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INTERVENTION

I Will Protect this House: US Sport Brand Trademark Infringement Claims in China

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In 2017, two US sport brand companies, Under Armour and New Balance, won trademark infringement cases in China. These victories demonstrated a potential turning point in Chinese trademark law and the protection of foreign company marks. The country has long been plagued with rampant counterfeiting and trademark squatting issues, but since China's acceptance into the World Trade Organization in 2001, the country has made moves to improve its trademark laws through two amendments. China's first amendment occurred in 2001. However, this amendment suffered from multiple vulnerabilities, providing loopholes for foreign trademarks to be infringed upon. The most recent amendment, which was enacted in 2014, provides stronger protections and resolves the vulnerabilities of its predecessor. This article discusses the limitations of the 2001 amendment and the opportunities afforded to foreign brands for trademark protection under the 2014 amendment. The Under Armour and New Balance cases are discussed as examples of a new trademark enforcement paradigm in China. Recommendations for foreign brands seeking to expand and protect their trademarks are also provided.

Keywords: China trademark law; trademark infringement; trademark squatting; New Balance; Under Armour; sport brand

Introduction

With China's rapid economic growth, the country has emerged as the second largest global economy and a desirable market for foreign companies (Swamidass & Swamidass 2014). Specifically, China's major cities – Beijing, Shanghai, and Guangzhou – provide opportunities for global commerce and trade (Kossof 2014). Although many foreign companies have been conducting business in China for decades, they have often faced obstacles due to China's ineffective trademark laws (Chang 2014). Legal protection of trademarks is critical for the success of any business abroad, as these marks communicate product quality and brand reputation to consumers (Nguyen 2017). The inadequacy of China's trademark laws in protecting foreign marks allows multinational companies to be victimised by trademark squatting (Chow 2015). Trademark squatting is a practice by local Chinese individuals and companies to register and hold hostage foreign companies' trademarks to gain benefit from the original trademark's reputation (Sangsuvan 2013).

China's current trademark system was introduced by the Standing Committee of the National People's Congress in 1982, and has since been amended three times (Zhang, Wei, & Li 2014). The most recent amendment in 2014, came in response to China's explosive economic growth, a desire for foreign investment and international pressure for change (John 2017). This article explores the evolution of Chinese trademark law by exposing the pitfalls in China's 2001 trademark law amendment, discusses the improvements of the 2014 amendment, and highlights the new amendments' impact on two recent US sport brand cases regarding Under Armour and New Balance.

2001 Trademark Law Amendment

The second amendment to the Chinese trademark law was passed in 2001 (World Trademark Review 2017) in response to China gaining membership into the World Trade Organization (WTO) and the need to bring the country's laws into compliance with the obligations of the WTO and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreements (John 2017). Despite acceptance into the WTO, China's newly amended trademark laws still enabled trademark infringement. Between 2011 and 2013, 63.2 percent of all fake products seized in the world originated from China (Bambrough 2016); footwear was the most duplicated, and Nike, Rolex, and Louis Vuitton were the most counterfeited brands (Rodionova 2016). Several foreign companies, including Apple, Pfizer, New Balance, and Tesla, have attempted to litigate trademark infringement claims in China, but have not been successful in the courtroom (Doland 2015). There were two major impediments to effective trademark protection under the 2001 Trademark Law: the first-to-file rule and the single-class filing system (Chang 2014).

