is the most likely reason for appeals.

Nevertheless, appellants were generally unsuccessful – of the 359 foreign and domestic second instance cases in our dataset, for the 312 plaintiffs who won at first instance, only 12 (4%) saw the lower court decision overturned, while a further 16 cases (5%) were upheld but the compensation lowered. On the reverse side, out of 47 cases where the plaintiff lost at first instance, 8 cases (17%) were reversed on appeal. This illustrates that the high win rates for software copyright plaintiffs at first instance are carried through in the second instance. A summary is shown in Table 4 below.

*Table 4: Summary of appeal outcomes for domestic and foreign-related software copyright cases (2<sup>nd</sup> Instance Cases, 2010-2019, N=359)*

Outcome at 1st Instance	Case No.	Outcome at 2 <sup>nd</sup> Instance (Compensation Award)	Case No.
Plaintiff Won	312	1 <sup>st</sup> Instance Upheld	283
		1 <sup>st</sup> Instance Award Increased	1
		1 <sup>st</sup> Instance Award Decreased	16
		1 <sup>st</sup> Instance Overturned	12
Plaintiff Lost	47	1 <sup>st</sup> Instance Upheld	39
		1 <sup>st</sup> Instance Overturned	8

## Types of Defendant

It is sometimes assumed by foreign IP owners that state-owned enterprises (SOEs) in China are protected by the courts, and that foreign companies could not prevail in a lawsuit against an SOE. The data in CIELA in general does not support this assumption, finding that statistically, SOEs as defendants do not appear to enjoy better treatment in the courts. While the sample size of cases brought against SOEs is small, the findings appear to confirm that the nature of the defendants has little impact on the results of the case. The win rate by foreign plaintiffs against different types of defendant at first instance are:

- SOE - 85.7% (14 cases)
- Foreign-invested enterprise (FIE) or Sino-Foreign joint venture (JV) - 87.2% (39 cases)
- All other defendants (non-SOE and non-FIE, domestic Chinese entities) - 84.9% (218 cases).

It is also worth noting that China's central government has actively pursued a campaign for government departments and enterprises to use authorized software, and SOEs in particular are expected to adhere to government policies. Thus, an SOE may be particularly keen to avoid being the subject of a piracy lawsuit. On the other hand, SOEs may be amongst the largest potential customers for enterprise software publishers, and therefore license compliance issues are more likely to be approached through negotiation than through a lawsuit. This may explain the relatively small number of cases against SOEs in our database.

## Compensation Awarded

For successful plaintiffs, how much compensation was awarded? The CIELA database records both compensation requested and compensation actually awarded (for definition of "Compensation Awarded", see Appendix 1 – About CIELA). In the 285 foreign-related software cases at first instance, the mean compensation was CNY 1,182,423 claimed and CNY 501,195 (approx. USD 69,600) awarded, or 42% of the claimed amount. However, the median of CNY 75,000 (approx. USD 10,600) illuminates how the mean has been raised by some very large awards to a few plaintiffs. The gap in compensation rates between foreign and domestic plaintiffs is stark, as shown in Table 5 below.

*Table 5: Comparison of mean and median compensation for foreign and domestic plaintiffs in software copyright cases (1<sup>st</sup> instance, 2010-2019, N=285)*

Plaintiff Domicile	Compensation Claimed (CNY)	Mean Compensation Awarded (CNY)	Median Compensation Awarded (CNY)	Percentage Claim / Award
Foreign	1,182,423	501,195	75,000	42%
Domestic	141,207	39,111	5,000	28%

As a point of comparison, these figures are significantly higher than the mean and median compensation awards for foreign plaintiffs in patent cases, as shown in Table 6 below.



*Table 6: Comparison of mean and median compensation for foreign and domestic plaintiffs in patent infringement cases (1<sup>st</sup> instance, 2010-2019, N=13,923)*

Plaintiff Domicile	Compensation Claimed (CNY)	Mean Compensation Awarded (CNY)	Median Compensation Awarded (CNY)	Percentage Claim / Award
Foreign	738,004	205,176	100,000	28%
Domestic	232,216	66,643	30,000	29%

### Interim Orders and Injunctions

Courts in China may grant interim orders such as Asset Preservation Orders (i.e., an asset freezing order) to prevent defendants from moving cash or other assets up to a certain amount, or Evidence Preservation Orders (i.e., a search order) for the court to search for and seize evidence relevant to the case. Evidence Preservation Orders are particularly useful in end-user piracy cases where the infringing behaviour takes place behind the closed doors of a company and other methods of evidence collection are challenging. The value of Evidence Preservation Orders is particularly clear for cases involving a larger value of infringement: In the top 30 cases with the largest compensation amounts in our dataset, 17 of the plaintiffs had been granted an Evidence Preservation Order. These tactics are discussed further in Section 2 below.

