

eCONTROL CHINA

Control & Grow Your Brand in the World's Largest eCommerce Market



VORYS
eCONTROL

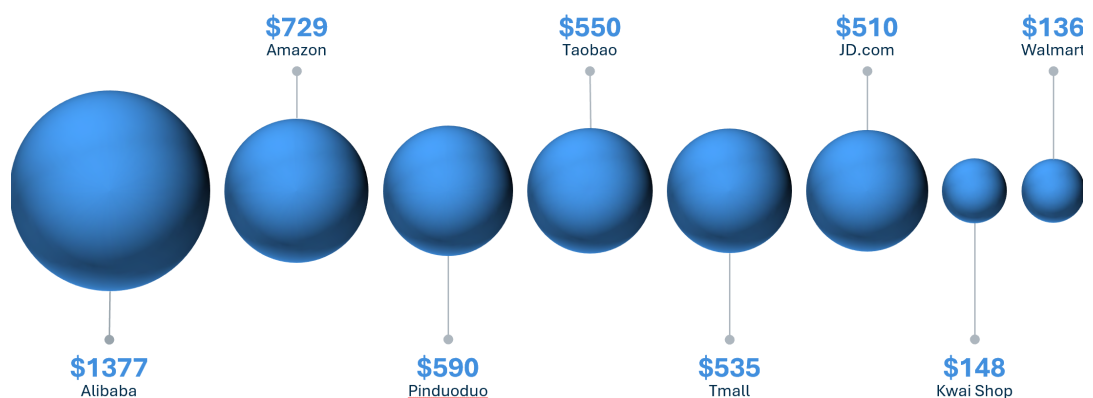
econtrol@vorys.com
vorysecontrol.com

CHINA is the largest eCommerce market in the world, accounting for over 50% of global eCommerce transactions¹ and generating a projected \$1.469 trillion in revenue by year-end 2024. With the eCommerce market expected to grow at an annual rate of 9.95% over the next five years, reaching an estimated \$2.361 trillion by 2029, eCommerce user penetration in China is projected to rise from 78.8% in 2024 to 97.4% by 2029².

\$1.469 t
revenue in 2024

9.95%
eCommerce growth
over next 5 years

The eCommerce market is dominated by domestic platforms such as Alibaba's Taobao and Tmall (50.8% market share), followed by JD.com (15.9%) and Pinduoduo (13.2%)³. To state the obvious, China presents a massive opportunity for international brands seeking sales growth—one that in many instances can dwarf that presented by other regions. The reality, however, is that China is very different from the "Amazon-centric" eCommerce world to which Western brands are accustomed—and a plug-and-play model won't work in the region. Chinese marketplaces present distinct challenges, such as language barriers, cultural differences, advertising requirements, selling models, brand recognition issues, and varying platform rules and business customs, all of which must be managed. Western brands must develop a specific and effective strategy for expanding to and growing their business on Chinese marketplaces.



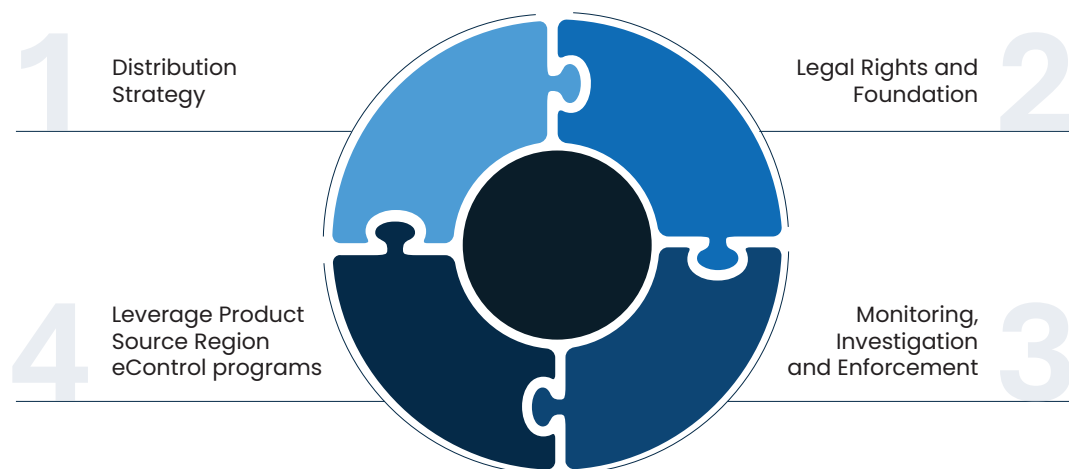
Source: Statista

- <https://www.trade.gov/chinese-e-commerce-market>
- <https://www.statista.com/outlook/emo/e-commerce/china>
- <https://www.trade.gov/country-commercial-guides/china-e-commerce>

Simply relying on the timeworn brand protection playbook is not enough—novel approaches are needed to achieve measurable commercial impact.

