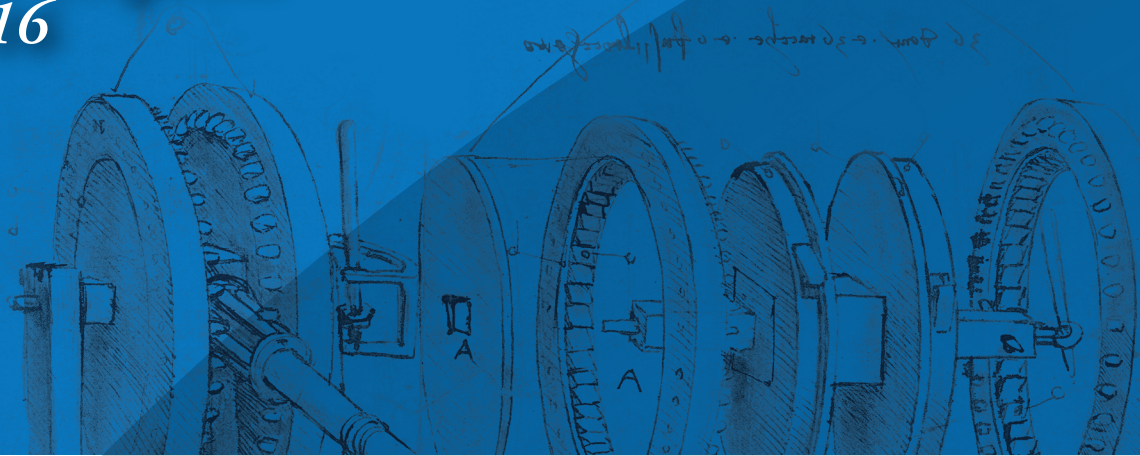


Lex Machina
Trademark Litigation
Report 2016



 **Lex Machina™**
a LexisNexis® Company

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Executive Summary

Lex Machina's Trademark Litigation Report showcases the power of Legal Analytics™ to inform business decisions around trademark litigation.

From precise timing metrics on injunctions that can improve budgeting for outside counsel and in-house counsel alike, to trends in the top trademark parties and law firms, Legal Analytics provides, data-driven, customized insights that supplement traditional research and accumulated experience. In today's world, leveraging this data gives companies and firms a competitive edge - companies can choose better counsel based on their performance, and counsel can increase their performance by understanding how data influences decisions from motion practice to damages demands and settlement thresholds.

This report examines several important metrics (and their interactions) for trademark litigation in aggregate across cases filed from January 2009 through the end of the first quarter of 2016.

Areas of focus and key insights for the first part include:

Injunctions and Other Remedies

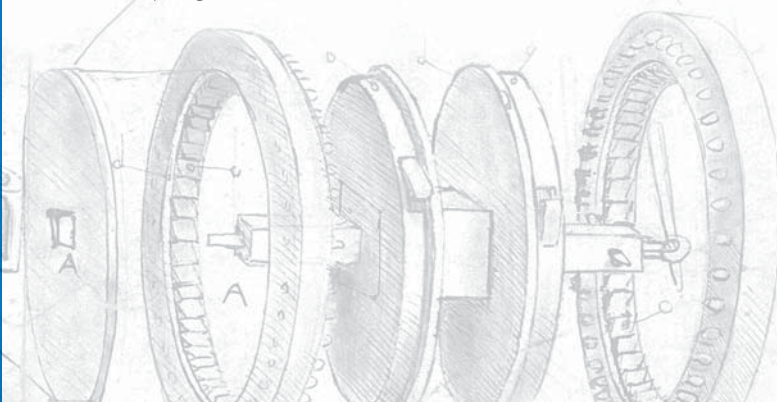
- The median time to a temporary restraining order in trademark cases is 6 days. For preliminary injunctions, the median time to issuance is just over 1 month. For permanent injunctions, the median is 6 months.
- Cybersquatting cases reach preliminary injunction slightly faster than trademark cases generally (0.8 months median vs 1.1 months median), but false advertising cases tend to take longer to reach both preliminary (2 months to 1.1) and permanent injunction (7.2 months to 6) compared to trademark cases generally.
- Chanel, Deckers, Tiffany, Louis Vuitton, Gucci, and Coach are the most common parties to win relinquishment of a domain name.

Findings and Judgments

- Default judgments happen frequently, often result in findings of a Lanham Act violation, and account for 68.0% of all Lanham Act violation findings.
- Equitable and fair use issues are usually determined on summary judgment more often than not.

Lex Machina's Trademark Litigation Report surveys and summarizes the key trends and insights, and also profiles in detail a few of the major players.

Based on the same data driving Lex Machina's platform, this report examines timing to remedy, case findings and resolutions, and damages to showcase the power of Legal Analytics .



Damages

- Damages in trademark litigation come almost entirely from default judgments, and majority of the rest come from consent judgments.
- Of damages resulting from decisions on the merits, juries have awarded more damages than judges.
- Chanel has won the most damages (\$1 billion) followed by Burberry Limited (\$523 million), and Gucci (\$208 million).
- Excluding damages resulting from consent or default judgments, Coach (\$66 million) won the most damages followed by PODS Enterprises (\$60 million) and Neurovision Medical Products (\$60 million).

Districts

- Central District of California (4,164 cases) is the most popular district, although it has seen a decline since 2015 corresponding to an overall decline in all trademark cases filings.
- For cases involving allegations of cybersquatting, the Southern District of Florida leads with 486 cases, followed by the Northern District of Illinois (429 cases), and the Central District of California (361 cases).
- For cases involving allegations of false advertising, The Central District of California tops the chart with 785 cases, followed by the Southern District of New York (389 cases) and the Northern District of Illinois (274 cases).

Parties

- Coach is the leading plaintiff in trademark cases filed from January 2009 through March 2016 with 730 cases, followed by Chanel (330 cases) and Microsoft (203 cases).
- The National Football League (NFL) is the top defendant with 548 cases related to a single dispute over use of former players likeness; the other top defendants are Syngenta Seeds (184 cases), Big Bad Limo Service (109 cases), Amazon.com (66 cases), and Walmart (59 cases).

Law Firms

- Top law firms representing plaintiffs include Goldberg, Perkys & White (542 cases), Stephen M. Gaffigan (539 cases), the Blakely Law Group (371 cases), and Kilpatrick Townsend & Stockton (366 cases).
- On the defense side, Greenberg Traurig is the top firm (with 161 cases), followed by Kilpatrick Townsend & Stockton (146 cases), and Lewis Brisbois Bisgaard & Smith (110 cases).

This report provides a starting point for understanding the impact of Legal Analytics on the business and practice of trademark law. It sheds light on the big trends in trademark litigation. But the full power of Legal Analytics is revealed when users engage with the platform to produce actionable and strategic insights tailored to their particular context and circumstance. When users have the ability to “twist the dials,” their results provide them a competitive advantage in landing clients, winning cases, and closing deals by making data-driven decisions.

Lex Machina's Data and Methodology

This report draws on data from Lex Machina's proprietary intellectual property litigation database. Although some of our data is derived from litigation information publicly available from PACER (the federal court system's document website), Lex Machina applies additional layers of intelligence to bring consistency to, and ensure the completeness of, the data. Beyond the automation, key areas of Lex Machina's data are either human-reviewed or hand-coded by a dedicated team of attorneys to ensure accuracy.

Lex Machina's trademark content covered in this report focuses on U.S. district court cases pending from January 1, 2009 through March 31, 2016. Cases are identified as trademark based on the primary filing codes Nature of Suit (NOS) 840 and Cause of Action codes for Trademark Infringement and then verified; additional cases with trademark claims are found from cases filed as NOS 820 and NOS 830. Terminated cases are coded for injunctive relief, merits decisions on the claims brought and defenses raised, and damages awarded for Lanham Act violations. Damages may be compensatory (including defendant's profits, plaintiff's actual damages, reasonable royalties, and statutory damages) or non-compensatory (including attorneys' fees, costs, and prejudgment interest). Damages enhanced for willfulness are also distinguished.

Lex Machina considers a trademark case to be a case with one or more claims involving violations of the Lanham Act (the federal trademark statute) including for trademark infringement, trademark dilution, unfair competition or cybersquatting. This definition excludes cases with only state claims of infringement or unfair competition, trademark ownership disputes, and appeals from TTAB or USPTO decisions.

Two primary sub-categories of trademark cases are presented in this report, in addition to analysis of all trademark cases (comprising all charts not specifically labeled with one of the two sub-categories below):

- **Cybersquatting Cases:** Trademark cases involving claims of cyberpiracy prohibited under 15 U.S.C. § 1125 (d) of the the Lanham Act.
- **False Advertising Cases:** Trademark cases involving claims of false advertising prohibited under 15 U.S.C. § 1125 (a)(1)(B) of the Lanham Act.

A trademark finding is defined as a court-enforceable finding regarding one of the claims or defenses listed below. Findings may also include negatives like "No Lanham Act Violation," when such is found in a granted order (denied orders do not rule one way or the other and are not counted).

- **Lanham Act Violation – Activity of trademark / trade dress infringement, trademark / trade dress dilution, unfair competition, or cybersquatting prohibited by the Lanham Act.**
- **Trademark Ownership / Validity – Proof that the party enforcing the trademark or trade dress owns the right to do so and that the trademark or trade dress is valid.**
- **Equitable Defense – A defense against a claim of Lanham Act Violation involving license, acquiescence or laches.**
- **Fair Use Defense – An affirmative defense permitting the limited use of a protected trademark under the Lanham Act, including statutory fair use, nominative use, comparative advertising, and parody.**

Lex Machina's data is focused on the U.S. District Courts and does not include appeals or modifications of judgments on appeal.

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Injunction and Remedy Timing

Fig. 1: Timing for permanent and preliminary injunctions granted, for cases filed Jan 2009 - Mar 2016

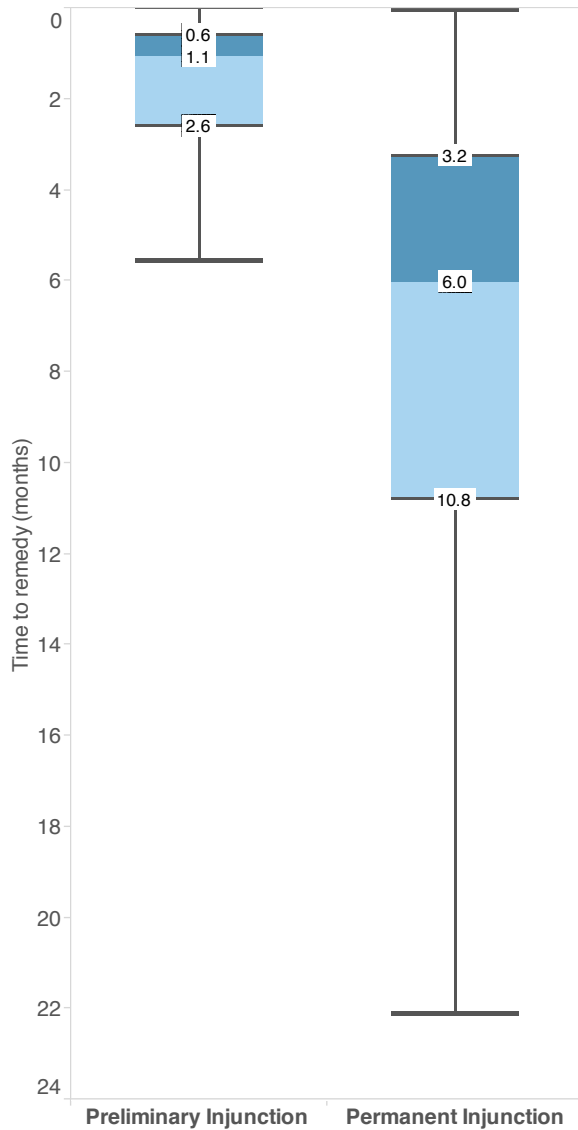


Fig. 2: Timing for temporary restraining orders granted, for cases filed Jan 2009 - Mar 2016