Interim injunctions are rarely granted in China and would be unlikely to be granted in the case of end-user piracy, where the defendant is actually using the software for its operations, and where monetary compensation should provide adequate remedy. Final injunctions, however, are routinely granted by China's courts. The dataset of software cases finds that of the companies that requested final injunction, it was granted 98.6% of the time.

### Duration of Cases

Civil lawsuits in China proceed relatively rapidly compared with many common law jurisdictions, and the duration of software cases is consistent with the average of all CIELA IP infringement cases over the same period (for definition of "Duration", see Appendix 1 – About CIELA). The average duration of domestic cases was 5.6 months from filing, with foreign-related cases taking an average of 9.1 months from filing (see Table 7 below). It is normal for foreign-related cases to have a longer duration as there are no statutory deadlines for courts to conclude a foreign-related case, unlike cases between domestic parties, so there is nothing unusual in the discrepancy of duration between foreign and domestic cases.

A feature of the Chinese civil system is that if a case is appealed (which, as referred to above, is an automatic right of the parties) the effect of the lower court decision is stayed pending appeal. Given that nearly half of all cases are appealed, it is important to look at appeal duration as well, as no decision comes into effect until the appeal is concluded. Fortunately, as Table 7 below shows, appeals are also not a lengthy process, taking only slightly longer for foreign-related cases: 5.3 months, compared to 4.2 months for domestic parties.

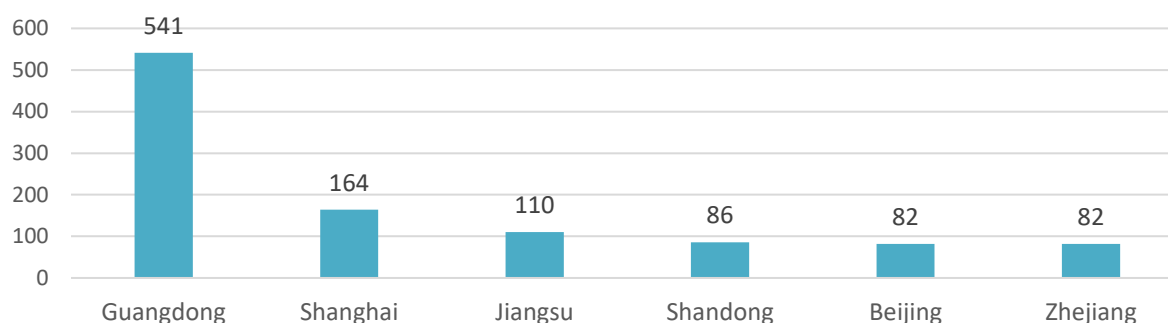
*Table 7: Mean duration of proceedings at 1<sup>st</sup> and 2<sup>nd</sup> instance for foreign and domestic plaintiffs in software copyright cases (1<sup>st</sup> & 2<sup>nd</sup> instance, 2010-2019 N=1,303 & 359)*

1st Instance Mean Duration (months)		2nd Instance Mean Duration (months)	
Domestic Plaintiff	9.1	Domestic Plaintiff	5.3
Foreign Plaintiff	5.6	Foreign Plaintiff	4.2