One critical aspect of this strategy needs to be how brands will be able to assert viable control over their product sales in China. Gone are the days when brands could rely on some monitoring for counterfeits and other IP infringements. Brand control requires a different approach today—one tied to enabling revenue and profitability growth, rather than touting vanity metrics like infringement takedowns. Simply relying on the timeworn brand protection playbook is not enough—novel approaches are needed to achieve measurable commercial impact.

To optimize eCommerce performance in China, brands must adopt a comprehensive strategy for controlling their distribution and sales in the region⁴—one that can address disruptions to their sales strategy, as they arise, in an efficient, effective, and legally compliant manner. For most brands, this will require the integration of domestic and global distribution strategies, foundational legal rights and authorization programs in market, ongoing monitoring, investigation and enforcement actions, and leveraging eControl programs from product source regions outside of China. We examine this approach in detail below.



Setting Your Distribution Strategy

Many of the challenges and opportunities that brands face in China are impacted by their chosen distribution strategy in the market. While a deep dive into these different strategies is beyond the scope of this paper, it is helpful to have a baseline understanding of the most common approaches, as brands must be prepared to address different eControl challenges under each model.

⁴ This paper applies only to Mainland China and does not cover Hong Kong, Macau, or Taiwan, which operate under separate legal systems.

International brands enter China's online marketplaces in two primary ways: cross-border eCommerce (CBEC) and traditional imports. CBEC involves the online sale of products across borders via dedicated platforms. Unlike traditional importation, CBEC allows international brands to sell directly to Chinese consumers without the need to establish a presence in China. Sellers can list their products on an online store on a CBEC platform, enabling Chinese customers to purchase directly through the platform.

China's CBEC market has experienced massive growth, reaching \$331 billion in 2023, and making it the largest CBEC market in the world. The United States is China's second-largest source of CBEC imports with a 17.9% market share, behind Japan at 21.7%. Consumer goods dominate this sector, comprising 98.3% of total CBEC imports⁵. The two main CBEC platforms are:

- **Tmall Global**, owned by Alibaba, which is an extension of Tmall focused exclusively on B2C and B2B2C cross-border eCommerce. Tmall Global is the largest CBEC platform, sharing the same consumer interface with Tmall domestic (B2C) and Taobao (C2C) and with access to at least 900 million annual active consumers.⁶
- **JD Worldwide** owned by JD, is the CBEC extension of JD.com, the second-largest B2C eCommerce platform in China with over 600 million active users.

CBEC products can be shipped two primary ways: (i) direct from the exporting country after an order is placed, or (ii) from a warehouse in a bonded zone within mainland China. In the latter, CBEC goods are temporarily stored without taxation until they are sold, allowing for faster delivery to consumers.

Unlike traditional imports, CBEC products bypass the need for premarket filings, registration, or certification, which are required for many goods entering China.

CBEC can provide significant advantages over traditional import methods. Unlike traditional imports, CBEC products bypass the need for premarket filings, registration, or certification, which are required for many goods entering China. For instance, foreign health supplements traditionally must be registered with the relevant Chinese authorities before being sold in the market for the first time. However, this requirement is waived for products imported through CBEC. Additionally, CBEC imports enjoy exemptions from import tariffs and benefit from reduced value-added taxes, making it a potentially more cost-effective option.⁷

For international brands, CBEC offers a low-cost entry point into the Chinese market, eliminating the need for a physical presence in the country. This makes it particularly

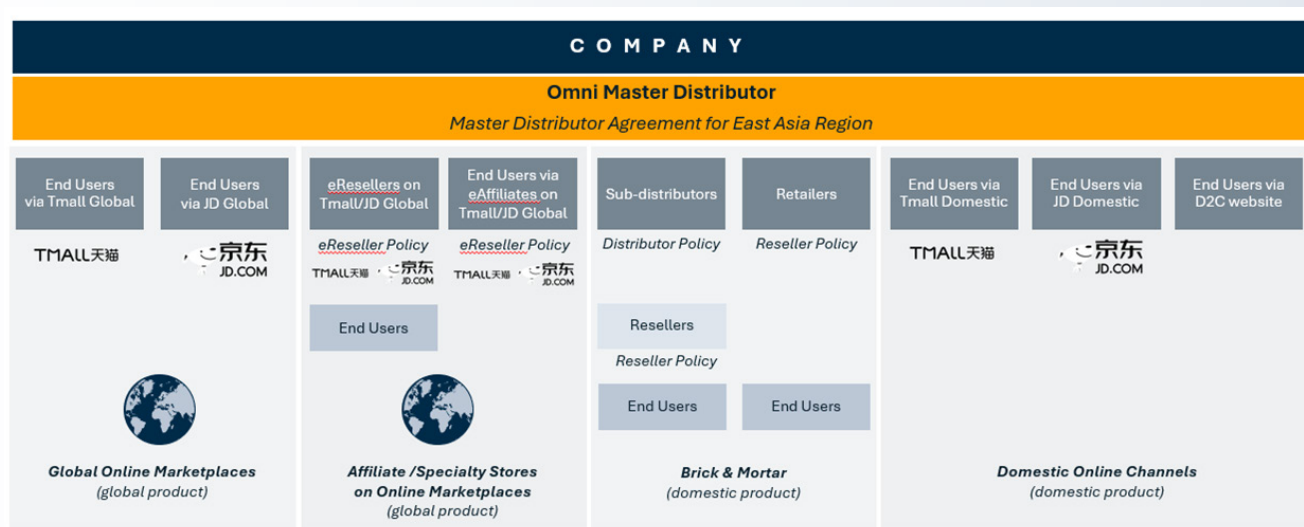
5 https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=China%20Cross-Border%20E-commerce%20Market%20Opportunities%20for%20US%20Agricultural%20Products%20_Beijing%20ATO_China%20-%20People%27s%20Republic%20of_CH2023-0180.pdf