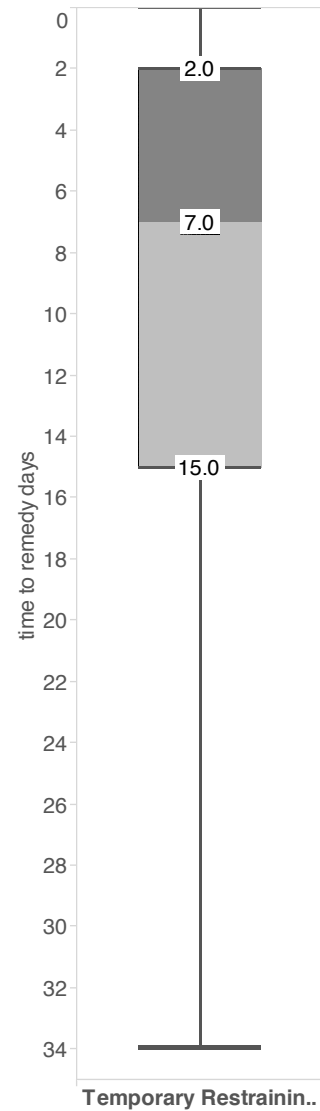
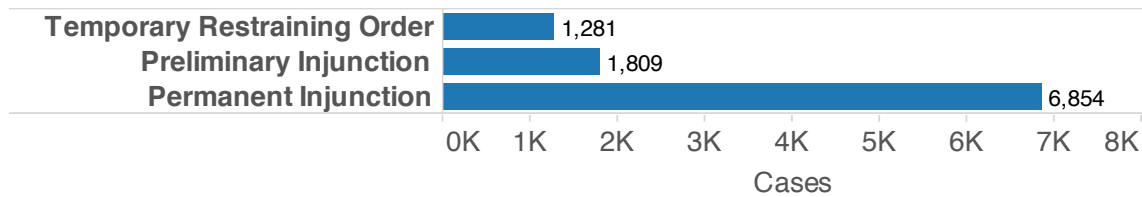


Fig. 3: Total number of injunctions and temporary restraining orders, for cases filed Jan 2009 - Mar 2016



Note: All charts reflect trademark litigation in the U.S. District Courts unless otherwise stated. The charts in this section only show injunctions and temporary restraining orders granted through March 31, 2016.

Time to Injunction

Understanding the timing of injunctive relief can help practitioners form expectations of when the relief will be granted and to budget accordingly.

Nation-wide data on injunctions and remedies from 2009 through the first quarter of 2016 show some interesting trends:

- The median time to a temporary restraining order in trademark cases is 6 days.
- For preliminary injunctions, the median time to issuance is just over 1 month. For permanent injunctions, the median is 6 months.
- Cybersquatting cases reach preliminary injunction slightly faster than trademark cases generally (0.8 months median, 50% between 0.6 and 1.5 vs 1.1 months median, 50% between 0.6 and 2.6).
- False advertising cases tend to take longer to reach both preliminary and permanent injunction compared to trademark cases generally:

	Preliminary injunction:	Permanent injunction:
False advertising:	2 months median, 50% between 0.8 and 4.8	7.2 months median, 50% between 3.8 and 13
Trademark generally:	1.1 months median, 50% between 0.6 and 2.6	6 months median, 50% between 3.2 and 10.8

- Getting a domain name relinquished takes a median of 4.6 months (50% between 2.4 and 8.0) and the parties most frequently winning include Chanel, Deckers, Tiffany, Louis Vuitton, Gucci, and Coach.

The data shown in this section and the insights below provide only an example of what is possible with Lex Machina's timing data, which combines timing data with other criteria to, for example, let in-house counsel choose faster lawyers and outside counsel find the fastest districts. The real power of analytics is the ability to interactively harness the data relevant to your specific context to tailor an answer to your specific question.

Fig. 4: Total cases filed for trademark subtypes with granted injunction, for cases filed Jan 2009 - Mar 2016

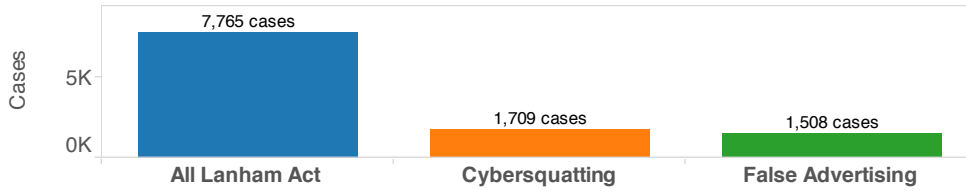


Fig. 5: Time to grant of permanent injunction in cybersquatting cases, for cases filed Jan 2009 - Mar 2016

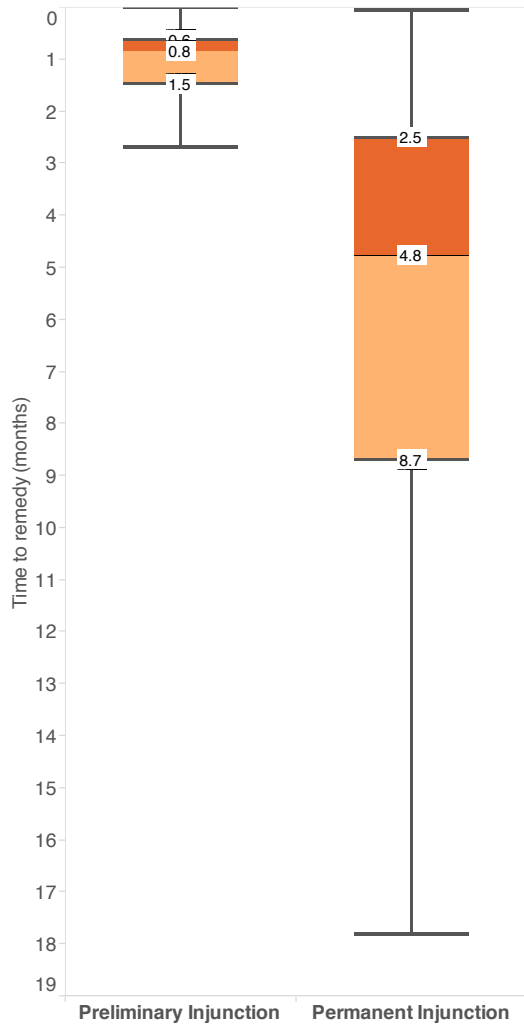


Fig. 7: Number of granted of permanent injunction in cybersquatting cases, for cases filed Jan 2009 - Mar 2016

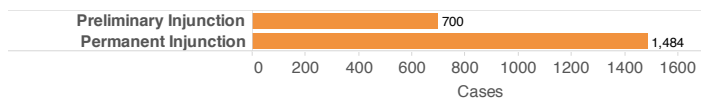


Fig. 6: Time to grant of permanent injunction in false advertising cases, for cases filed Jan 2009 - Mar 2016

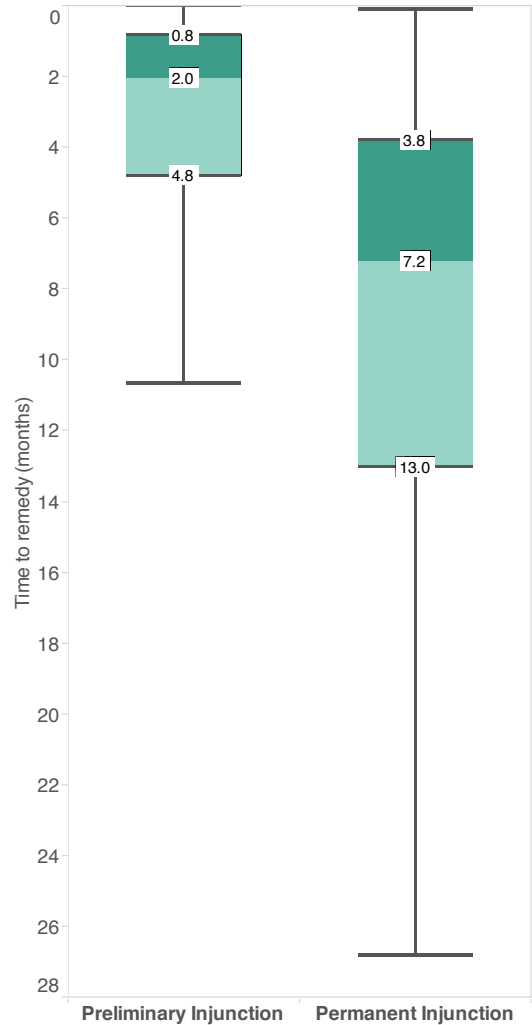


Fig. 8: Time to grant of permanent injunction in false advertising cases, for cases filed Jan 2009 - Mar 2016

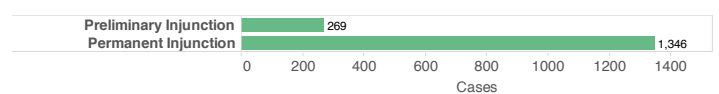


Fig. 9: Top parties (10 or more cases with grant of relinquishment of domain name), for cases filed Jan 2009 - Mar 2016

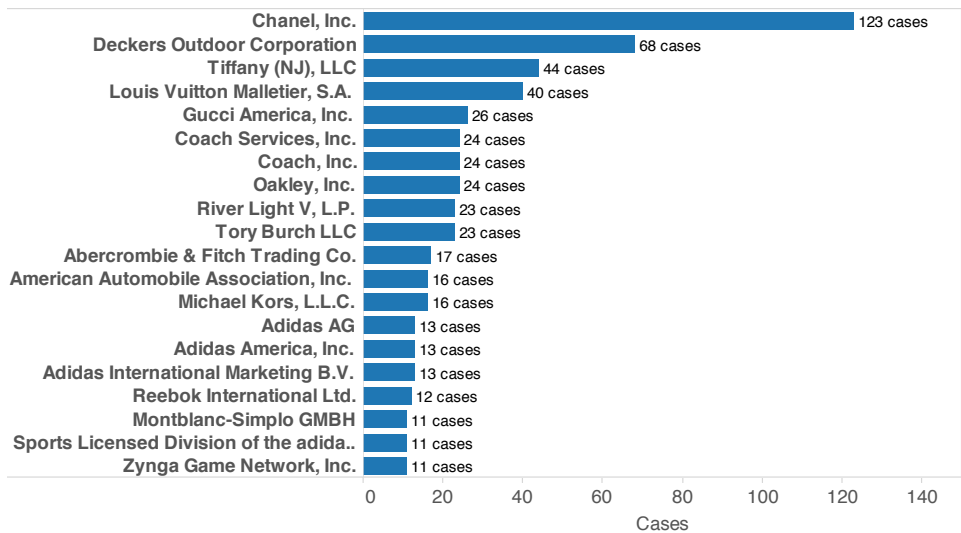


Fig. 10: Time to grant of relinquishment of domain name, for cases filed Jan 2009 - Mar 2016