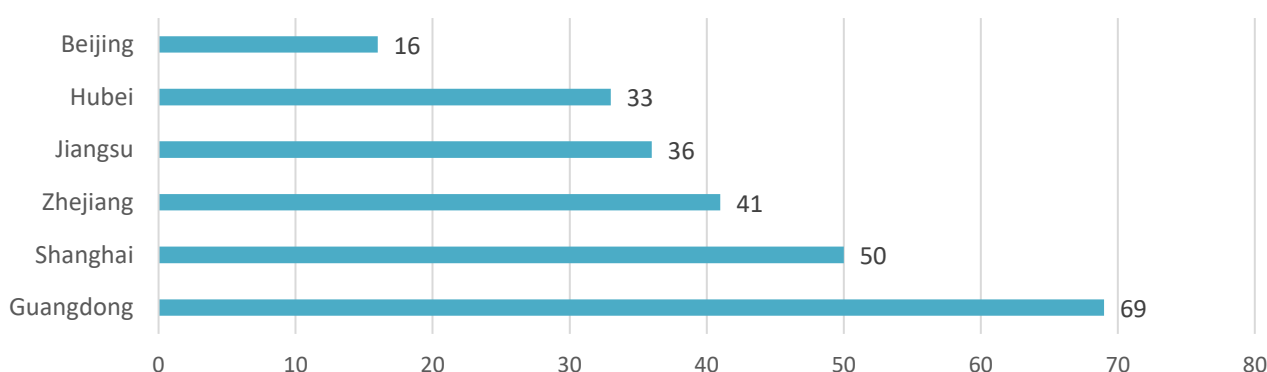
### Geographical Distribution of Software Cases

In which locations have the most software cases been filed? Our data (see Table 8 below) shows that for the total dataset of 1,303 software cases, and the 285 foreign-related cases, Guangdong Province has by far the biggest concentration: Guangdong Province has 41.5% of the total of all software cases, and 24.2% of foreign-related cases. For foreign-related cases, other cities in the top 5 are Shanghai, Zhejiang, Jiangsu and Hubei. Beijing, which typically has the largest caseload of IP infringement cases, has relatively few foreign-related cases – only 16 in our time period.

*Table 8: Top 6 venues for all software copyright infringement cases (1<sup>st</sup> instance, 2010-2019, N=1,303)*



*Table 9: Top 6 venues for foreign-related software copyright infringement cases (1<sup>st</sup> instance, 2010-2019, N=285)*



It should be noted that while China’s litigation system provides considerable scope for forum-shopping by allowing for suits to be filed where sales of infringing items occurs or the impact of infringement is felt, in cases of end-user piracy, choices are more limited because effectively a plaintiff is limited to suing where the infringing act is occurring. Unless the defendant has more than one location where piracy is taking place, action will need to be taken in the defendant’s home jurisdiction. Therefore, it is more likely that the distribution of software cases here represents the location where defendants are actually based, rather than forum-shopping preferences of the plaintiffs.

### Most Prolific Plaintiffs

Which companies have filed the most cases? In our dataset of 285 foreign plaintiffs filing cases between 2010 and 2019, the rankings are shown in Table 10 below:

*Table 10: Ranking and number of cases, foreign software copyright plaintiffs (1<sup>st</sup> instance, 2010-2019, N=285)*

Plaintiffs	Number of Cases
<b>Rhino Software, Inc.</b>	113
<b>Alt-N Technologies, Ltd</b>	67
<b>Microsoft Corporation</b>	63
<b>Siemens Product Lifecycle Management Software Inc</b>	10
<b>Autodesk, Inc.</b>	10
<b>Dassault Systèmes</b>	6
<b>Adobe Systems Incorporated</b>	4
<b>Brother Industries, Ltd.</b>	3

This group of 8 foreign companies accounts for 276 out of the total of 285 foreign plaintiffs in our dataset, and there are just 9 other companies that filed one case each. Of the 285 cases in total filed at first instance, 243 of them, or 85%, were brought by just 3 companies, of which Rhino Software has the clear lead, comprising 40% of all cases. Rhino Software and Alt-N Technologies have taken a “bulk lawsuit” approach – that is, multiple lawsuits in the same court on the same day against different defendants. As noted above, the “bulk lawsuit” approach has been accompanied by a lower win rate. Meanwhile, the companies that achieved the highest awards also had the highest win rates, but filed relatively few cases.

Looking at appeals, since second instance cases are obviously derived from first instance, it is not surprising that the number of second instance cases closely follows the activity at first instance (noting that some of cases listed here are appeals of first instance cases that may have concluded outside of the date range of this dataset). Rhino Software again comprises over 40% of the total of cases at second instance, as shown in Table 11 below.

