

3 myths about China's IP regime

Dan Prud'homme

Harvard Business Review (October 23, 2019)

<<https://hbr.org/2019/10/3-myths-about-chinas-ip-regime>>

Is China's intellectual property (IP) regime really all that bad? It has become generally accepted that the ongoing U.S.-China trade war is at least partially in response to Communist China's practice of forcing technology transfers and its extremely poor protection of IP. But China's IP regime is not as bad as the ongoing trade war narrative suggests. Instead, I see a paradox in China's IP regime: while certainly risky in a number of ways, it is often less risky than many Western executives assume. Three myths about China's IP regime hold back executives considering investments in the country – and the ability to see through these offers much needed nuance when strategizing for the Chinese market.

The first myth is that state-sponsored “forced” technology transfer (FTT) in China is ubiquitous. In fact, while interviewing and surveying multinational executives in China, I have found that the most egregious Chinese [policies](#) coercing technology transfer do not appear to be commonly faced by foreign firms in recent years. And the most commonly cited examples of [less egregious policies](#), which more transparently mandate technology transfer for market access, have usually been confined to a handful of industries. Further, the rest of China's controversial [technology transfer policies](#), while problematic in terms of transaction costs, typically do not result in unmanageable losses of value captured by foreign firms. In other words, although there were technology transfer policies in China at the start of the trade war that violated free-trade norms, they were not as widespread or always as consequential as many assume. All this helps explain why only 8% of respondents to a foreign industry association [survey](#) in the lead up to the trade war reported that expectations of technology transfer in China were a top IP challenge for them. “Theft” of IP by employees and cyber-hacking, behavior which is distinguishable from FTT policies, may also be more sporadic than many assume: 13% and 8%, respectively, of respondents on a recent foreign industry association [survey](#) reported that they faced these issues in China.

Moreover, in 2018 and 2019 – clearly in response to the trade war – the Chinese government rapidly instituted a number of [significant reforms](#) to the majority of its most controversial technology transfer policies. Recent reforms have also been made to China's [IP court infrastructure](#) that should help mitigate the effects of discriminatory treatment of foreign IP in local courts, a type of FTT policy. These changes join other business-friendly reforms this year to China's [unfair competition law](#) (which governs trade secrets) and trademark law.

The second myth is that China's IP regime is categorically weaker and therefore less business-friendly than those of rich nations such as the US. In fact, even though there are a number of shortcomings in the IP institutions in China, those same institutions are, generally-speaking, capable of reasonably [protecting IP rights](#). Moreover, in some ways China's IP regime is [actually](#)

more optimal for IP-intensive businesses – including foreign ones – than the IP regimes in prominent rich nations. For example, in terms of law, Non-Compete Agreements are allowed in China but not in some US states (e.g., California). In terms of IP regulations and administration, business methods are easier to patent in China than in the US and Europe, and certain biotechnology and software are patentable in China but not in the US. There is faster invention patent pendency (time to grant patents) in China than at the European Patent Office (EPO) and US Patent & Trademark Office (USPTO), and invention patent examination appears to be of higher quality in China than at some national offices in Europe. In terms of IP enforcement, there are lower attorney and court costs for IP litigation in China than the US and various other major jurisdictions, there are faster IP trials in China than other major markets, the “local administrative enforcement” route in China offers potentially more efficient enforcement options than available in rich nations, and there is arguably less risk of patent trolls in China than in the US due to the design of Chinese legal institutions. At the same time, [foreigners win most of the IP infringement cases they bring in China](#).

The third myth is that because China is not a Western-style liberal democracy, its governing institutions will never seriously respect IP. Politics certainly matter to economic governance in any country. But there are several reasons why a liberal democracy is probably not necessary to adequately protect IP. For starters, some countries that are not liberal democracies respect the rule of economic law needed to protect IP just as well if not better than liberal democracies. For example, Singapore is not a [typical “liberal” democracy](#) yet it has [one of the best reputations](#) globally for protecting IP, foreign IP included.

What’s more, having a liberal democratic political system does not actually ensure state compliance with rule of international economic law, despite its clearer ability to safeguard sociocultural rights. In fact, some iconic liberal democracies frequently violate international legal norms by discriminating against foreign businesses. Among other examples, there appears to be a persistent anti-foreign bias in IP litigation [in Canada](#); potential discrimination against foreigners during the patent examination processes at [the EPO, Japanese Patent Office](#), and [in other liberal democracies](#); and, more generally, the US and EU are the [world’s leading defendants in WTO cases](#) and have the worst records in terms of timely and full [compliance](#) with WTO judgments.