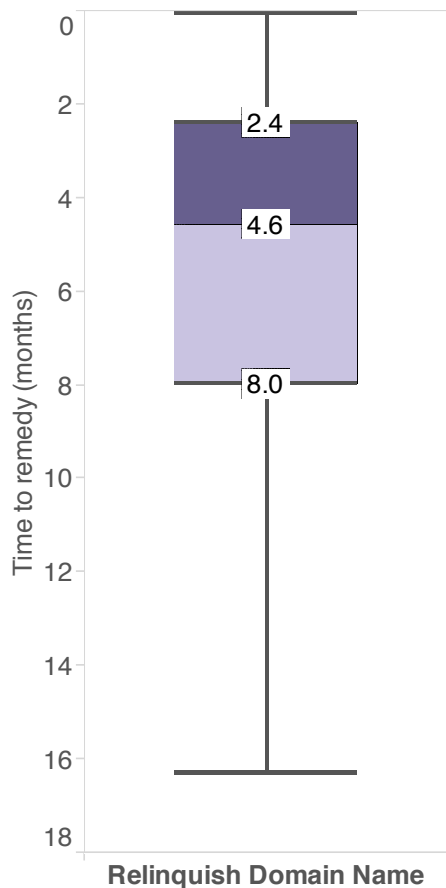
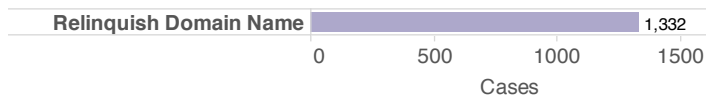
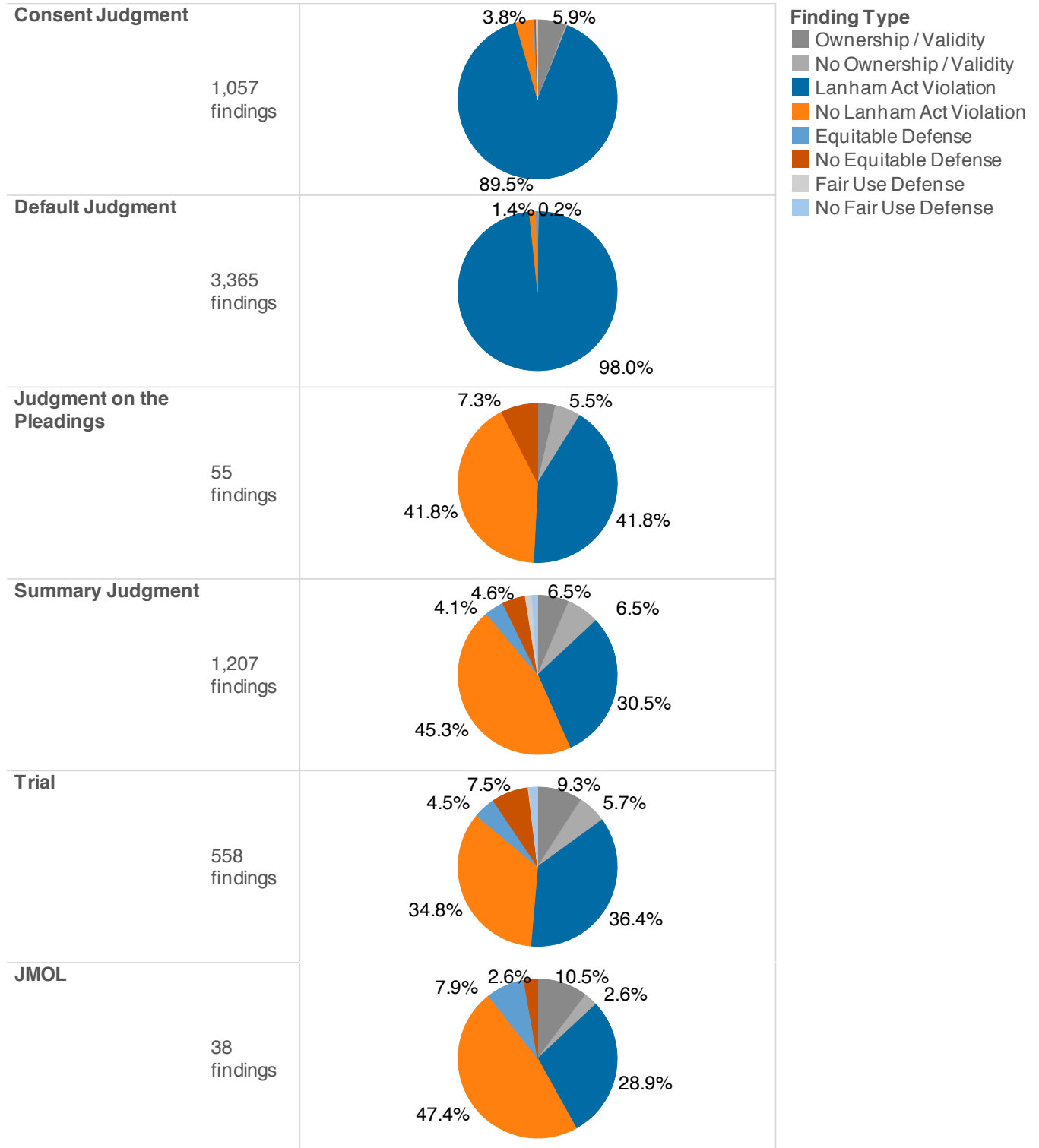


Fig. 11: Number of grants of domain name relinquishment, for cases filed Jan 2009 - Mar 2016



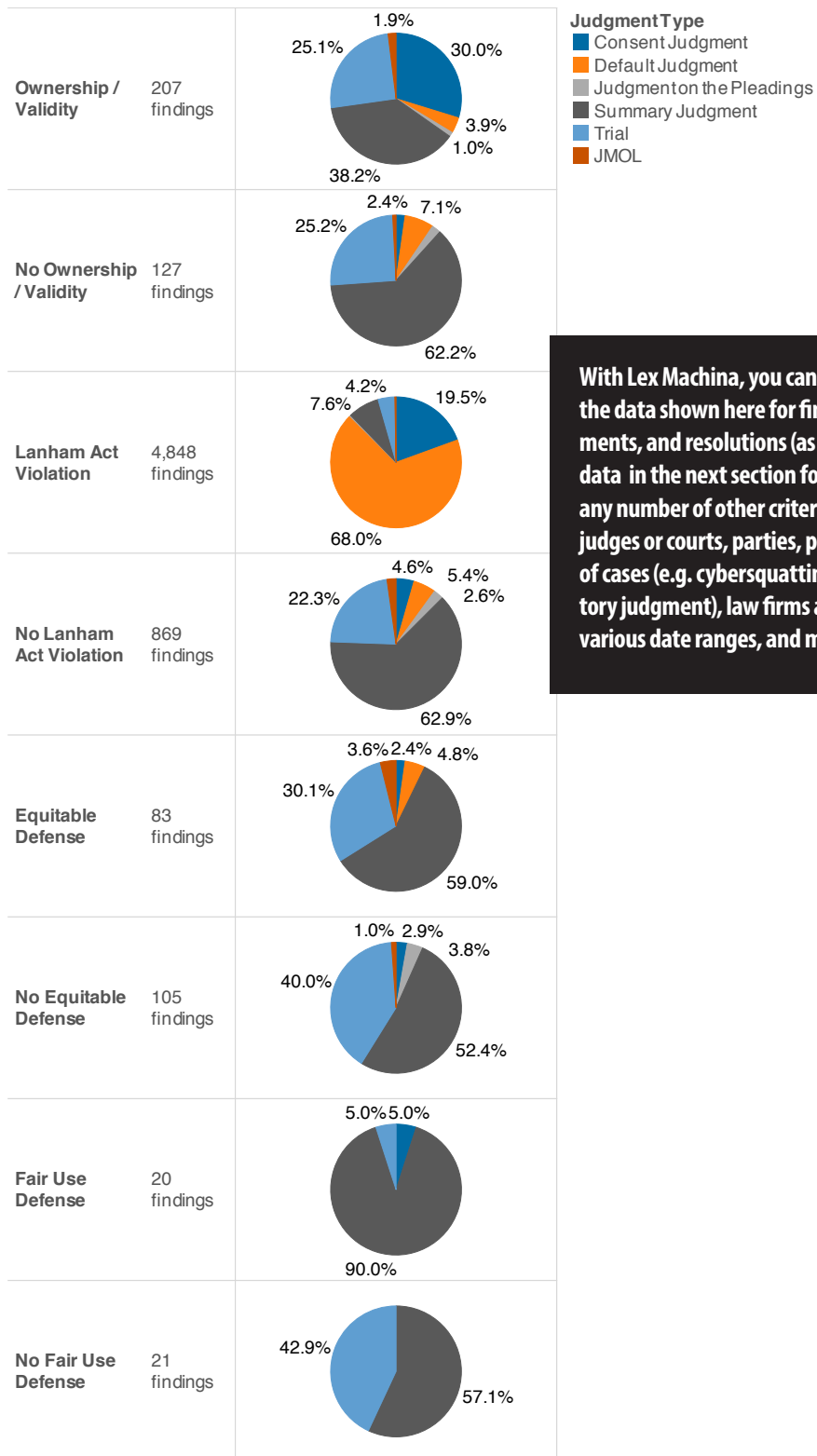
Findings and Judgments

Fig. 12: Judgment type by finding, in cases terminated Jan 2009 - Mar 2016



Note: percentage labels for small slices may be omitted in this and the next figure.

Fig. 13: Finding by judgment event, in cases terminated Jan 2009 - Mar 2016

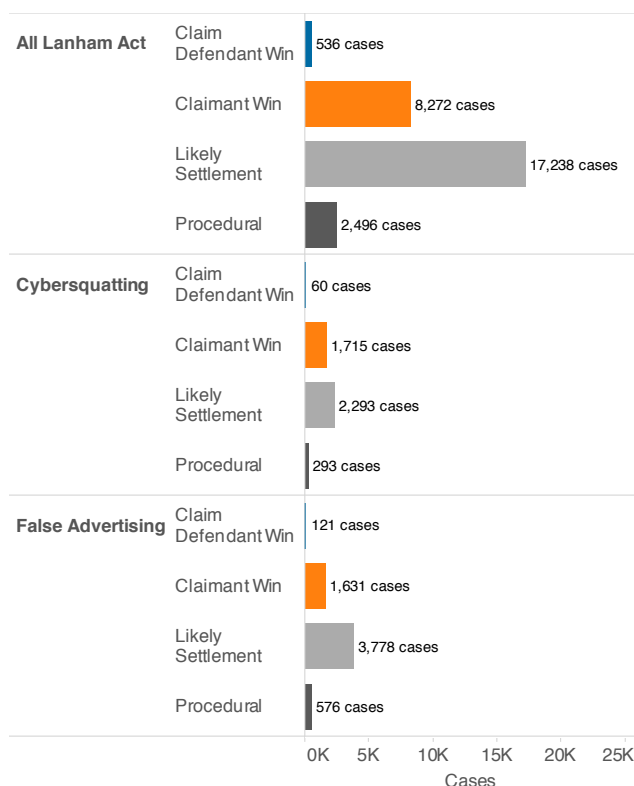


With Lex Machina, you can drill down on the data shown here for findings, judgments, and resolutions (as well as the data in the next section for damages) by any number of other criteria including judges or courts, parties, particular kinds of cases (e.g. cybersquatting or declaratory judgment), law firms and lawyers, various date ranges, and much more!

Fig. 14: Findings and judgments table, in cases terminated Jan 2009 - Mar 2016

	Consent Judgment	Default Judgment	Judgment on the Pleadings	Summary Judgment	Trial	JMOL
Ownership / Validity	51 cases	8 cases	2 cases	77 cases	48 cases	4 cases
No Ownership / Validity	3 cases	8 cases	3 cases	78 cases	32 cases	1 cases
Lanham Act Violation	841 cases	3,149 cases	15 cases	358 cases	183 cases	11 cases
No Lanham Act Violation	38 cases	47 cases	23 cases	510 cases	170 cases	18 cases
Equitable Defense	2 cases	4 cases		49 cases	25 cases	3 cases
No Equitable Defense	3 cases		4 cases	55 cases	40 cases	1 cases
Fair Use Defense	1 cases			18 cases	1 cases	
No Fair Use Defense				12 cases	9 cases	

Fig. 15: Case resolutions, in cases terminated Jan 2009 - Mar 2016



Default judgments happen frequently, often result in findings of a Lanham Act violation, and account for 68.0% of all Lanham Act violation findings. Consent judgments are slightly less frequent, but account for another 19.5% of all Lanham Act violation findings. Ownership / Validity is most often resolved on consent judgment (30.0% of those findings), while No Ownership / Validity was most found on summary judgment (62.2% of those findings).

Equitable and fair use issues are usually determined on summary judgment (in each of the four findings shown at bottom on the previous page, summary judgments accounts for 50% or more).