Table 11: Number of appeal cases of foreign-related software copyright (2nd instance, 2010-2019. N=121)

Plaintiffs	Number of Cases
Rhino Software, Inc.	53
Alt-NTechnologies,Ltd.	32
Microsoft Corporation	20
Siemens Product Lifecycle Management Software Inc	4
Dassault Systèmes	4
Altium Limited	3
Brother Industries Ltd	3
Adobe Systems Incorporated	2

### Highest Compensation Awards

The high average compensation achieved by foreign plaintiffs is skewed by some very high awards given in a few cases – over 50% of the total compensation awards in our dataset of 285 cases at first instance is attributed to the top 10 largest awards, as shown in the table below. Particularly outstanding in this list is Dassault Systèmes, which has obtained outsized awards in 4 out of the 6 cases at first instance.

Table 12: Top 10 highest awards for foreign software copyright plaintiffs (1st instance, 2010-2019, N=285)

Rank	Case Reference	Plaintiff	Defendant	Venue (Province)	Compensation (CNY)
1	(2017) Jing 73 Min Chu No. 396	Dassault Systèmes	Jane Style International Automotive Design (Beijing) Co., Ltd.	Hubei	20,000,000
2	(2017) Hu 73 Min Chu No. 208	Dassault Systèmes	Shanghai Tongjie Technology Co., Ltd	Shanghai	15,050,000
3	(2009) Hu Yi Zhong Min Wu (Zhi) Chu Zi No. 146	Norton Life Lock	Ma & Yu	Shanghai	9,900,000
4	(2018) Hu 73 Min Chu No. 81	Dassault Systèmes	Shanghai Zhidou Electric Vehicle Technology Co., Ltd	Shanghai	9,000,000
5	(2017) E 01 Min Chu No. 3999	Siemens Product Lifecycle Management Software Inc	Wuhan Dejiao Baier Surgical Implant Co., Ltd	Hubei	7,095,000

6	(2013) E Wuhan Zhong Zhi Chu Zi No. 01421	Microsoft Corporation	Wuhan Yinjia Information Technology Co., Ltd	Hubei	5,800,000
7	(2014) Pu Min San (Zhi) Chu Zi No. 114	Microsoft Corporation	Shanghai Boke Information Co., Ltd	Shanghai	3,300,000
8	(2015) Yue Zhi Fa Zhu Min Chu Zi No. 4	Dassault Systèmes	Zhongshan Xinhai Precision Manufacturing Technology Co., Ltd	Guangdong	2,470,000
9	(2016) Su 01 Min Chu No. 2012	Microsoft Corporation	Nanjing Leirui Network Technology Co., Ltd	Jiangsu	2,000,000
10	(2012) Sui Nan FA Zhi Min Chu Zi No. 56	Microsoft Corporation	Guangzhou Jinxing Textile Bleaching and Dyeing Co., Ltd	Guangdong	1,546,310

Excluding this top 10 high awards from the total brings the average down to CNY 242,470 (approx. USD 34,600). As the median figure in Table 5 above suggests, the “bulk litigation” cases brought by Rhino Software and AltN Technologies resulted in much smaller awards.

The figures here illustrate how one group of foreign plaintiffs who have pursued a strategy of large numbers of lawsuits and gained a small average recovery, and another group, exemplified by Dassault Systèmes, who have been much more selective but who have achieved exceptional results in the cases they have brought.



## SECTION 2 – HIGHLIGHTING KEY ISSUES

This section leads on from the statistical summaries in Section 1 and conducts a review of some of these foreign-related cases to highlight some key issues that arise in software copyright cases.

In common with all other copyright cases, the plaintiff in a software piracy case needs to establish the following:

1. Its ownership of works protected by copyright;
2. Proving that the defendant infringed the protected work;
3. Determining of the amount of compensation using the methods provided under the law.

Review and commentary on each of these points follows below.

### Ownership of Copyright

A review of decisions shows that there has been no difficulty for the plaintiffs in satisfying this test. Legislation in China provides for a wide range of methods for proving copyright ownership<sup>3</sup> and foreign copyright registration certificates, such as are issued in the USA, are accepted. China also has its own voluntary copyright recordal system, including for software works, and this recordal is commonly used by foreign software owners in China as it provides a convenient means to prove ownership.

### Evidence of Infringement

One of the most difficult issues for cases involving end-user piracy is to procure evidence of the unlicensed use, as this occurs entirely within the walls of the infringing company. Indeed, nearly all the cases in our dataset where the foreign plaintiff did not win the case were due to deficiencies in the evidence of infringement.