China's first-to-file rule gives an applicant priority based on the time the application was submitted (Anderson, Chan & Tian 2013). Article 29 outlined the first-to-file requirement: 'where two or more applicants apply for the registration of identical or similar trademarks for the same or similar goods, the preliminary approval, after examination, and the publication shall be made for the trademark which was first filed….' (Trademark Law of the People's Republic of China, Chpt. III, Article 29 2001). While this may seem fair, it was problematic because China did not require proof of use of the trademark in commerce (Marquez 2011). Without a use in commerce requirement, trademark squatters were able to register foreign companies' popular marks first, keep them dormant, and attempt to sell or license the trademark back to the original owner (Sangsuvan 2013). However, the WTO required its members to have a 'prior rights' provision, to alleviate prejudices against existing intellectual property rights (Lee & Mehaffy 2015). Article 31 of the 2001 Trademark Law outlined China's 'prior rights' language: '[n]o applicant for trademark application may infringe upon another person's existing prior rights, nor may he, by illegitimate means rush to register a trademark that is already in use by another person and has certain influence' (Trademark Law of the People's Republic of China, Chpt. III, Article 31 2001). This language appeared to protect individuals' or foreign companies' prior rights and to solve issues resulting from the first to file rule, but it failed to include a definition of prior rights and a mechanism for plaintiffs to bring prior rights claims, ultimately rendering the provision futile (Lee & Mehaffy 2015). Additionally, the Paris Convention and TRIPS agreement required its members to recognise unregistered well-known marks, another potential protection against the first-to-file rule (Marquez 2011). A well-known mark is a trademark that has acquired a strong reputation and influence among a specific public (Sun & Wu 2016). Protection for such marks was rooted in Article 13 and 14 of the 2001 Trademark Law. Article 13 stated:

> Where a trademark in respect of which the application for registration is filed for use for identical or similar goods is a reproduction, imitation or translation of another person's trademark not registered in China and likely to cause confusion, it shall be rejected for registration and prohibited from use. (Trademark Law of the People's Republic of China, Chpt. III Article 13 2001)

Article 14 articulated several factors the Chinese courts used to determine whether a mark was well known:

> (1) reputation of the mark to the relevant public; (2) time period for continued use of the mark; (3) consecutive time, extent and geographical area of advertisement of the mark; (4) records of protection of the mark as a well-known mark; [and] (5) any other factors relevant to the reputation of the mark. (Trademark Law of the People's Republic of China, Chpt. III, Article 13 2001)

These factors created a high evidentiary burden for foreign trademark owners to prove well-known status in Chinese courts. For example, in 1993, Ferrari registered the prancing horse design with the Ferrari print combination in China (Luo & Ghosh 2009). In 1995, a Chinese department store, White Clouds Sports Merchandise, registered the prancing horse design to be used on a clothing line (Harris 2007). Ferrari filed a timely opposition to the mark, arguing that the mark was confusingly similar to its Ferrari and prancing horse design. The Beijing First Intermediate Court rejected this argument and Ferrari appealed the decision arguing for the well-known status of the prancing horse design (Luo & Ghosh 2009). The court again rejected Ferrari's argument, citing three reasons: (1) Ferrari failed to establish sufficient use and advertisement of the horse mark, (2) the recognition of 'Ferrari' as a famous trademark does not extend to the Ferrari horse graphic; and (3) the Ferrari trade-name is not at issue in this case, and it cannot extend its protections to the horse design (Harris 2007). Ferrari was not the only company to have difficulty proving the well-known status of its mark. In fact, well-known status for foreign companies was so difficult to achieve that between 2012 and 2013 only 20 out of the 1,300 trademarks endorsed as well-known in China belonged to foreign companies (Choi & Chan 2014).

The second impediment to the 2001 Trademark Law was China's single-class filing system (Van Someren & Van Someren-Wang 2013). Trademarks are often categorised in various classes under the International Classification of Goods and Services for the Purposes of Registration of Marks (the Nice Classification List) (WIPO 2018). Products are grouped by function or, if no apparent function, its material composition and services are grouped by services performed (China Global 2017). There are thirty-four classes of products and eleven classes of services in the Nice Classification List (Chang 2014). Chinese trademark law only allowed for an applicant to file a trademark under one classification per application. If an applicant intended to use the trademark in more than one of the categories, they needed to submit a separate application (Campbell & Pecht 2012). The single-class filing system differed from other countries filing systems where applicants can file in multiple classes with one application (Keepax & Cassidy 2014). This single-class filing system has caused numerous problems for foreign companies. For instance, Apple filed for the iPhone trademark in 2002 in the class designated to 'computers and computer software' (Chang 2014). By only filing in one category, Apple opened the door for a Chinese company, Xintong Tiandi Technology (Beijing) Co, Ltd., to register the iPhone mark under the leather product category in 2007 (Mozur 2016). Apple sued the Chinese technology company to cancel the mark, arguing that iPhone was a well-known name in China since 2007, but lost in the lower court and on appeal to the Trademark Review and Adjudication Board (TRAB) (Yan & Dong 2016), resulting in Apple being forced to pay $3.65 M for the iPhone trademark (Chang 2014).