Damages

Fig. 16: Top parties by damages won, Jan 2009-March 2016 in cases filed Jan 2005 - Mar 2016

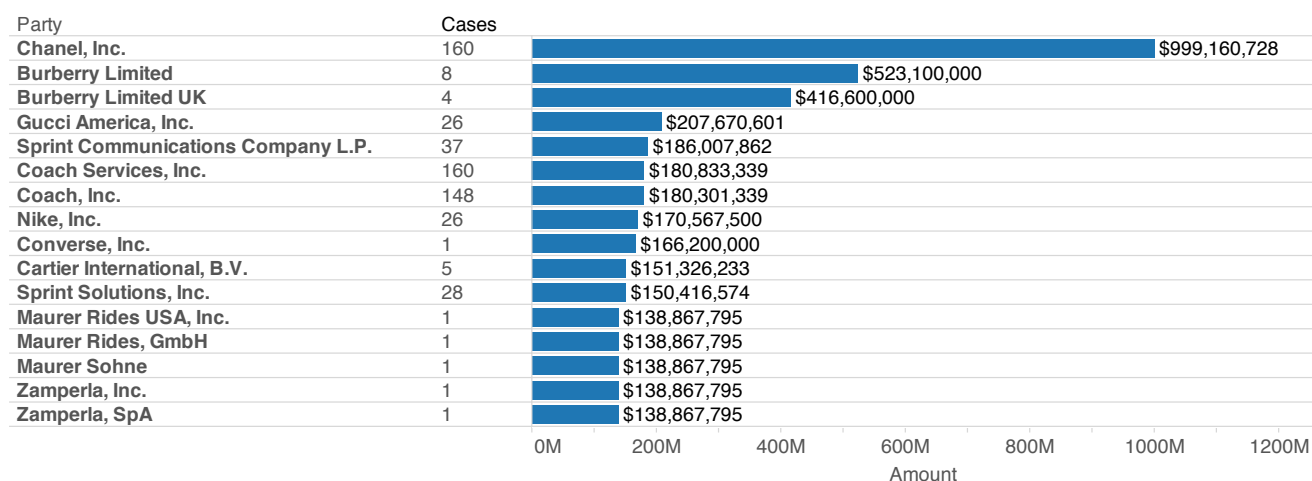
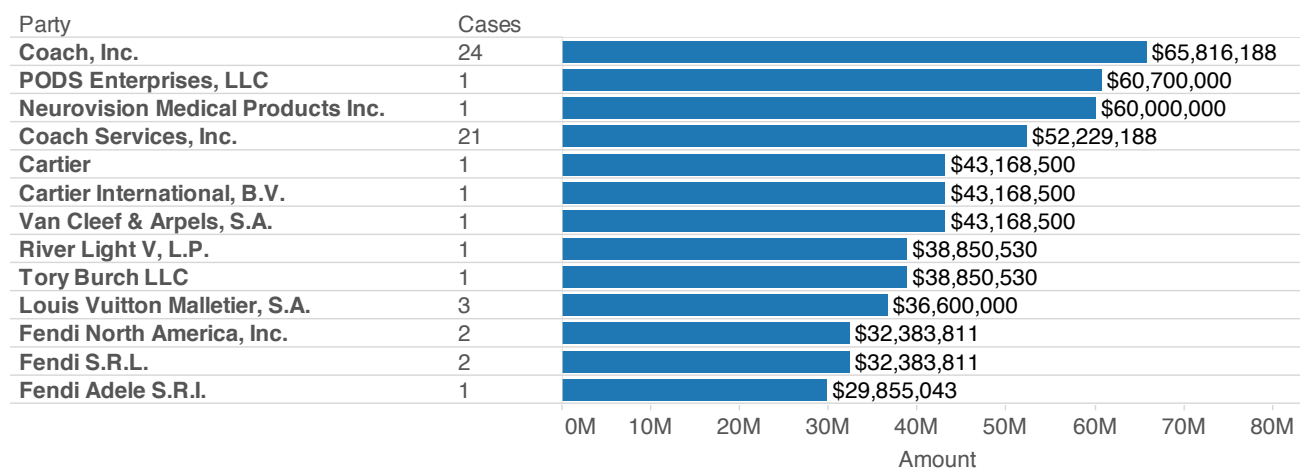


Fig. 17: Top parties by damages won (omitting consent and default judgments), Jan 2009 - Mar 2016 in cases filed Jan 2005 - Mar 2016



Damages in trademark litigation come almost entirely from default judgments, and majority of the rest come from consent judgments. Of damages resulting from decisions on the merits, juries have awarded more damages than judges.

Chanel has won the most damages (\$1 billion) followed by Burberry Limited (\$523 million), and Gucci (\$208 million).

Excluding damages resulting from consent or default judgments, Coach (\$66 million) and PODS Enterprises (\$60 million) have won the most damages followed by Neurovision Medical Products (\$60 million).

Fig. 18: Damages by judgment type, damages awarded Jan 2009 - Mar 2016 in cases filed Jan 2005 - Mar 2016

Damages Type	Judgment Type			
	Consent Judgment	Default Judgment	Judge	Jury Trial
Statutory Damages	\$36,273,483 33 cases	\$614,379,250 514 cases	\$22,641,450 57 cases	\$9,204,000 5 cases
Statutory Damages - Willful	\$67,075,212 24 cases	\$2,700,060,913 551 cases	\$106,520,035 37 cases	\$41,471,500 6 cases
Corrective Advertising		\$1,460,262 28 cases	\$88,884 6 cases	
Infringer's Profits	\$583,061 4 cases	\$300,213,422 87 cases	\$39,258,153 49 cases	\$113,055,529 31 cases
Trademark Owner's Actual Damages	\$12,784,185 18 cases	\$103,591,523 132 cases	\$33,686,737 16 cases	\$65,265,399 26 cases
Other / Mixed Damage Types	\$319,352,007 223 cases	\$369,182,388 325 cases	\$84,784,431 45 cases	\$53,706,802 22 cases

Fig. 19: Damages and judgment types chart (damages awarded Jan 2009 - Mar 2016 in cases filed Jan 2005 - Mar 2016)

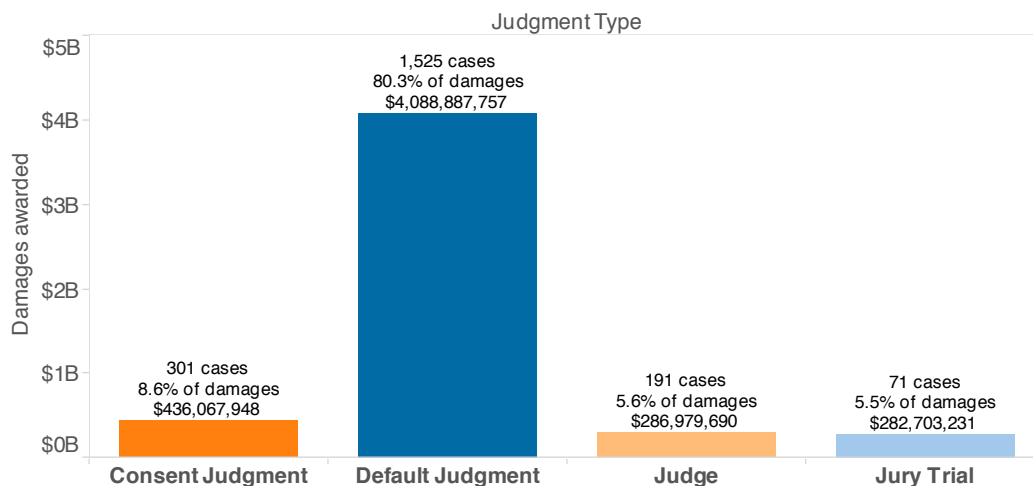
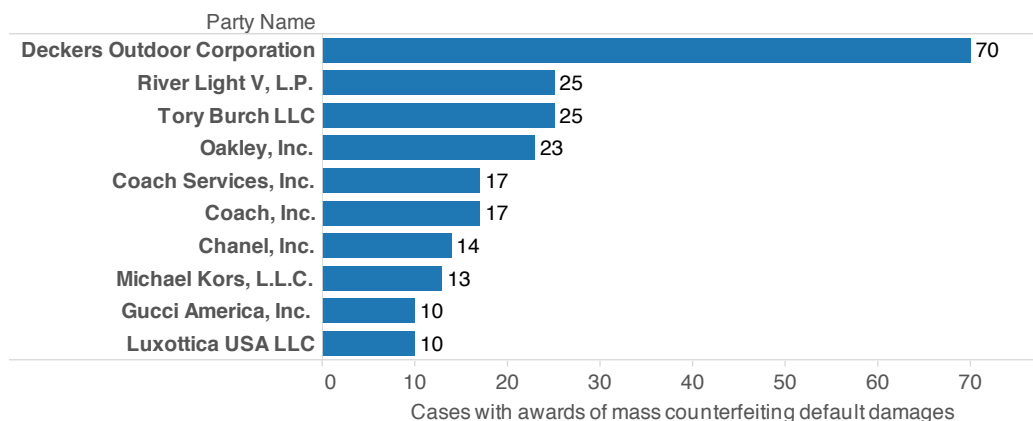


Fig. 20: Top parties winning mass counterfeiter default damages awarded Jan 2009 - Mar 2016 in cases filed Jan 2005 - Mar 2016



Note: The damages charts in this section exclude damages in cases including one or more claims for infringement of a non-design patent.

Fig. 21: Mass counterfeiter default damages awarded Jan 2009 - Mar 2016 in cases filed Jan 2005 - Mar 2016 (showing amounts with at least 3 cases)

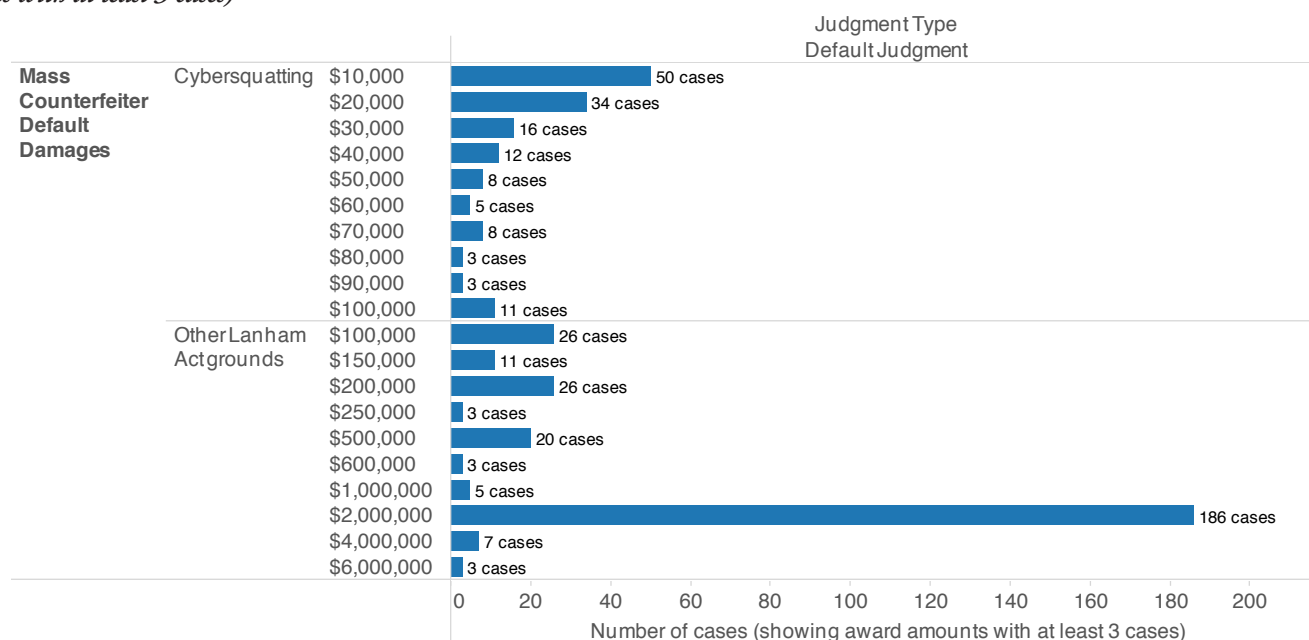


Fig. 22: Average mass counterfeiter default damages awarded Jan 2009 - Mar 2016 in cases filed Jan 2005 - Mar 2016

Judgment Type	Average Cases	Average Damages
Mass Counterfeiter Default Damages - Cybersquatting	62 cases	\$41,939
Mass Counterfeiter Default Damages - Other Lanham Act grounds	292 cases	\$1,894,679

Lex Machina has introduced Mass Counterfeiter Default Damages as a type of trademark damages to capture scenarios where plaintiffs are awarded statutory damages on default judgment en masse against many defendants accused of counterfeiting. Typically, the defendants are websites, paypal accounts, aliases, or other entities, often with overlapping identity, provided by plaintiffs in a list or schedule, and the damages award are awarded as a rate (e.g. \$2,000,000 per defendant, where each defendant is separately liable) instead of as a lump sum (e.g. \$10,000,000 against all defendants, where defendants are jointly and severally liable).