China's civil procedure system does not provide for a discovery process, and plaintiffs must themselves gather all the evidence to support their case. However, under 2020 Evidence Rules and proposed amendments to the Copyright Law<sup>4</sup>, where a plaintiff has provided sufficient evidence of infringement, the court may reverse the burden of proof onto the defendant and order it to produce evidence. Where the defendant refuses to produce evidence or provides unreliable evidence, the court may make adverse inferences or use the plaintiff's evidence to determine compensation. This brings the Copyright Law into line with other IP legislation and will make it much easier for plaintiffs to make out their case.

The evidence of infringement recognized by Courts includes:

- (1) Evidence obtained through the copyright owner's own investigations. This is normally preserved by a notary public;
- (2) Evidence collected by the court itself through an Evidence Preservation Order;

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<sup>3</sup> Article 7 of Interpretation of the Supreme People's Court on Issues Relating to Application of Law to Adjudication of Cases of Copyright Disputes

<sup>4</sup> Draft Amendment to Copyright Law Art.52.

- (3) Evidence of infringement obtained through a prior administrative enforcement action (“raid”) by the Copyright Administration or other administrative bodies.

These are discussed in more detail below.

*(1) Notarised Evidence Obtained by the Copyright Owner*

Where IP owners provide evidence from their own sources, in order to be admissible in court, it must normally be recorded or preserved by a notary public, or via certified electronic evidence preservation software.

A common method for gathering evidence is for undercover investigators, using a pretext, to visit the infringers premises and try to record use of infringing software by visual record of computer terminals using the software product. This is an unsophisticated approach and a challenging method to employ. While a skilled investigator may be able to gain access to the target’s premises to confirm that infringement is taking place, this method is less likely to provide clear evidence of the number of regular infringing users for the purposes of calculating damages (and it should be noted that witness testimony carries almost no weight in China’s civil courts). In the past, the requirement for notarization meant that the investigator would have to bring two notary officers to physically accompany him or her - the notaries also acting undercover. However, as an alternative to notaries actually witnessing an investigation in person, Chinese courts now accept investigators providing evidence captured using notarization video apps which employ blockchain to ensure that the contents have not been altered. While these technologies not as probative as traditional in-person notarisation, since they are more flexible and much less costly, they are becoming gradually adopted more in practice.

There are sometimes publicly available forms of evidence. For example, a company using unlicensed software may reveal it is using the software in its public communications, such as sales materials or in recruitment advertisements for technical personnel. This is particularly common where a particular software product is “industry standard”. Such evidence is useful to be used to corroborate infringing use but rarely sufficient on its own to establish a case.

The most powerful form of direct evidence gathering is usage tracking, provided through “phone home” functions embedded in the code which are triggered even when pirate versions are used. Companies such as Cylint and Revulytics are leading third-party providers of such usage tracking technologies. Their reports can provide highly specific and accurate information on the location of users and the instances of use.

Unfortunately, Chinese civil judgments do not always include detailed descriptions of the evidence presented in the case, nor are other court documents published which might reveal this. While usage tracking data certainly has been used as evidence by plaintiffs in China’s courts, there is no available data to show whether Chinese judges routinely accept such data to determine infringement and to calculate damages.

Where the courts use Evidence Preservation Orders to directly acquire evidence (see below), usage tracking data can serve a useful function in persuading a judge to grant such an order.

As the example of Rhino Software shows, it is possible in China to use a strategy of filing “bulk” litigation cases against multiple infringers cheaply and quickly. However, for Rhino, this resulted in a lower win rate due to deficiencies in the evidence. If such usage tracking technologies were to become widely accepted as primary evidence of infringement, it would provide significant benefit to plaintiffs. It is likely that further education of Chinese courts on how these “phone home” technologies work and their level of accuracy,

spearheaded by Chinese court-accredited experts, will be needed to achieve this level of acceptance. The new Evidence Rules and draft amendments to the Copyright Law which shift the burden of proof to the defendant and favour the plaintiff's evidence in cases where the defendant does not cooperate should also boost the value of such technologies in litigation.