2014 Trademark Law Amendment

China's current trademark law was approved on 30 August, 2013 and went into effect on 1 May, 2014 (Mao 2014). The new law implements changes to help resolve the lingering issues from the 2001 amendment. The 2014 amendment addresses the Article 31 'Prior Rights' provision by adding Article 33, which provides a specific challenge mechanism to allow for prior right holders to challenge a mark registered in appropriation of those prior rights (Lung Tin Intellectual Property Agent LTD 2014). Article 33 allows for oppositions to be filed under either absolute grounds or relative grounds (Kossof 2014). Several other provisions were added in the 2014 amendment to aid foreign companies with protecting their marks in China, such as a holder of prior rights or an interested party can bring a claim alleging: violation of well-known marks (Trademark Law of the People's Republic of China, Chpt. III Article 13 2014); the applicant is aware of the existence of the plaintiff's trademark due to a contractual or business relationship (Trademark Law of the People's Republic of China, Chpt. III Article 15 2014); or the mark bears a misleading geographical location (Trademark Law of the People's Republic of China, Chpt. III Article 16 2014). An interested party can also assert the mark conflicts with plaintiff's prior applications or preliminary approved marks (Trademark Law of the People's Republic of China, Chpt. III Article 30 2014) or the application creates prejudice for the plaintiff's prior rights with their mark in which they enjoy some reputation (Trademark Law of the People's Republic of China, Chpt. III Article 31 2014).

Additionally, China has modernised the trademark application process by accepting electronic filings. This allows for applicants to make changes after the application has been submitted without waiting for the application to be rejected and returned (Nguyen 2017). Furthermore, the 2014 law now permits trademark applicants to register a trademark in multiple classes under one application, replacing China's previous single-class filing system (MMLC Group, China 2018). This is a welcomed change to help simplify the registration process and avert trademark squatters from registering well-known trademarks in different classes. Further, the new law includes a principle of good faith in trademark use and registration clause (Trademark Law of the People's Republic of China, Chpt. III Article 13 2014). Article 13 serves as a catch-all clause to guard against any bad faith registrations that may not be precluded in other areas of the law. Applicants will now be rejected if they attempt to register a trademark that imitates a registered mark in a different classification (Anderson et al. 2013). Lastly, the 2014 amendment increases the cap of statutory damages from RMB 500,000 to RMB 3,000,000 (from approximately US $75,000 to $435,000) and allows for punitive damages up to three times the normal damages (Chang 2014). China's recent amendment has already started to impact litigation results for foreign-based companies, as seen in the Under Armour and New Balance cases.

Under Armour v. Tingfei Long Sport Goods, Co

In the summer of 2016, Under Armour filed a lawsuit for trademark infringement against a Chinese sports manufacturer, Tingfei Long Sport Goods, Co. (Tingfei), for its Uncle Martian line (Linder 2017). A year later the People's Higher Court of Fujian Province issued a judgment in favour of Under Armour (Machar 2017). The court determined that Tingfei's Uncle Martian line directly infringed on Under Armour's registered trademarks (Ma 2017). The court found basis for its ruling in Article 57 of the new trademark law, which prohibits individuals and companies from using a mark that is similar to a registered trademark on the same kind of goods or an identical mark to a registered mark on similar goods that is likely to cause confusion (Dresden 2017). The court compared the two companies' logos and ascertained that both utilised a graphic in the top portion of the logo and English writing in the bottom portion. Additionally, both graphics contain two U shapes, with the Under Armour logo U's intersecting and the Uncle Martian logo U's touching at the U bases (see https://www.chinalawblog.com/2017/08/china-trademarks-under-armour-vs-uncle-martian-part-two.html) (Dresden 2017). The Fujian court concluded that because the Uncle Martian logo was so similar to the Under Armour logo and used on similar products it was likely to cause consumer confusion as to the origin of the product (Lim 2017). Further, the Fujian court determined that Tingfei's blatant infringement of Under Armour's registered trademarks, including having the Chinese transliteration for Under Armour on their business cards, amounted to unfair competition (Tso & Yu 2017). Tingfei's actions were a clear attempt to free ride on Under Armour's goodwill and mislead consumers to improperly obtain market share (Encina 2017). To determine damages for Tingfei's infringement, the court looked to Article 63 of the 2014 Trademark Law, which outlines the process for determining damages:

> The amount of damages for infringing the exclusive right to use a trademark shall be actual losses that the right owner has suffered as a result of the infringement during the period of the infringement; where the losses suffered by the right owner cannot be determined, the amount of damages for trademark infringement shall be the profits that the infringer has earned as a result of the infringement during the period of the infringement; where the losses suffered by the right owner, or the profits earned by the infringer, cannot be determined, the amount of damages shall be determined based on a reasonable amount that would be paid for a licensing royalty for the trademark right. If there is malicious infringement and an existence of serious circumstances, the amount may be more than one up to three times the aforesaid determined amount. The amount of damages will also include reasonable expenses the right owner has suffered to prevent the infringement … Where the actual losses suffered by the right owner, the profits earned by the infringer, or the licensing royalties of trademark infringement cannot be determined, a People's Court shall award damages up to RMB 3,000,000, depending on the facts of the case. (Trademark Law of the People's Republic of China, Chpt. III Article 63 2001)

Under Armour sued for US $15 million in damages, but they could not prove actual damages or profits made from Tingfei's infringement since the lawsuit was filed before Tingfei distributed the infringing products (Lou 2017). The court based its decision on other various factors including: '(1) the reputation of Under Armour, (2) the subjective malice of Tingfei, (3) Tingfei's act constituting both trademark infringement and unfair competition, (4) Under Armour's reasonable expenses for ceasing the infringement act (including the attorneys' fees)' (Tso & Yu 2017). The court ordered Tingfei to destroy all of the infringing products, publish a public statement to reduce adverse effects of the infringement and pay RMB 2,000,000 or about US $300,000 (Encina 2017). While US $300,000 is not a large monetary settlement, it represents a massive victory for Under Armour and protection of their rights. Shortly after the Under Armour case was decided, another Chinese court issued a landmark judgment in favour of the sport brand New Balance.

New Balance v. New Boom

For over a decade New Balance has struggled to protect its trademarks in China. It all started in 2004 when a Chinese businessman, Zhou Lelun, applied for the Chinese transliteration of New Balance, Xin Bai Lun (Hak 2017). Transliteration occurs when words from one language, typically an alphabet language, are translated into Chinese characters (Baker et al. 2017). New Balance filed a timely opposition, but it was rejected by the Chinese Trademark Office and Zhou was granted the trademark (Hak 2017). Then in 2013, Zhou sued New Balance for infringement of his protected mark and the court ruled in his favour for $15.8 M in damages. New Balance appealed the decision, but the ruling was upheld; however, damages were decreased to $750,000 (Thomas 2017). New Balance did not let this setback discourage them from continuing to aggressively protect its marks in China.