6 <https://www.spglobal.com/ratings/en/research/articles/240409-china-e-commerce-giants-face-their-biggest-test-13046260#:~:text=Key%20merchants%20will%20still%20aim,of%20erosion%20due%20to%20competition.>

7 <https://fas.usda.gov/data/china-using-crossborder-e-commerce-channel-increase-us-food-imports-china>

attractive for smaller brands or those interested in testing the waters in China with minimal upfront investment.

Under the traditional importation model, brands often work through a master distributor for China, whereby a single distributor is responsible for developing the brand in the region—either across all channels or in a specific channel; i.e., brick-and-mortar or eCommerce. Working with a master distributor that understands the complexities inherent to the market can be crucial—particularly for brands seeking to either expand existing domestic channel distribution and/or those seeking other approved sellers to offer their products in their global marketplace stores. A skilled master distributor can help build and promote brand image, develop downstream partners, drive sales, and ensure overall market success. They can also help prevent channel and geographical distribution conflicts, develop effective go-to-market and pricing strategies, and direct online traffic to authorized stores and products.



Regardless of which model is chosen, brands need a different playbook for eCommerce optimization in China. The Chinese eCommerce landscape is vastly different than Western markets—from the absence of buy boxes/Featured Offers to different expectations around consumer education and customer service to varying ad spend realities. Accordingly, the market requires a different approach than simply replicating an Amazon-focused model effective in other regions. Brands often measure eCommerce success through distinct Chinese market metrics: sales growth, participation in platform promotional events, the number of authorized sellers offering products in approved global marketplace stores, and the mitigation of brand erosion and channel conflict.

Establishing The Necessary Legal Foundation

Once brands decide to sell their products on Chinese marketplaces or to optimize and scale their existing sales in the region, they need to establish the foundational legal components necessary to help make their desired distribution strategy a reality.

Neither China's legal system nor the key marketplace platforms provide a mechanism for blanket unauthorized sales bans. Additionally, Resale Price Maintenance (RPM) strategies like MAP and UPP policies are not permitted in the market.

As a result, Western brands will need to rely on a legal foundation grounded in applicable intellectual property law alongside other legal approaches and distribution control methods to be successful.

I. INTELLECTUAL PROPERTY

A. Trademark Registration—A Must Have

A validly registered trademark is a key foundational element empowering a brand's ability to operate and protect its business in China. A Chinese trademark registration establishes the legal basis that enables brands to effectively combat counterfeit and copycat issues, both in China and globally, while also supporting business expansion and growth. Accordingly, brands must formally register their trademarks in China.

Importantly, China follows a "first-to-file, first-to-right" approach, offering minimal protection for unregistered trademarks, except in the case of specific, limited exceptions. These exceptions include well-known trademarks, instances of bad faith trademark squatting and the use of marks that have gained "a certain influence." Often, these exceptions can be difficult and expensive to prove, potentially requiring protracted court action. This is very different than the US system, where prior common law use can create trademark rights.

To register a trademark in China, a brand must first determine the appropriate class of goods or services and conduct a trademark search, then apply to the China National Intellectual Property Administration (CNIPA) through a registered trademark agent. The application undergoes a formal and substantive examination to check for conflicts and legal compliance. If approved, the trademark is published for a three-month opposition period. If no opposition is filed or any opposition is resolved, the trademark is registered, and a Trademark Registration Certificate is issued. The registration is valid for 10 years and can be renewed indefinitely in 10-year increments.

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There are important legal and brand protection rights that only apply to registered trademarks, as well as several negative consequences for delays in registration. First, online marketplaces and administrative agencies typically decline to enforce the rights of unregistered trademark owners. As a result, China's trademark system can be generally seen as a "no registration, no rights" regime when it comes to enforcement—particularly as it relates to marketplace-based enforcement against unauthorized sellers. The ability to enforce against online infringement is widely recognized as a fundamental and non-negotiable component of brand protection in today's market.

66%
of counterfeits
originate in China⁸

17.7%
of counterfeits come
from Hong Kong⁸

Owning a Chinese trademark registration is also critical for brands' global anti-counterfeiting strategies. According to U.S. Customs and Border Protection, nearly 66% of all counterfeits seized by the agency in 2023 originated from China, with an additional 17.7% coming from Hong Kong.⁸ While frequent online takedowns can help curb and deter casual or small-scale traders selling counterfeit goods, brands are often compelled to shut down larger scale operators at their source of manufacture. This requires offline enforcement actions, such as conducting administrative raids on factories and warehouses, litigating against manufacturers in court, and working with law enforcement to imprison repeat offenders—all of which require a China registered trademark.