## (2) Evidence Preservation Order by the Court

Copyright owners may apply to Chinese courts for an Evidence Preservation Order. This involves the judge, supported by court enforcement officers, appearing unannounced at the premises of the alleged infringer to seize evidence. Evidence preservation may include seizure of records, taking photos of software in use on screens and using forensic technology to identify unlicensed use. If necessary, the court may also seal hardware for later analysis. Evidence Preservation Orders can be the most decisive form of evidence gathering. Chinese courts readily grant Evidence Preservation Orders, and as noted in Section 1, such orders were used regularly by plaintiffs where the highest compensation awards were achieved.

Given that Evidence Preservation Orders involve some cost and planning, the court will need to be persuaded that the order will yield valuable evidence. In making an application, the plaintiff should be able to show the court a prima facie case of infringement. As noted above, this is where evidence collected by the plaintiff, particularly usage tracking data, serves a valuable purpose.

Where the defendant tries to block the evidence-gathering process or destroy evidence, Courts have shown willing to make an adverse inference against the defendant. For example, in *Dassault Systèmes v. Shanghai Yashen Investment Co., Ltd*<sup>5</sup>, the defendant deliberately cut off the electrical power while the court officers were carrying out the search. The court treated this as an obstruction, since it had already confirmed that two computer terminals were using unlicensed software before the power outage, it made an adverse inference that all 65 computers on site were using unlicensed copies.

Likewise, in *Autodesk Company v. MOSO Power Supply*<sup>6</sup>, during the court's search, the defendant simply removed computers from the premises. This did not stop the court from finding in the plaintiff's favour and awarding compensation.

Finally, in the case of *Dassault Systèmes v. Jane Style International Automotive Design (Beijing) Co., Ltd*<sup>7</sup>, the court found evidence that 16 out of 19 computer terminals on site had used, and then uninstalled, the unlicensed software, but, based on other factors, the court made an adverse inference against the defendant and awarded damages on the assumption that all 19 computers had used the unlicensed software.

The 2020 Evidence Rules and draft amendments to the Copyright Law will reinforce the current practice of the courts to compel evidence disclosure by defendants. As mentioned above, the draft amendments to the Copyright Law also provide for punitive damages of up to five times the compensation award in serious circumstances, and it is likely that wilful obstruction of the court's attempts to gather evidence will be grounds for punitive damages.

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<sup>5</sup> (2017) Hu73 Min Chu No.624

<sup>6</sup> (2016) Yue 0305 Min Chu No.7211

<sup>7</sup> (2017) Jing 73 Min Chu No. 396

### (3) Administrative penalty decision

Administrative enforcement involves an unannounced inspection (“raid”) by a dedicated local enforcement unit of the National Copyright Administration<sup>8</sup>, with powers to investigate infringement and issue fines (but not to award compensation to the copyright owner). Where an administrative raid has taken place and confirmed infringement, the records of the raid be used as evidence in court claim compensation. For example, in *Dassault Systèmes v Shanghai Zhidou Electric Vehicle Technology Co., Ltd.*<sup>9</sup>, the court’s award of compensation was based on an earlier inspection by administrative authorities that confirmed infringement.

While administrative action can provide a convenient and low-cost means of evidence gathering, it is not an altogether reliable method. Copyright enforcement authorities in different parts of the country have differing policies on whether they will accept software end-user piracy cases. Administrative inspections tend to be relatively brief, and the authorities lack the powers of the courts to make an adverse inference or apply punitive measures if the defendant does not cooperate. In the worst case, an administrative raid could result in an unsuccessful action that does nothing more than warn the defendant of the plaintiff’s intentions. For high-value cases, potential plaintiffs are more likely to seek an Evidence Preservation Order directly from a court.

## Determining Compensation

In software copyright infringement cases, there are currently 3 methods for determining compensation<sup>10</sup>:

- (1) the copyright holder's actual losses;
- (2) the infringer's illegal gains; or
- (3) where the above two methods can not be determined, the court has the discretion to determine the award itself under statutory compensation limits.

It should be noted that the amendment to the Copyright Law will introduce a new method (3), which comes before the statutory compensation option: a multiple of the license fee. In reality, the license fees have already been used as a reference in calculating compensation, as is shown below, however this amendment will be valuable in explicitly making license fees and method for calculation.

In our dataset of 285 first instance foreign-related cases, 239 cases were won by the plaintiff and compensation was awarded. Of these, in the vast majority of cases (224 cases, or 94%) the court determined the compensation based on method (3): statutory compensation. Of the remainder (6%), 13 cases were determined based on the copyright owner’s actual losses and 2 based on the infringer’s illegal gains. These are discussed in more detail below.