Due to the nature of these cases, the total amount of damages is often very high but almost never collected. Moreover, because the actual number of defendants is unknown or unclear from the court record, the total amount of damages awarded in the case cannot be reliably calculated. Consequently, these damages have been isolated in the new damages type, which helps prevent the other totals from becoming artificially inflated.

The damages “rate” per defendant tends to be lower when the award is based on cybersquatting (when compared to other Lanham act grounds).

Districts

Fig. 23: Top districts for all Lanham Act cases, by cases filed Jan 2009 - Mar 2016

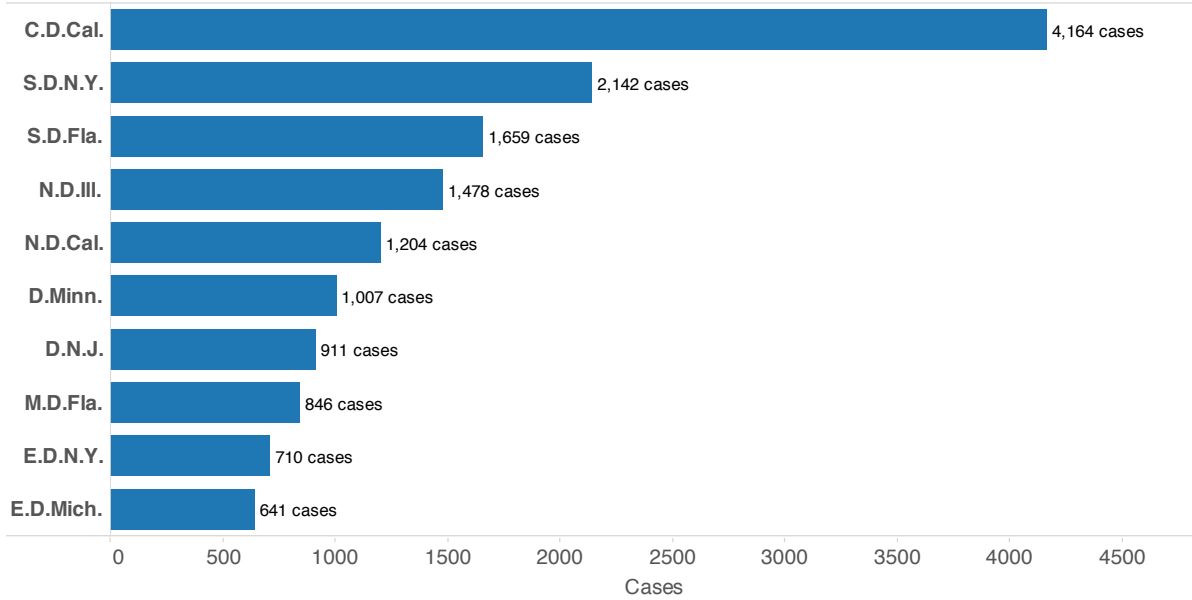


Fig. 24: Top districts 2011-2016 Q1, all Lanham Act cases, by cases filed Jan 2009 - Mar 2016

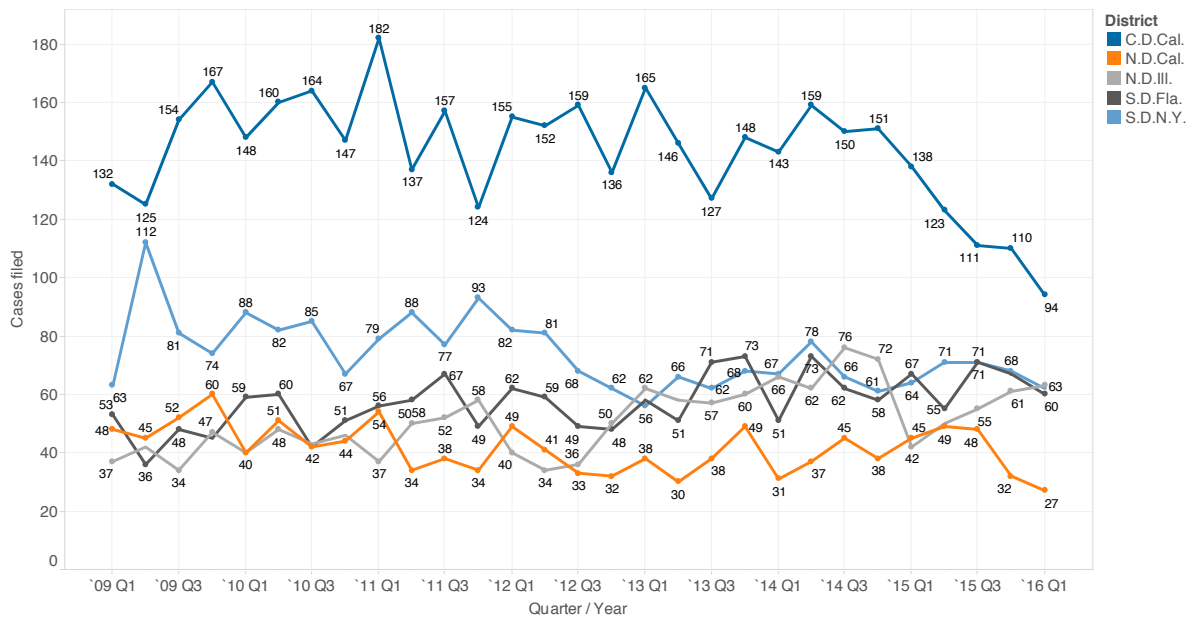


Fig. 25: Top districts for cybersquatting cases, by cases filed Jan 2009 - Mar 2016

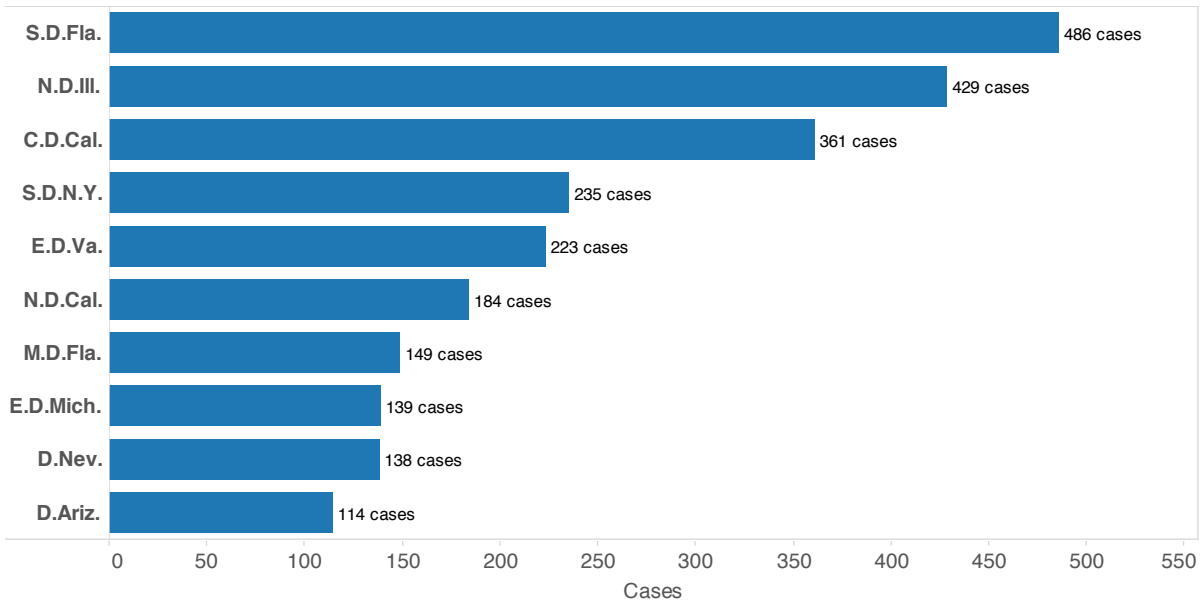


Fig. 26: Top districts 2011-2016 Q1, cybersquatting cases, by cases filed Jan 2009 - Mar 2016

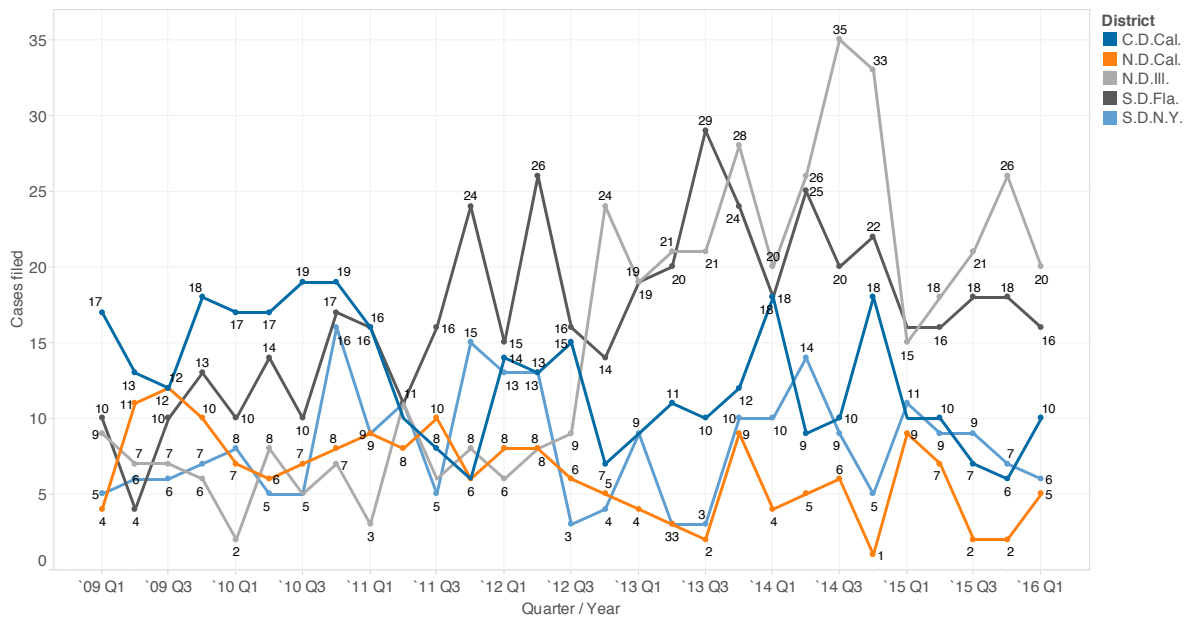


Fig. 27: Top districts for false advertising cases, by cases filed Jan 2009 - Mar 2016