If a counterfeiter or other manufacturer holds a valid trademark registration for your brand (which is quite common), enforcing against them becomes difficult.

8 <https://www.cbp.gov/trade/fakegoodsrealdangers>



Therefore, it is crucial to invalidate or cancel their trademark (due to non-use) or oppose their pending application before, or alongside, any enforcement efforts. The success of these actions often determines the outcome of enforcement. Trademark oppositions, invalidations, and cancellations are managed by the CNIPA. Oppositions must be filed within three months of a trademark's publication, and invalidation requests are typically made within five years, except for well-known marks. Grounds for opposition and invalidation include bad-faith registrations, fraud, and infringement on well-known trademarks or prior rights. Cancellations are based on non-use of the trademark for three years, requiring the registrant to provide proof of use.

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In addition to counterfeiters, bad-faith trademark squatters who preemptively register a brand's trademark in China can effectively hold the brand hostage, undermining its business expansion by initiating frivolous enforcement actions. This tactic is commonly used by "professional" trademark applicants to profit from trademark squatting. The best way to avoid this is to secure your brand's registration as soon as possible.

In terms of brand expansion in-country, a Chinese trademark registration is essential for fully tapping into China's vast consumer markets. This registration enables access to multiple sales channels, including local platforms like Taobao, Tmall, and JD; local distributors' websites and stores, social commerce platforms like Douyin (China's TikTok) and WeChat; and establishing brick-and-mortar stores.

Without a Chinese trademark registration, brands are limited to selling on a few CBEC platforms such as Tmall Global and JDWorldwide⁹ While CBEC products benefit from preferential tax treatment, China imposes a personal tariff-free and tax-reduced purchase limit for CBEC transactions: 5,000 RMB (approximately \$700 USD) per single transaction and an annual cap of 26,000 RMB (around \$3,670 USD).¹⁰ These caps, are often quickly surpassed by the region's affluent consumers, underscoring the importance of a comprehensive strategy for long-term success in the market.

II. DISTRIBUTION CONTROL

As in all markets globally, brands need to give careful thought to how they will memorialize and protect their desired distribution strategy. Under China's current Antitrust Law and Anti-Unfair Competition Law (AUCL), brands have flexibility to impose vertical

⁹ <https://marketingtochina.com/tmall-global-international-vs-tmall-mainland-china/>

¹⁰ https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=China%20Cross-Border%20E-commerce%20Market%20Opportunities%20for%20US%20Agricultural%20Products%20_Beijing%20ATO_China%20-%20People%27s%20Republic%20of_CH2023-0180

restraints on distribution, such as restrictions on customers, channels, and territories. However, the landscape of competition law in China is evolving rapidly, with key laws recently amended or pending revision. Notable updates include the amended Anti-Monopoly Law (AML) in 2022, its Implementing Rules in 2023, and revisions to the Provisions on Prohibition of Monopoly Agreements, Provisions on Prohibition of Abuse of Dominance, and Provisions on Prohibition of Elimination and Restriction of Competition Through Intellectual Property Rights in 2023. Additionally, the Supreme People's Court (SPC) issued guidelines on civil monopoly disputes in 2024, and the AUCL is currently under revision. We closely monitor these developments and will provide timely updates regarding their potential impact on brand business.

A. Vertical Restraints (i.e., Authorized Selling Programs)

Vertical restraints—like authorized selling programs and selective distribution—are not presumed to be anticompetitive under the AML. Indeed, the AML introduced a “safe harbor” provision for vertical restraints, allowing parties to a vertical agreement to be exempt from scrutiny if they can demonstrate that their market share is below a threshold specified by the State Council of the People's Republic of China. In the past, the State Council proposed a 15% market share threshold across sectors¹¹ but it has not been adopted officially.

A judicial interpretation from the SPC, effective July 1, 2024, outlines a set of factors to consider when assessing the legality of vertical restraints. The court is required to deem the conduct legal if its pro-competitive effects substantially outweigh its anticompetitive effects.

Factors to be considered in ascertaining the potential for anticompetitive effects include:

- Whether the defendant has “market power” (a term not defined);
- The cumulative effects of similar vertical arrangements in the market;
- Whether vertical restraints raise barriers to entry for more efficient firms or business models; and
- Whether they restrict intra-brand or inter-brand competition.

On the pro-competitive side, factors include whether vertical restraints are necessary to prevent free riding, promote inter-brand competition, protect brand image, raise service levels, or encourage innovation.

¹¹ https://www.moj.gov.cn/pub/sfbgw/lfyjzj/lfyjzj/202206/t20220627_458527.html

...Most consumer product companies—particularly Western brands—are likely to have nominal market share in China

It is important to note that in December 2024, China released draft amendments to the AUCL, introducing new rules on unfair trade practices by firms with a “position of relative advantage.” These rules include restrictions on imposing unreasonable terms or conditions on trade counterparties, such as exclusive dealing arrangements, limits on price, promotional activities, sales territories, customers, and time constraints.¹² It remains to be seen whether these rules will be included in the finalized version of AUCL.