On 1 August 2016, New Balance sued five defendants in the Suzhou Intermediate People's court arguing unfair competition, under the Anti-Unfair Competition Law, for use of New Balance's unique trade dress (slanted *N* logo) on a well-known commodity (sport shoes) (Agence France-Presse 2017) (see https://hypebeast.cn/2017/8/new-balance-win-chinese-counterfeiters-lawsuit) (Jas 2017). New Balance requested an injunction to require the immediate halt on production and distribution of the product, which was granted, but ignored by the defendants (Xue 2017). Consequently, in August 2017, the Suzhou Intermediate People's Court ruled in favour of New Balance requiring the domestic shoemakers to pay $1,500,000 in damages and legal costs (Hancock 2017). To date, this victory is the largest trademark infringement award ever granted to a foreign business in China and a sign that Chinese courts will punish defendants who willingly violate court ordered injunctions (Xue 2017). The court said the defendants 'had relied on "malice of free-riding"', saying their actions led to 'confusion by a large number of consumers' (Shomade & Ude 2017 para. 1). The court opinion explained that the defendants had appropriated market share from New Balance and had injured New Balance's business reputation in China (Wee 2017). New Balance's senior counsel, Daniel McKinnion, said the ruling gave New Balance 'a renewed confidence in [their] aggressive intellectual-property protection strategy within China' (Wee 2017 para. 6).

The Anti-Unfair Competition Law offers corresponding protection for trademarks. However, if both the Anti-Unfair Competition Law and trademark law are available, trademark law will prevail (Lim 2017). Unregistered marks may seek protection under the Anti-Unfair Competition Law that states:

> A business operator shall not harm his competitors in market transactions by resorting to any of the following unfair means:
> 1. Counterfeiting a registered trademark of another person;
> 2. Using for a commodity without authorization a unique name, package, or decoration of another's famous commodity, or using a name, package or decoration similar to that of another's famous commodity, thereby confusing the commodity with that famous commodity and leading the purchasers to mistake the former for the latter;
> 3. Using without authorization the name of another enterprise or person, thereby leading people to mistake their commodities for those of the said enterprise or person; or
> 4. Forging or counterfeiting authentication marks, famous-and-excellent-product marks or other product quality marks on their commodities, forging the origin of their products or making false and misleading indications as to the quality of their commodities. (Law of the People's Republic of China Against Unfair Competition, Chpt II, Art. 5 2018).

The Anti-Unfair Competition Law provides additional legislation for foreign companies to protect their intellectual property rights.

Recommendations to Sport Brands

Based on the outcomes in the Under Armour and New Balance cases, it seems that China no longer wants to be known as the country that enables counterfeiting. China has stepped up to not only make changes to its law, but also to affirm its initiatives in court rulings. The 2014 amendment to the Chinese Trademark Law may not solve or close all of the loopholes to China's trademark squatting problem (China still operates under a first-to-file system), but it certainly sends a message to Chinese individuals and companies, as well as, foreign companies that China values trademark protection. The recent rulings in favour of Under Armour and New Balance echo the sentiment of China providing greater trademark protection for foreign companies.

China is experiencing a government-backed physical fitness boom, resulting in an 11% increase in sportswear sales between 2016 and 2017 (Hancock 2017). To take advantage of this strong market, sports companies must protect their intellectual property abroad. First, companies should be aggressive in their trademark protection strategy. This includes actively monitoring the Chinese Trademark Office's publications of trademarks to ensure timely opposition filings and utilizing multiple laws (e.g., Anti-Unfair Competition Law) to bring claims. Second, when filing a trademark application, companies should file under all appropriate classifications, to avoid situations similar to that experienced by Apple. In addition, companies should consider filing trademark applications for the company's existing brand name, as well as, the Chinese translation and transliteration of the brand name. Lastly, both Under Armour and New Balance hired in-country counsel to assist with the litigation process. A domestic counsel is a great resource because of their familiarity with China's legal customs and legal system.

Conclusion

China has made vast improvements with their trademark laws, but a recent survey by the World Intellectual Property Review found 80% of its readers believed China still needs to do more to protect intellectual property rights in the country (WIPR 2018). However, the New Balance and Under Armour rulings offer hope that China is starting to take a strong stance on the protection of foreign companies' intellectual property. Unfortunately, it is too early to determine whether there will be consistency in Chinese court rulings, particularly, because China does not have common law and is therefore not bound to precedent. Although not all of the trademark law inefficiencies have been resolved, there is definitely momentum to bring China's trademark law up to par with its global peers.

Competing Interests

The authors have no competing interests to declare.

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