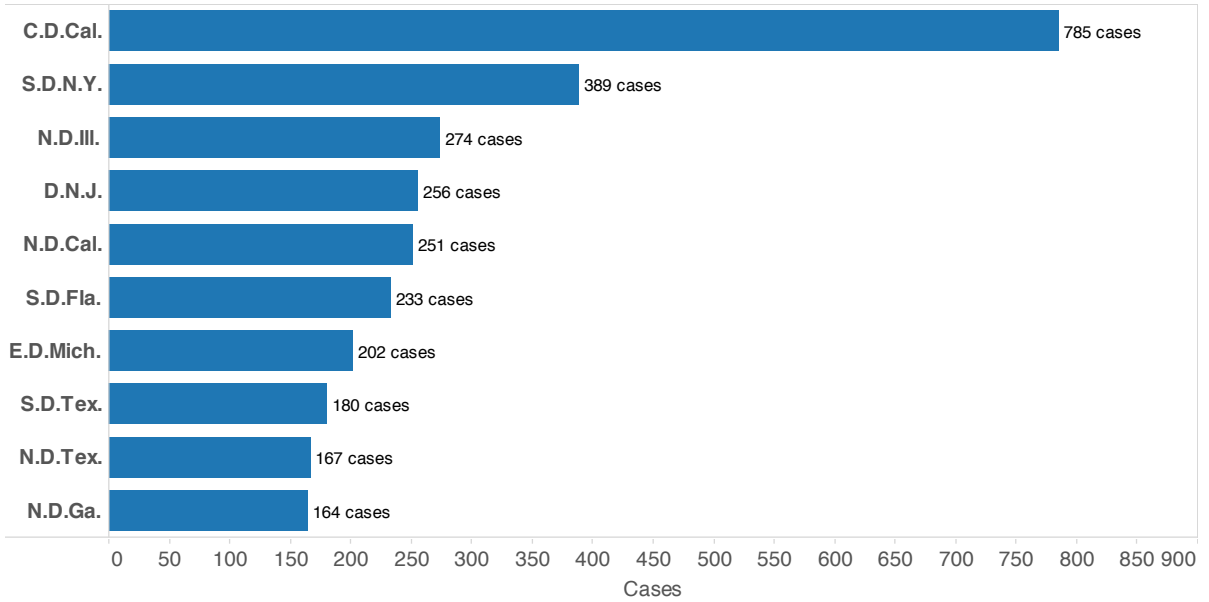
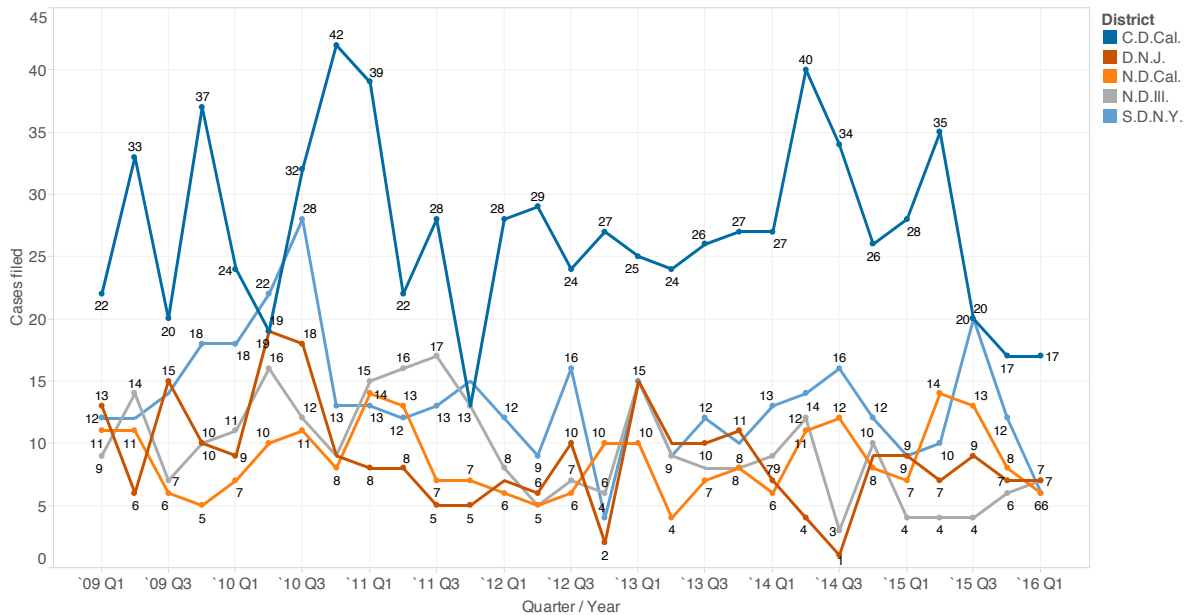


Fig. 28: Top districts 2011-2015 Q1, false advertising cases, by cases filed Jan 2009 - Mar 2016

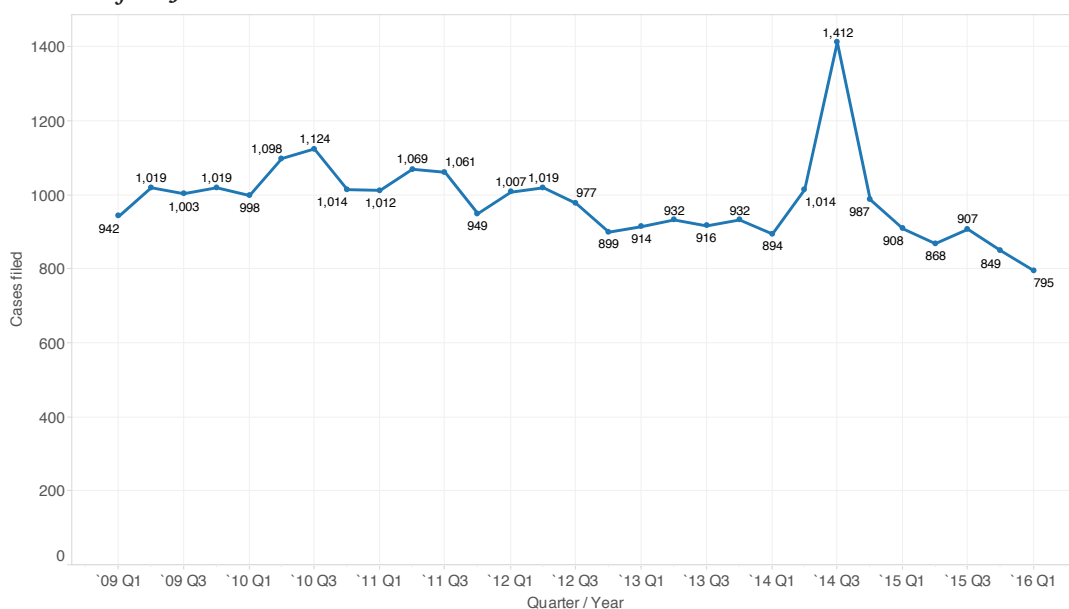


The Central District of California (4,164 cases) is the most popular district by cases filed from January 2009 through March of 2016, followed by the Southern District of New York (2,142 cases) and the Southern District of Florida (1,659 cases). However, the number of cases filed in the Central District of California have declined each quarter since the beginning of 2015, roughly tracking the overall decline in filings of all trademark cases (as shown below). On the other hand, the Northern District of Illinois has seen an increase, though less dramatic, each quarter over the same timeframe.

For cases involving allegations of cybersquatting, the Southern District of Florida leads with 486 cases, followed by the Northern District of Illinois (429 cases), and the Central District of California (361 cases). Looking at the historical trend, the Southern District of Florida and the Northern District of Illinois overtook the Central District of California around 2011, but have traded the lead between themselves since.

For cases involving allegations of false advertising, The Central District of California tops the chart with 785 cases, followed by the Southern District of New York (389 cases) and the Northern District of Illinois (274 cases).

Fig. 29: All trademark cases filed Jan 2009 - Mar 2016



Parties and Law Firms

Fig. 30: Top plaintiffs, by cases filed Jan 2009 - Mar 2016

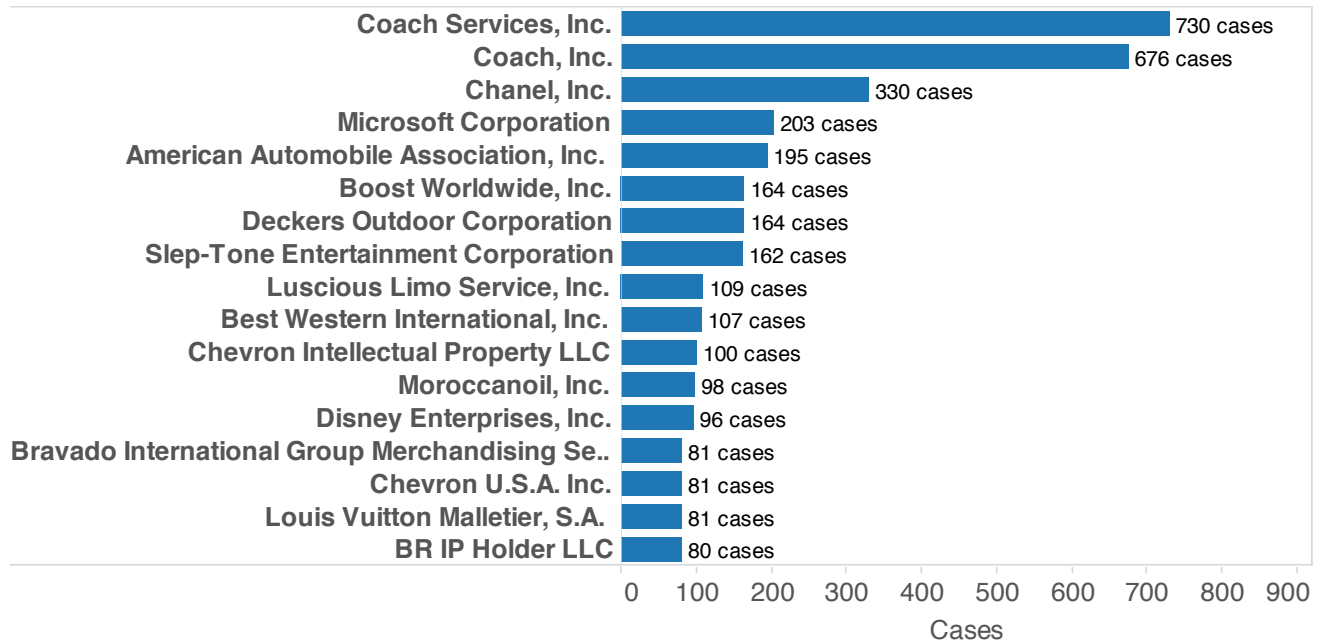
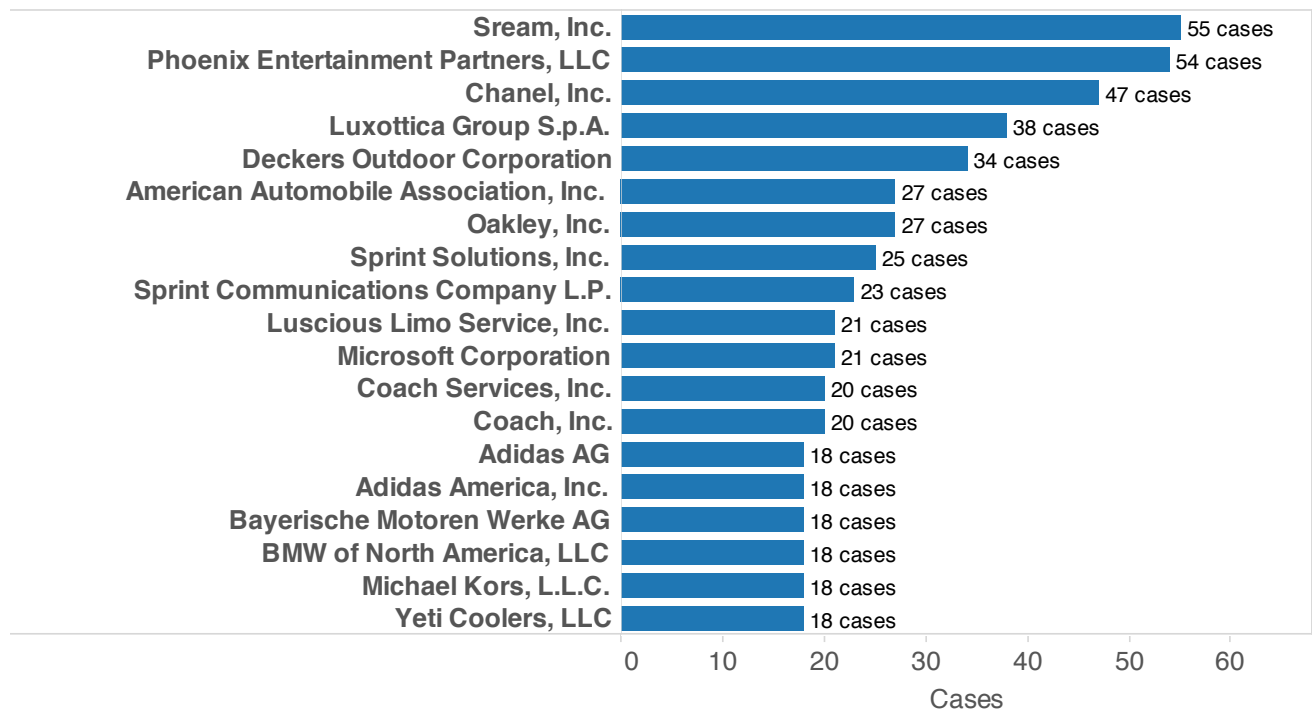


Fig. 31: Top plaintiffs, by cases filed Jan 2015 - Mar 2016



Coach is the leading plaintiff in trademark cases filed from January 2009 through March 2016 with 730 cases, followed by Chanel (330 cases) and Microsoft (203 cases). In the last 5 quarters, both Sream (55 cases - the maker of RooR water pipes) and Phoenix Entertainment Partners (54 cases - a theatrical production and management company that licenses karaoke) have filed more cases than Chanel (47 cases), or Coach (20 cases).

The National Football League (NFL) is the top defendant with 548 cases, although many of those cases are related to a single dispute between the NFL and former players over use of player likeness and were filed together in Q3 2014 in the District of Minnesota. After the NFL, the other top defendants are Syngenta Seeds (184 cases), Big Bad Limo Service (109 cases), Amazon.com (66 cases), and Walmart (59 cases). In the last 5 quarters, Syngenta Seeds is the most frequent defendant (140 cases).

Many of the individuals towards the bottom of the defendant charts may be aliases or pseudonyms - the cases attributed to these names may or may not relate to any single identity. They have been included to show the relative magnitude of litigation against such entities against that of the more recognizable names.

Two of the top defendants, WhoisGuard, and Domains by Proxy, are companies that offer anonymity and spam protection to owners of domain names. When registering a domain for a website, one must provide contact information to be included in the Internet's publically accessible WHOIS database. These companies provide a proxy address and email that customers can list in the WHOIS database. However, counsel attempting to determine the ownership of an infringing website often name them as a party when they appear in the WHOIS data for the website.

Top law firms representing plaintiffs include Goldberg, Perkys & White (542 cases), Stephen M. Gaffigan (539 cases), the Blakely Law Group (371 cases), and Kilpatrick Townsend & Stockton (366 cases). In the last 5 quarters, Stephen M. Gaffigan leads with 115 cases, followed by Greer, Burns & Crain (86 cases).

On the defense side, Greenberg Traurig is the top firm (with 161 cases), followed by Kilpatrick Townsend & Stockton (146 cases), and Lewis Brisbois Bisgaard & Smith (110 cases). In the last 5 quarters, Greenberg Traurig remains the leader (25 cases) with Gorden & Rees (24 cases) close behind.

Fig. 32: Top defendants, by cases filed Jan 2009 - Mar 2016

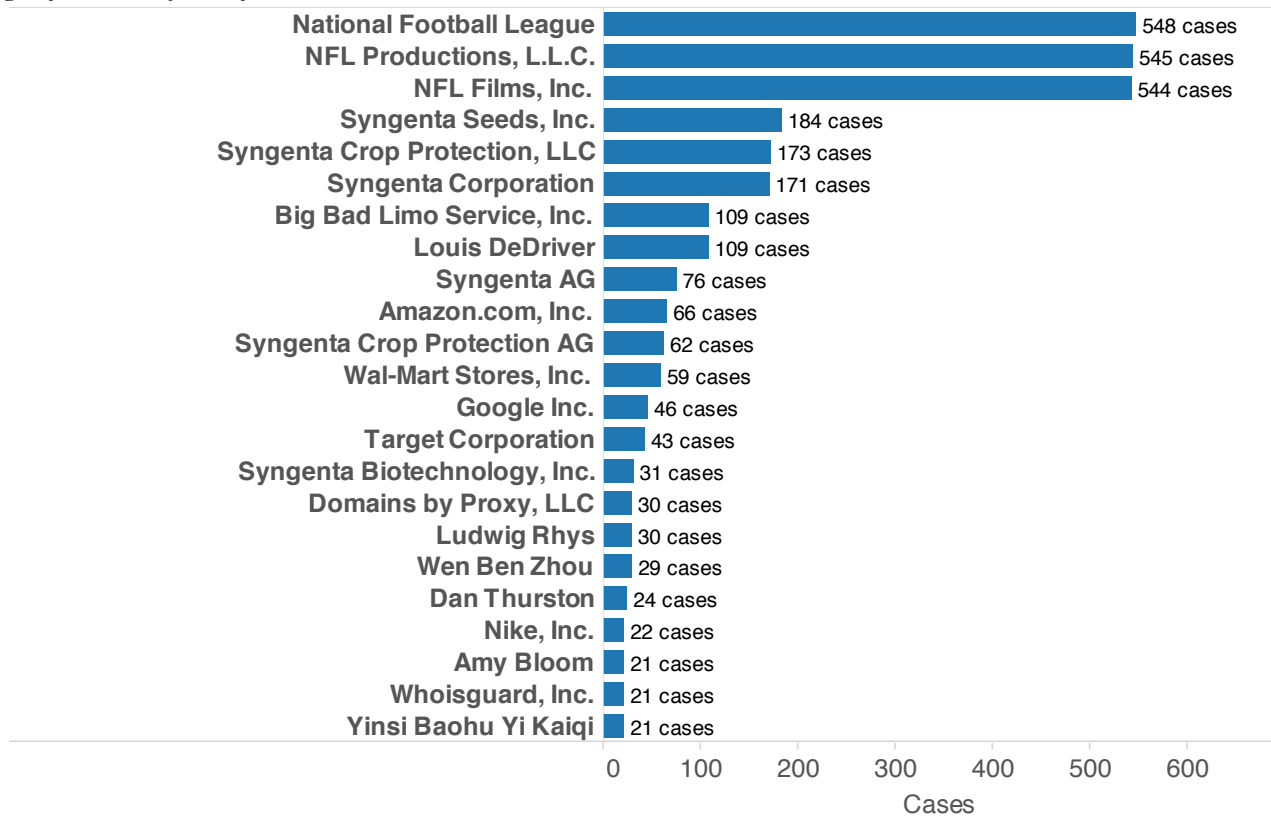


Fig. 33: Top defendants, by cases filed Jan 2015 - Mar 2016

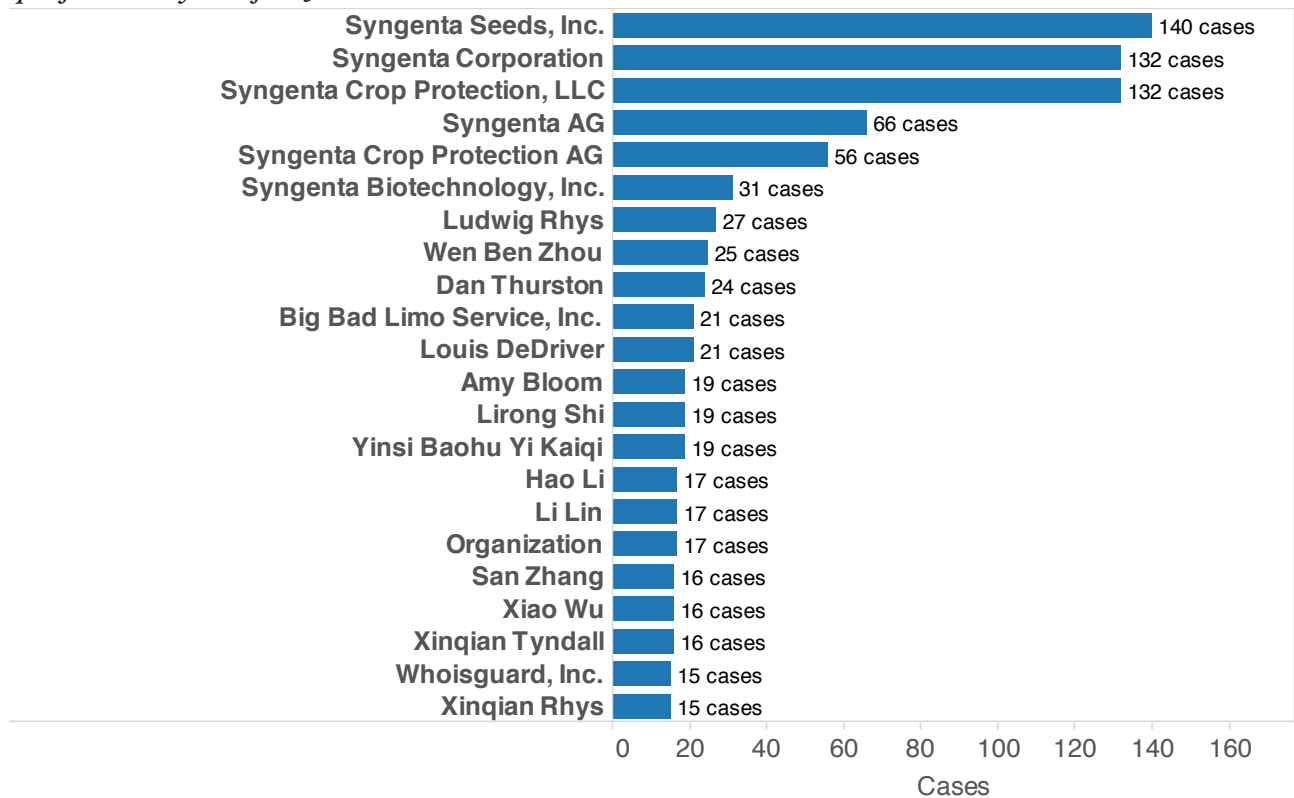


Fig. 34: Top law firms representing plaintiffs, by cases filed Jan 2009 - Mar 2016

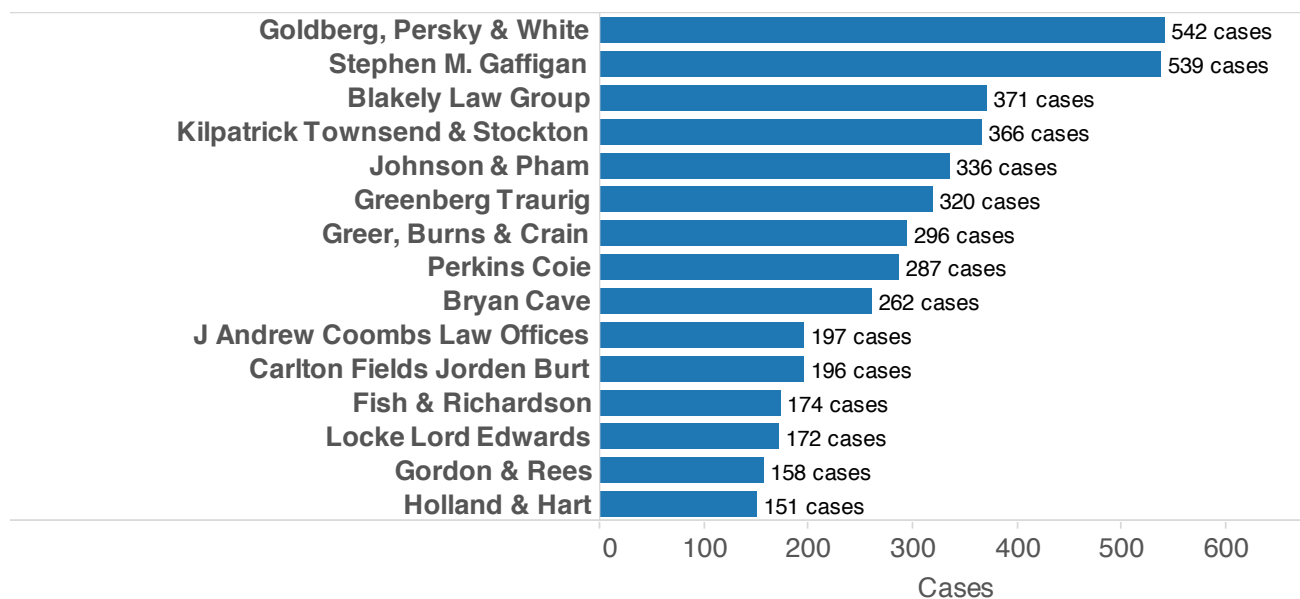


Fig. 35: Top law firms representing plaintiffs, by cases filed Jan 2015 - Mar 2016