In the absence of a specified market share percentage and a clear definition for “market power,” it is difficult to definitively determine whether vertical restraints imposed by a brand would violate China’s AML. However, as most consumer product companies—particularly Western brands—are likely to have nominal market share in China, the following pose relatively low risk:

- Customer and territorial restraints, including Do-Not-Sell Lists;
- Channel restrictions; and/or
- Exclusive/Selective distributorship arrangements.

Accordingly, most brands seeking to expand distribution beyond CBEC, should consider implementing some form of authorized seller program in China as a viable means for controlling their sales channels in market.

A. Resale Price Maintenance (RPM)—To be Avoided!

Brands should avoid implementing any resale price maintenance agreements or policies—e.g. a MAP or UPP policy—in China.

China’s AML has long followed a “prohibition in principle with exemptions” approach to RPM. Consequently, administrative agencies enforcing the AML have consistently applied an “illegal per se” approach, which sharply contrasts with the rule-of-reason and evidence-based standard applied by Chinese courts.

In the 2019 Hainan Yutai case, the SPC endorsed the “illegal per se” approach in administrative enforcement actions. The court clarified that antimonopoly enforcement agencies could treat RPM agreements as inherently illegal without the burden of proving their anticompetitive effects. This stance was justified on the grounds that requiring such proof would “substantially raise enforcement costs and impact enforcement efficiency,” conflicting with the current demands for AML enforcement.¹³

¹² <https://natlawreview.com/article/chinas-national-peoples-congress-releases-draft-anti-unfair-competition-law-comment>

¹³ <https://businesslawreview.uchicago.edu/print-archive/chinese-antitrust-paradox>

The 2022 amendments to the AML failed to reconcile the apparent discrepancy between the standards imposed on plaintiffs in civil litigation and those on anti-trust agencies regarding RPM, as highlighted in the SPC's Yutai judgment.¹⁴

Notably, the AML addresses RPM broadly, prohibiting any "monopoly agreement," defined as "an agreement, decision, or other concerted practice that eliminates or restricts competition."¹⁵ Thus, brands likely cannot escape scrutiny by merely adopting and enforcing a unilateral price policy.

Further, it is the responsibility of the brand, not the complainant, to prove that an agreement does not have the effect of eliminating or restricting competition. This legal standard incentivizes aggrieved parties to file administrative complaints or civil actions based on RPM, which in turn increases the legal costs for brands. For these reasons, brands should avoid MAP or other RPM strategies in China.

II. LEGAL LANDSCAPE COMPARISON

USA 	China 
First-in-use for trademarks	First-to-file for trademarks
Trademark Registrations are preferred but not required	Trademarks registrations are required for enforcement
"Material differences" exceptions to the First Sale Doctrine to restrict resale	No "Material Difference" exception but other exceptions (e.g., physical differences; repacking; expired, etc.)
Minimum Advertised Pricing ("MAP") policy or other pricing policy legal	MAP illegal
Authorized reseller programs generally premissible for majority of brands	Authorized reseller programs generally premissible for majority of brands
Broad based unauthorized seller enforcement strategy	More fact specific analysis required

¹⁴ Marco Colino, Sandra, China's New Legal Framework for Vertical Price Restraints: Aspirations and Limitations (April 14, 2023). European Competition Law Review, vol 44 (2023) 278-286, The Chinese University of Hong Kong Faculty of Law Research Paper No. 2023-27, Available at SSRN: <https://ssrn.com/abstract=4418094>.

¹⁵ <https://businesslawreview.uchicago.edu/print-archive/chinese-antitrust-paradox>

Monitoring, Investigation & Precision Enforcement Against Disruptive Seller Activity

I. OVERVIEW

Once a brand has settled on its intended distribution strategy and implemented the legal foundation required to protect it, a diligent monitoring, investigating and enforcement program will be needed to address the following primary sources of disruption that will present a threat to your brand's commercial success:

Parallel imports often undercut promotional and sales opportunities, leading to erosion and reduced profits for both the brand and its authorized distributors.