The debunking of these three myths illustrates that China’s IP regime may be much less risky than Western executives have often assumed. At the same time, no mistake should be made: IP infringement remains a significant problem in China and the country’s IP protection regime still has shortcomings. In response, parts of each major component of China’s IP regime – laws and regulations, enforcement, administration, and other policies – [require reform](#) to more efficiently and effectively protect IP.

Responding to this paradoxical reality surrounding China’s IP protection regime demands a more nuanced two-pronged approach to strategizing for the Chinese market. First, Western executives should not assume that Chinese IP institutions are incapable of safeguarding returns on assets. In fact, multinationals can often more confidently exploit technology and brands in China [to keep pace with increasingly innovative Chinese rivals](#).

Second, Western executives should join together to more constructively facilitate further reforms to China's institutions, including its IP regime. Further escalating tensions in the trade war may create more harm than benefits to Western multinationals: for example, Chinese firms' state-supported drive to become less dependent on [foreign](#) technology/suppliers may accelerate even faster and [Chinese](#) household consumers' backlash against American brands [may worsen](#). Meanwhile, as the trade war continues, U.S. businesses should properly separate myth from reality when considering investment in China.

References:

Allison, G., 2015. Singapore challenges the idea that democracy is the best form of governance. World Post, available at <https://www.hks.harvard.edu/publications/singapore-challenges-idea-democracy-best-form-governance>

AmCham, 2018. AmCham China 2018 Business Climate Survey, available at <https://www.amchamchina.org/policy-advocacy/business-climate-survey/2018-business-climate-survey>

AmCham, 2019. AmCham China 2019 Business Climate Survey, available at <https://www.amchamchina.org/policy-advocacy/business-climate-survey/>

Cohen, M., 2019, A Federal Circuit with Chinese Characteristics: The launch of China's New National Appellate IP Court, available at <https://chinaipr.com/2019/01/04/a-federal-circuit-with-chinese-characteristics-the-launch-of-chinas-new-national-appellate-ip-court-%E4%B8%AD%E5%9B%BD%E7%89%B9%E8%89%B2%E7%9A%84%E8%81%94%E9%82%A6%E5%B7%A1/>

Cohen, M., 2016. Patent litigation, local protectionism and empiricism: data sources and data critiques. China IPR, available at <https://chinaipr.com/2016/03/10/patent-litigation-local-protectionism-and-empiricism-data-sources-and-data-critiques/>

deRassenfosse, G., Jensen, P., T'Mir, J., Palangkaraya, A., Webster, E., 2019. Are foreigners treated equally under TRIPS? SSRN, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3434547

Hogan Lovells, 2019. Lightning fast IP reform in China: Trademark Law and Anti-Unfair Competition Law amended.

Mai, J., Stoyanov, A., 2019. Anti-foreign bias in the court: Welfare explanation and evidence from Canadian intellectual property litigations. Journal of International Economics 117, 21-36.

Prud'homme, D., von Zedtwitz, M., 2018. The changing face of innovation in China. *MIT Sloan Management Review* 59, 24-32.

Prud'homme, D., von Zedtwitz, M., Thraen, J., & Bader, M., 2018. "Forced technology transfer" policies: workings in China and strategic implications. *Technological Forecasting & Social Change* 134, 150-168.

Prud'homme, D., 2019a. Re-conceptualizing intellectual property regimes in international business research: foreign-friendliness paradoxes facing MNCs in China. *Journal of World Business* 54, 399-419.

Prud'homme, D., 2019b. Reform of China's 'forced' technology transfer policies. *University of Oxford Business Law Blog*, available at <https://www.law.ox.ac.uk/business-law-blog/blog/2019/07/reform-chinas-forced-technology-transfer-policies>

Prud'homme, D., von Zedtwitz, M., 2019. Managing "forced" technology transfer in emerging markets: the case of China. *Journal of International Management* 25, 1-14.

Prud'homme, D., Zhang, T., 2019. *China's Intellectual Property Regime for Innovation: Risks to Business and National Development*. Springer.

Reich, A., 2017. The effectiveness of the WTO dispute settlement system: A statistical analysis. *European University Institute Department of Law Working Paper*, available at http://cadmus.eui.eu/bitstream/handle/1814/47045/LAW_2017_11.pdf?sequence=1

US Chamber, 2018. *US Chamber International IP Index, Sixth Edition*. US Chamber of Commerce Global IP Center, available at <https://www.theglobalipcenter.com/ipindex2018/>

Vines, S., 2018. Why consumer boycotts of US brands in China might hit Chinese companies the hardest. *South China Morning Post*, available at <https://www.scmp.com/comment/insight-opinion/united-states/article/2161671/why-consumer-boycotts-us-brands-china-might>

Webster, E., Jensen, P., Palangkaraya, A., 2014. Patent examination outcomes and the national treatment principles. *The RAND Journal of Economics* 45, 449-469.

WTO, 2019. Disputes by member, available at https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm