

# PUBLICATION

---

## Checking in on China: Developments in Litigation and Policy and How They Impact Foreign Intellectual Property

Authors: Emily R. Billig

December 05, 2017

**In the latter portion of 2017, announcements from both business and government have drawn renewed attention to the gradually increasing focus being paid by the Chinese government to protection of foreign intellectual property rights. In early August, U.S. sportswear giant Under Armour generated press from a favorable ruling out of a Chinese court in a trademark infringement lawsuit with Uncle Martian, a Chinese company. A few days later, it was reported that the Trump Administration was eyeing another aspect of China's policies towards intellectual property protection – those requiring joint ventures and other mechanisms to increase the flow of intellectual property from U.S. and other foreign companies into business entities and computer servers on the Chinese mainland. For a non-Chinese company looking to enter the Chinese market, expand an existing presence there, launch R&D facilities in China or otherwise, how should these developments affect those strategy decisions?**

While President Trump's August 14, 2017 memorandum to the United States Trade Representative and the administration's statements about China's trade policies highlight their negative effect on American economic interests, Under Armour's experience in the Chinese courts showed a more positive trend. In June 2016, Under Armour sued Uncle Martian to put an end to the latter's use of a logo that both Under Armour and many commentators characterized as a blatant copy of Under Armour's own house mark. The results of that challenge to date have been notable not only for their favorability to a U.S. entity but also for the location of the Chinese court in issuing them. By necessity, Under Armour brought suit not in Beijing or Shanghai, whose courts have a modest and fairly consistent track record of rulings in similar cases, but in Fujian province, where Uncle Martian is based. After winning an interim, or preliminary, injunction against Uncle Martian in November, Under Armour then convinced the Chinese court to order Uncle Martian to stop use of the infringing logo, destroy its products, pay \$300,000 in damages and issue a curative statement.

Discovery practice in Chinese courts, which is far less robust than that in, for example, the United States, often suppresses damage awards but also decreases the overall cost of litigation. Meanwhile, a recent ruling in China regarding the burden of proof for damage calculations may help boost those awards in many cases. At the same time, injunctions granted by Chinese courts can apply not just to products sold within Chinese borders but to exports of Chinese-manufactured goods. With the *Uncle Martian* case showing a continuation of the trend towards increased grants of injunctive relief by Chinese courts, China is quickly emerging as a desirable litigation forum, and already has several advantages over western courts for companies with sufficient product presence in China to benefit from rapid and low-cost injunctive relief.

While China shows increasing promise as a litigation forum for intellectual property infringement, it also appears to be facing increasing pressure to reform trade practices, which to date have not been as positive for foreign companies. One policy, in particular, currently under international scrutiny, is China's joint venture requirement, which requires companies in certain sectors to enter into joint ventures with Chinese companies as a condition of distributing their products in China, leading to an inevitable transfer of knowledge, and even some trade secrets, from foreign to Chinese entities. Also in June 2017, the Chinese government implemented a portion of a revised cybersecurity law which requires certain data collected from Chinese individuals and companies to be housed or stored locally on Chinese servers, raising data privacy concerns.

This month, the Trump Administration released a memorandum to the United States Trade Representative directing an examination of China's potentially unfair trade practices. That memorandum follows on the heels of other U.S.-China trade developments, including increased tariffs on Chinese imports of aluminum foil products. With rare exception, however, China's policies towards intellectual property protection for companies wishing to trade in China show no signs of any drastic change in the near future. One silver lining came earlier in 2017 when China's National Development and Reform Commission (NDRC) announced that it would ease joint venture requirements on the auto industry, which has historically been a means for Chinese automakers to build up the technology needed to compete with foreign car manufacturers by owning at least 50 percent of a joint venture with any foreign automaker that wished to distribute inside China's borders. So far, no concrete steps or timeline for easing these restrictions have been set.

From an intellectual property perspective, China is still a complex place to do business. For most foreign companies, the decision to enter the Chinese market, or expand an existing presence there, will be made solely or primarily on the basis of the size of China's economy, which is currently the fourth largest. Access for foreign companies to the Chinese marketplace, and to remedies from Chinese courts when intellectual property is infringed, is improving. However, broader policy changes are needed before China can truly be a friendly place for foreign businesses in terms of intellectual property protection on the front end. For the time being, foreign entities can feel relatively safe placing increased reliance on the Chinese legal system for injunctive relief, which ought to factor more heavily into the brand protection strategy of those companies for which the Chinese marketplace is a business reality.