- **Unauthorized Parallel Imported Products:** These are products diverted from international markets—such as the US or Europe—into China and often sold in ways that disrupt the brand's Chinese go-to-market strategy and region-specific pricing strategy. Parallel imports often undercut promotional and sales opportunities, leading to erosion and reduced profits for both the brand and its authorized distributors. In China, three main types of parallel importation commonly disrupt brand business: unauthorized traditional imports, unauthorized cross-border e-commerce (CBEC), and "Daigou," which translates to "buying on behalf of"—the practice where millions of Chinese individuals purchase goods abroad more cheaply and resell them in China. Parallel imports have gained popularity among middle-class and affluent Chinese consumers due to their strong preference for Western brands. These consumers often discover the brands through social media and the experiences of millions of Chinese living or traveling abroad. However, they face limited access to these brands because they are not officially available in China, and most Chinese lack the ability to shop directly from international retailers, as they often do not use English or possess internationally accepted credit cards. Often, parallel imports do not meet the brand's quality control standards for packaging, shipping, or storage, and they lack after-sales support, causing potential damage to the brand's reputation and weakening consumer loyalty.
- **Domestic Product Diversion:** This involves products intended for a specific domestic sales channel or region in China that are diverted to other channels or regions in the country—often onto online marketplaces. Like parallel imports, domestic diversion can lead to channel conflict, sales disruptions, and brand erosion.
- **Trademark Squatting and Counterfeits:** Trademark squatters often register trademarks in China before the rightful owner secures their rights in the country. Trademark squatters can block legitimate brands from entering or expanding in China, resulting in lost revenue opportunities. When squatters use the trademark for counterfeit products, it confuses consumers, causes lost sales, and harms the real brand's reputation.
- **Brand Imitation and Copycat Products:** Bad actors create trademarks and products that closely resemble a third party's brand to exploit its reputation and consumer

recognition. Unlike counterfeits, which are exact replicas, imitations aim to confuse consumers by blurring the lines between the original brand and copycats, thereby diminishing the brand's distinctiveness and eroding its value.



A fulsome approach to addressing these issues will include the following:

- **Marketplace Monitoring and Data Evaluation:** Due to the widespread prevalence of parallel imports in China, particularly through Daigou, many Western brands may already have an unauthorized and uncontrolled presence in the market, leaving them vulnerable to all four types of brand control challenges. Consistent monitoring of marketplaces and thorough evaluation of key reseller data is essential for assessing business impact and prioritizing enforcement efforts. Resources should be focused on resellers that are truly disruptive from a sales or compliance standpoint, rather than indiscriminately pursuing enforcement every time products appear online (as is common under the traditional brand protection approach).
- **Seller Investigation and Identification:** Since many unauthorized sellers and infringers operate anonymously and take measures to conceal their identities, it is crucial to have a sophisticated process for investigating and identifying disruptive sellers and infringers for effective enforcement. In China, administrative agencies and the police rarely take proactive action against trademark infringers, viewing it mainly as a private issue for brands. In civil cases, the plaintiff bears the burden of proving their legal rights, the infringement, the harm caused, and the resulting losses. Since China lacks a formal discovery process, conducting thorough investigations is essential for success in civil actions against infringers. Finally, many products sold



in an unauthorized manner are diverted from overseas. As such, brands must be able to identify local sellers and trace products back to their point of origin within global distribution channels to cut off the supply at its source.

Precision Enforcement Actions: The key to effective enforcement is tying efforts to driving a measurable commercial outcome. Once disruptive sellers are identified, they typically can be categorized into three primary groups for enforcement: (i) counterfeiters and trademark infringers, (ii) unauthorized or grey market sellers; and (iii) authorized sellers violating reseller policies. Authorized sellers violating company policies can often be best managed through business-to-business negotiations and resolutions. For counterfeiters and trademark infringers, Chinese law provides a variety of enforcement options. For unauthorized sellers of legitimate products, a combination of legally-led enforcement, distribution policy enforcement, and leveraging of control mechanisms in product source countries is the most effective approach.

II. DISRUPTIVE SELLER ENFORCEMENT—THE RIGHT TACTIC AGAINST THE RIGHT SELLER, AT THE RIGHT TIME

Brands seeking to drive real commercial impact in China through their control efforts must be able to marshal a broad tool kit of enforcement tactics as disruptive sellers of all types, sizes, and impact levels will emerge. A comprehensive capabilities set allows brands to apply the right tool, against the right seller at the right time to achieve a desired business outcome. This approach is what enables brands to move beyond simply engaging in large levels of “enforcement” activity to an approach that drives real commercial impact.

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A. Warning Letters

Although brands are not required to start enforcement with warning letters, doing so is often a practical first step. It is a cost-effective way to deter casual sellers and encourage them to reveal the source of their goods. Warning letters can also educate sellers who unknowingly sold counterfeit products on how to verify and buy genuine items. Importantly, if the infringer ignores the letter, it can help prove malicious intent in future civil actions. According to Article 64(2) of the Trademark Law, sellers unaware of infringement and who obtained goods legitimately are not liable if they provide supplier information. However, if a brand proves the seller knew of the infringement, courts are more likely to hold them liable. Though warning letters could prompt a non-infringement suit in complex cases involving parallel imports, the risk is likely very low, as Chinese businesses are not typically litigious. Also, because China doesn't follow the laches doctrine, the three-year limit for filing lawsuits starts only when the infringement stops, so sending a warning letter doesn't affect a brand's right to take legal action later.



B. Online Takedowns

China's E-Commerce Law (2019)¹⁶ requires online marketplaces to have rules for protecting IP rights, including responding to takedown notices from brands and removing infringing content if they know or should have known of any infringement. To submit a takedown notice, a brand must provide evidence of trademark ownership (e.g., a Chinese trademark registration) and preliminary evidence of infringement, such as test purchase results or chat records with the seller. Once submitted, the marketplace temporarily removes the listing and notifies the seller, who can respond with a declaration of non-violation and supporting evidence. If the marketplace finds the seller's evidence unconvincing, the listing is permanently removed. For counterfeit cases, additional penalties may apply, such as Alibaba's "three-strikes" policy, which can result in account termination. If no violation is found, the brand is advised to file a complaint or civil action, and the listing will be restored if no further action is taken.