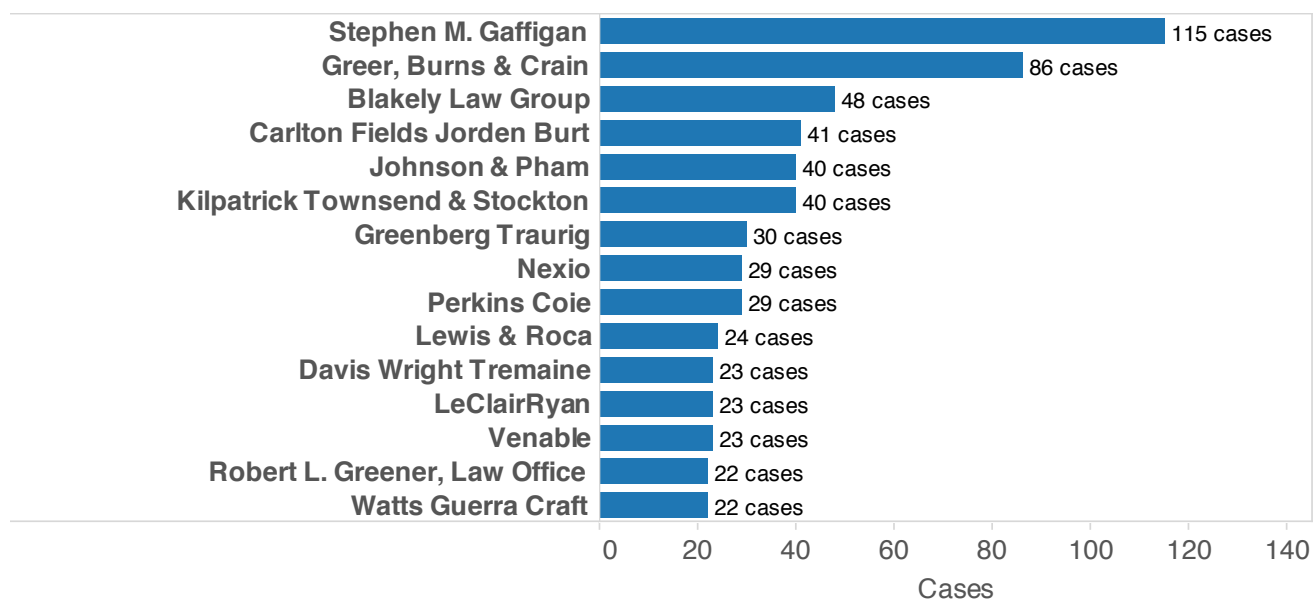


Fig. 36: Top law firms representing defendants, by cases filed Jan 2009 - Mar 2016

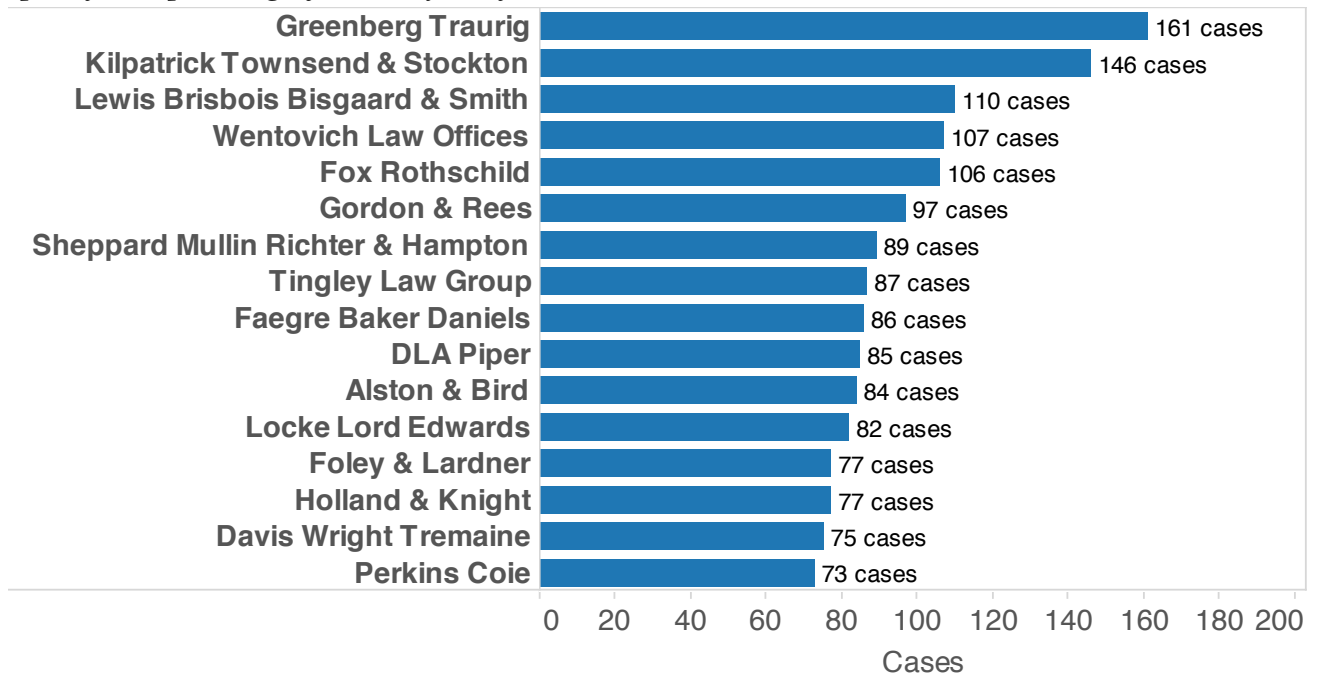
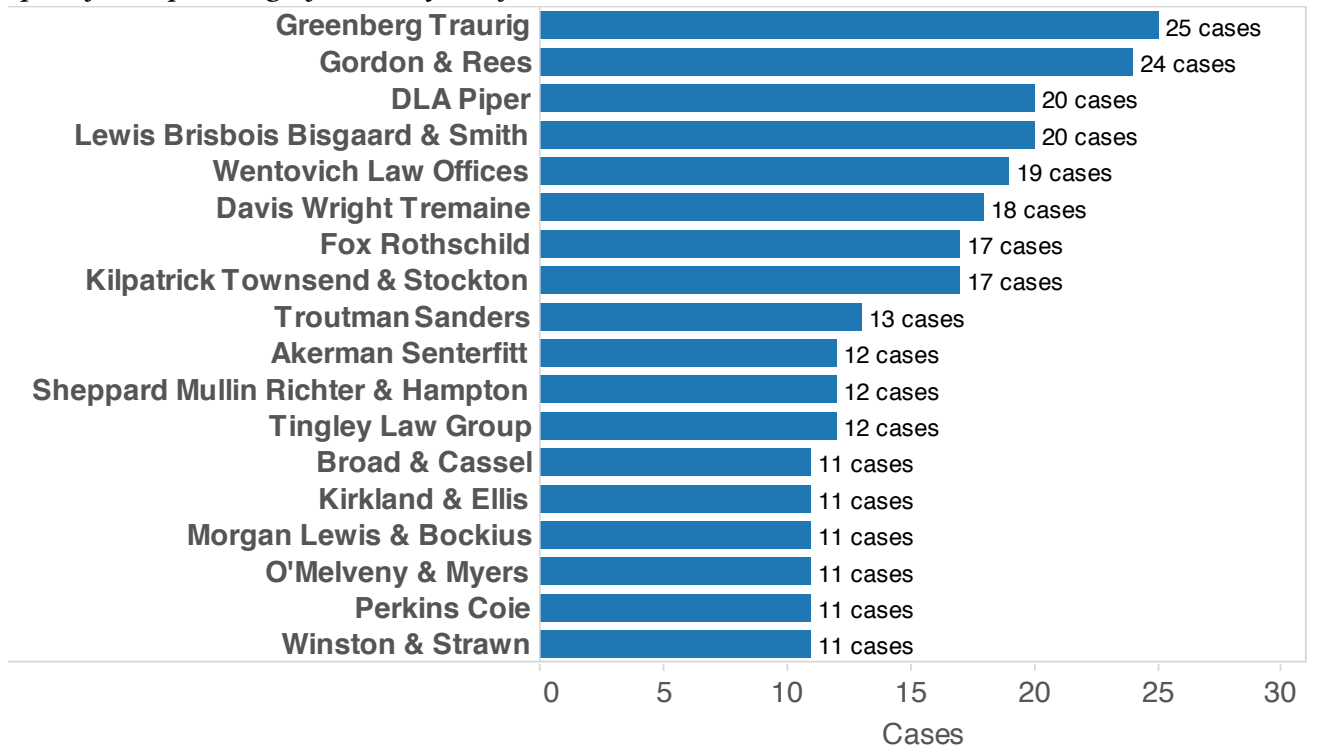


Fig. 37: Top law firms representing defendants, by cases filed Jan 2015 - Mar 2016

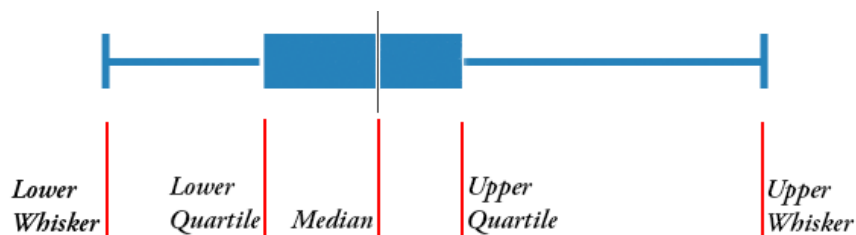


Using Boxplots to Understand Timing

Lex Machina’s analytics use a data visualization known as the boxplot to convey information about the timing of significant events in a case. Knowing how to interpret this data gives you an advantage when it comes to strategy, budgeting, and setting expectations, as well as in other decisions that involve case timing.

Consider a newly filed case: Regardless of whether you’re an outside counsel, say, trying to determine how large of a flat fee to charge or trying to make sure two trials don’t overlap, or an inside counsel estimating legal spend and evaluating a firm’s proposed budget, case timing matters. Knowing the lower and upper bounds of how long it may reasonably take the case to reach injunction can give both kinds of counsel a strategic advantage over opponents lacking such nuanced information. Moreover, knowing the best and worst case scenarios for timing, or exactly how likely it is that a case will be active in 6 months enables more far-sighted contingency planning.

A boxplot summarizes a series of data points to help you understand the shape, or distribution of the values in those points. The boxplot is drawn based on five numbers: the median, the upper and lower quartiles, and the whiskers for a distribution.



Paying attention to these key parts of the plot will help you quickly understand what you need to know. Although boxplots provide a wealth of information, the four observations below, in order from simplest onwards, are all one needs to easily grasp the significance of a boxplot.

Median: the middle dividing line of the box splits the data points evenly so that 50% fall to either side. It’s a form of average that gives a single number representation of what to reasonably expect.

Box bounds: the box encloses the middle-most 50% of the datapoints (from the 25th percentile to the 75th), with 25% of the datapoints falling outside to either side. This makes the box a good representation of the range one can reasonably expect.

Box compressed or elongated: a more compressed box means that more datapoints fall into a smaller range of time and therefore are more consistent; in contrast a longer box means that the datapoints are spread out over a wider time period and are therefore less predictable.

Whiskers: Whiskers are drawn to show the outside bounds of reasonable expectation, beyond which datapoints are considered outliers.¹

¹ By statistical convention, boxplots define outliers as points beyond more than 1.5 times the width of the box (sometimes called the “interquartile range”).



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