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<sup>8</sup> Raids can also be carried out for trade mark and patent infringement by other bodies. Evidence from these bodies can also be used in copyright cases in court if relevant.

<sup>9</sup> (2018) Hu 73 Min Chu No. 81

<sup>10</sup> Article 49, Copyright Law of the People’s Republic Of China, 2010.

### (1) Copyright Owner's Losses / Infringer's Illegal Gains

An analysis of the 15 cases that used either the copyright owner's losses or the infringers gains as the basis for determining damages shows that these two methodologies in fact amount to the same thing.

In these cases, the courts appear to have accepted the plaintiff's normal license price for those products, multiplied by the number of unlicensed users, as discovered through evidence collection, as the basis for determining the loss to the copyright holder or, in reverse, the illegal gains enjoyed by the infringer.

For example, in *Siemens Product Lifecycle Management Software Inc v. Wuhan Dejiao Baier Surgical Implant Co., Ltd.*<sup>11</sup>, the evidence preservation carried out by the court determined that the defendant company had 33 unlicensed users. Siemens provided evidence that a license would typically cost RMB 215,000. The court thus determined that the copyright owner's losses were: CNY 215,000 x 33, equalling CNY 7,095,000 and awarded this amount.

In the case of *Dassault Systèmes v. Jane Style International Automotive Design (Beijing) Co., Ltd.*<sup>12</sup>, the court followed a similar method of calculation and awarded CNY 20 million. In this case, which was mentioned above, the court had not determined precisely the number of users, but made an adverse inference based on evidence of the software having been deleted from some of the computers.

However, in most cases the courts do not appear to have accepted a direct calculation of license price multiplied by estimated number of users, as explained further below.

### (2) Statutory Compensation

In the majority of foreign-related cases in our dataset, compensation was calculated on the basis of statutory damages, i.e., the court does not determine compensation based on the copyright owner's losses or infringers' gains but instead awards an amount to reflect its best estimate of the compensation due. This is not unique to copyright cases – in the entire CIELA dataset, over 90% of compensation awards are based on statutory compensation. In reality, the widespread use of statutory damages is an expediency by which busy courts can avoid more time-consuming damages calculation methods. The Copyright Law provides for statutory compensation of up to CNY 500,000 (USD 71,400), to be awarded by the court at its discretion based on the extent of the infringement. However, if evidence suggests that the copyright holder's actual losses obviously exceed the statutory limit, the court does have the power to break through this ceiling. Indeed, in 18 out of 285 of the first instance cases in our dataset, the courts have chosen to do so.

In the case of *Siemens Product Lifecycle Management Software Inc v. Chongqing Huan-song Industries (Group) Co.*<sup>13</sup>, although Siemens asked for the compensation of actual losses and provided similar contracts signed with customers parties to show the software market price, the court preferred to apply statutory damages. The reasoning of the court appeared to be that the software in question had been in the market for some time, and that the price had dropped since the time of the license contracts with other licensees that Siemens was using as evidence of its losses.

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<sup>11</sup> (2017) E 01 Min Chu No. 3999

<sup>12</sup> Ibid. note 5

<sup>13</sup> (2016) Yu 01 Min Chu No.1150



Therefore, the court decided that actual losses of the infringement could not be determined directly from the license contracts that Siemens submitted and applied statutory compensation to set the award. However, the scale of infringement was nevertheless large and the court did not feel bound by the upper limit of statutory compensation in the Copyright Law, awarding Siemens CNY 1,250,000.

The bad faith of the defendant seems to be a factor in some of the decisions, particularly where the defendant obstructed an Evidence Preservation Order. In the case of *Dassault Systèmes v. Tj Innova Engineering And Technology Co., Ltd*<sup>14</sup> a number of factors, including the price of the software, the duration of unlicensed use by the defendant, and their bad faith in the course of the case were cited. Since the plaintiff was able to demonstrate that the actual loss would far exceed the statutory damages range, the court granted an award totalling CNY 15,050,000.