C. Administrative Actions

In China, intellectual property-related administrative actions, particularly those concerning trademarks, are mainly managed by the Administration of Market Regulation (AMR) and Customs. The AMR handles most market supervision tasks, including intellectual property, while Customs manages IP enforcement at the borders. Administrative enforcement actions can be initiated by brands or by these agencies, but a valid Chinese trademark registration and initial evidence of

16 <http://mg.mofcom.gov.cn/article/policy/201912/20191202923971.shtml>



infringement are required. If infringement is confirmed, AMR and Customs can confiscate goods, stop infringing activities, impose fines, and even suspend business licenses. Administrative actions are quick, low-cost, and have a low evidence threshold, but they cannot detain individuals or award damages like the courts can.

Administrative agencies in China have generally been reluctant to recognize trademark infringement claims related to parallel imported products. Notably, in 2019, the Ministry of Commerce, along with six other administrative agencies, issued guidelines promoting and regulating the parallel importation of automobiles. While not a comprehensive legal framework, this guideline may have contributed to a perception of legitimacy regarding parallel imports within administrative agencies.

At the local level, the Beijing Intellectual Property Office ruled that parallel imported MOBIL-branded lubricant oil did not constitute trademark infringement. The ruling was based on the importer providing comprehensive documentation, including sales contracts, customs clearance documents, and tax records, proving that the products were imported through legitimate channels from Germany.¹⁷

Additionally, the Shanghai Intellectual Property Office has re-posted an article on its official website that advocates for the economic benefits of parallel imports. The author supports evaluating parallel import cases on an individual basis.¹⁸

It is important to note that while China Customs does not enforce against parallel imports, customs recordation remains a vital tool for identifying diverters operating from China. The customs recordation system requires brand owners to provide

¹⁷ <https://zscqj.beijing.gov.cn/zscqj/zwgk/mtfb/436435058/index.html> (in Chinese)

¹⁸ <https://sipa.sh.gov.cn/2020mtjd/20201012/08c8f2d9d44e447a82e030d423977eb0.html> (in Chinese)

an accurate and up-to-date list of authorized exporters, known as a “Whitelist.” Diverters, who are not included on the Whitelist, will have their shipments flagged and detained at China Customs checkpoints, triggering alerts to the brand owners. Although brand owners may not always be able to stop these shipments depending on the circumstances, the information gathered about the diverters and diverted goods can be invaluable for pursuing potential action in the destination country.



D. Additional Legal Strategies to be Leveraged Against Sellers Offering Parallel Imported Products

Given Chinese authorities’ reluctance to find infringement in matters involving parallel imports, brands facing these issues will likely need to turn to additional legal strategies in support of their control programs. Some combination of these actions will likely form an important part of a brand’s efforts to combat unauthorized sales in China of parallel imported products.

1. **Copyright:** Brands can enforce under Chinese copyright law if unauthorized importers or domestic sellers use copyrighted materials—such as promotional images or text—without permission. As a member of the Berne Convention for the Protection of Literary and Artistic Works, China allows brands to enforce their copyrights without prior registration. Nevertheless, for enforcement actions, such as online takedowns, administrative complaints, and civil suits, brands will need to demonstrate their ownership of copyrighted materials.
2. **Unfair Competition:** China’s Anti-Unfair Competition Law (AUCL) offers brands additional mechanisms for addressing parallel importation issues where a traditional trademark-based approach would fall short. For example, in the 2013 Victoria’s Secret case, Shanghai’s Second Intermediate Court ruled that there was no trademark infringement when an unauthorized seller imported genuine Victoria’s Secret products from authorized channels and resold them with the original labels, hangers, and packaging. However, the court held the unauthorized seller liable for false advertising and unfair competition. This was due to the seller’s misleading claims of being an exclusive authorized distributor for Victoria’s Secret and their use of the brand’s intellectual property in advertising and promotional campaigns to imply official authorization.¹⁹
3. **False Advertising:** Unauthorized sellers often falsify or misrepresent information about parallel imported products and their relationship with brands, as seen in Victoria’s Secret case. When this occurs, brands can report these

¹⁹ <http://gongbao.court.gov.cn/Details/5ad255db361ca9a3687273b21c6eeb.html> (in Chinese)

According to Article 28 of the Advertising Law, which was most recently amended in 2020, any advertisement that deceives or misleads consumers with false or misleading information constitutes false advertising.

issues to administrative agencies and online marketplaces under China's Advertising Law. According to Article 28 of the Advertising Law, which was most recently amended in 2020, any advertisement that deceives or misleads consumers with false or misleading information constitutes false advertising. This includes incorrect descriptions of product ingredients, functions, producers, or import channels. Furthermore, all parties involved in false advertising—including advertisers, advertising agencies, advertisement publishers, and in some cases, endorsers—can be held liable. The law's provisions are stringent, and administrative agencies are highly proactive in enforcing it, pressuring marketplace operators to take corrective actions and remove unauthorized products with misleading information.