The draft amendments to the Copyright Law include a tenfold increase of statutory compensation under the Copyright Law, to CNY 5 million (approx. USD 700,000), which brings the law in line with the statutory compensation provided in the Trade Mark Law and in proposed amendments to the Patent Law. The proposed amendments to the Copyright law and Patent Law will also allow the courts to order punitive damages of 1 to 5 times damages where there is wilful infringement. While courts have already shown willingness to break through the statutory compensation threshold in some cases, it is likely that raising the statutory threshold will quickly result in a rise in average compensation awards.

## Conclusions

Our findings show that some foreign companies in the enterprise software industry have achieved impressive results in pursuing infringement cases in China's courts. However, despite a high level of end-user piracy in the country, only a few in the industry are taking action through the courts to seek recovery. This seems to be a wasted opportunity. China's court system is well-suited to tackling the industry's end-user piracy problem: lawsuits can be brought cheaply, are concluded in a few months without much procedural complexity, and have a high success rate. While compensation awards have traditionally been low, our data shows that compensation awards are significantly above the average for foreign plaintiffs who win patent or trade mark lawsuits.

The main obstacle for plaintiffs is proving the extent and value of the unlicensed use. If the industry can drive use of usage tracking technologies as a primary source of evidence, combined with legislative changes that make such evidence more readily acceptable reverse the burden of proof onto the defendant, China's courts will be an even more effective recourse.

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<sup>14</sup> (2017) Hu 73 Min Chu No. 208

## APPENDIX – ABOUT CIELA

CIELA is a database and research tool founded and operated by Rouse ([www.rouse.com](http://www.rouse.com)), the leading IP and technology services firm. The purpose of CIELA is to analyse IP litigation and administrative decision data from courts and National Intellectual Property Administration (CNIPA) in China to provide insights and inform private practice lawyers, legal counsel, researchers and others about strategies for litigating in China.

CIELA gathers and extracts data points from published IP decisions from courts all around China. To date, CIELA contains data from over 54,000 infringement decisions, as well as over 440,000 decisions from administrative bodies such as the Re-examination and Invalidation Department of the Patent Office, and the Review and Adjudication Department of the Trademark Office. The Supreme People's Court encourages publication of as many IP judgments as possible by courts with IP jurisdiction in China, but not all IP judgments are published. There is an increasing trend towards greater transparency and in 2017, Civil Procedural Rules mandated access to decisions (Art 148: courts must pronounce their decisions publicly; Art 156: public must have the right to consult effective decisions).

Despite this, not all IP decisions are published by all courts, and therefore the user must bear in mind that there may be some selection bias where particular courts may only publish certain cases. However, the leading courts which see the most cases do appear to publish all of their decisions, with few, if any, exceptions. The sample size of CIELA data is sufficient to be able to draw statistically valid conclusions.

A more detailed explanation of the definitions and methodology used in CIELA can be found in the “Help” section of the CIELA website at [www.ciela.cn](http://www.ciela.cn). The following are definitions of three of the data points used in this report:

### “Compensation Awarded”

Compensation awarded means the final compensation awarded by a court to a plaintiff either at first instance or later instances. The award is always in Chinese Yuan (CNY). The Compensation may sometimes include costs awarded to the plaintiff, for example for legal fees or other expenses, or costs may be listed separately – there is no standard practice. CIELA will list cost awards separately where the judgment so states. In the vast majority of civil cases however, the costs awarded to the plaintiff are an insignificant amount and therefore are not regularly included in our data. Other remedies ordered by the court to a winning plaintiff apart from compensation are included in the CIELA database, but have not been cited in this report.

It should be noted that compensation awarded by the courts is not automatically paid by the defendant. While enforcement of judgments has improved significantly in recent years, and while larger corporations will generally not avoid paying court-awarded compensation, the Compensation figure in this report may not represent compensation sums actually received.

### “Duration”

The duration of a case refers to the time taken for proceedings in months from the date of acceptance of the filing of the claim to the date when that instance of the case is concluded. Note that not all decisions consistently display the date of filing, so the mean duration may be calculated from a subset of the total cases within the dataset.

### **“Win Rate”**

A win means a decision where the court recognises some or all of the plaintiff’s claims for infringement and awards remedies in all or some of the categories of relief sought by the plaintiff (e.g. apology, injunction, damages and costs). Note that a finding of infringement for the plaintiff indicates that some damages may have been awarded, but does not necessarily mean that the full amount of damages claimed by the plaintiff have been awarded by the court.