4. **Product Warranties and Customer Services:** Parallel importers typically cannot offer the same level of product warranties and customer service as authorized resellers. While enforcing trademark rights directly against parallel importers may be challenging for brands, consumers and end users retain the right to hold them accountable for inadequate warranties and services through administrative complaints or civil litigation, with or without support from brands. Brands can also place parallel importers in a legal bind: if warranties and customer services are affixed to products or packaging and parallel importers fail to honor them or fail to expressly decline to honor them, this may result in false advertising claims. On the other hand, if parallel importers remove or alter the products or packaging to remove warranties, the exceptions for parallel import products could come into play.
5. **Product Standards, Product Labeling, and Marking Requirements:** Unless imported and sold through CBEC, all products sold in China must include a label with product information in Chinese and comply with the labeling and marking requirements set by various industry authorities.²⁰ Many imported products, including some electrical products, information technology products, consumer appliances, fire safety equipment, and auto parts, must undergo testing and receive a China Compulsory Certification (CCC) before they can be sold. China has at least five categories of product standards: national standards, industry standards, regional or local standards, enterprise standards for individual companies, and association standards.²¹ Brands or consumers can report parallel imports that fail to meet these product standards, labeling and marking requirements. Such products may be seized by

²⁰ <https://www.trade.gov/knowledge-product/china-labelingmarking-requirements>

²¹ <https://www.trade.gov/china-standards-trade>

China Customs during customs clearance or confiscated by regulatory agencies, such as the Administration for Market Regulation, during distribution or sales. Before pursuing this legal claim, brands and their authorized distributors in China should conduct internal audits to ensure their own compliance with relevant regulatory requirements.

6. **Tax Code:** CBEC products are classified as personal goods, with the CBEC system designed to allow individual consumers in China to purchase imported products at a preferential tax rate. In essence, CBEC operates as a business-to-consumer (B2C) model between overseas businesses and Chinese consumers. These products should not be sold or shipped to Chinese consumers through domestic resellers, nor should domestic sellers acquire CBEC products for resale. If this happens, it transitions into a business-to-business-to-consumer (B2B2C) model, allowing domestic resellers, rather than Chinese consumers, to benefit from the preferential tax rates. In practice, domestic resellers may try to pass off CBEC products as traditional imports to avoid tax inspections by adding Chinese-language labels with product information. This repackaging may involve false product details and alter genuine products, potentially triggering two of the exceptions for parallel imports discussed earlier.



E. Judicial Actions

In China, trademark infringers can face both civil and criminal liabilities in court.

For civil actions, brands or their licensees must file a lawsuit within three years of becoming aware of counterfeits or other trademark infringement. If the infringement is ongoing, the lawsuit can still proceed after three years, but damages will be limited to the previous three years. Brands can request Act Preservation (akin to a Preliminary Injunction) to stop infringement or Asset Preservation to ensure damage payments. Courts can order infringers to stop their actions, remove negative influence, apologize, and pay damages. Damages are calculated based on actual loss, infringer profits, reasonable license royalties, or statutory damages up to 5 million RMB (about \$707,413 USD). Punitive damages up to five times the calculated amount may apply for bad-faith infringement.

Criminal investigations against counterfeits are handled by local Public Security Bureaus, usually triggered by brand reports. Criminal thresholds include business turnover over 50,000 RMB (about \$7,074 USD) or illegal gains over 30,000 RMB (about \$4,245 USD), with penalties ranging from fines to three to ten years' imprisonment.

Chinese courts have taken a nuanced approach and found trademark infringement and/or unfair competition in parallel import cases based on the following grounds.

1 Insufficient Documentation:

Importers cannot provide adequate documentation to prove the legitimate source of the products or fail to show that they have exercised reasonable care to verify the product's source. In China, where there is no evidence discovery procedure, the burden of proof shifts from the claimant to the defendant, which can be advantageous for brands.

2 Regulatory Non-Compliance:

The imported products do not meet China's quality and safety standards, compulsory product registration or approval, or other regulatory requirements enforced by administrative agencies and relevant industry organizations. Products must not be inferior to authorized goods, though differences in warranties and customer service are not deemed sufficient grounds for infringement.

3 Physical Differences:

The imported products and authorized products are "physically different." It is different from the "material differences" standard in the US, where differences in warranties, guarantees, return policies, and customer service are typically considered "material."

4 Altered Products or Packaging:

The imported products or their packaging have been altered, such as by removing product identification codes or adding labels in Chinese characters, leading to consumer confusion.

5 Improper Use of Trademark:

The importers use the brand beyond necessary nominative use for resale, such as by affixing a label with the brand's Chinese character mark or using the brand in advertising and promotions.

Distilling the above, implementing a blanket ban on parallel imported or diverted products in China based solely on trademark infringement, such as the "material difference" exception to the US first sale doctrine, is not feasible. However, depending on the situation, brands may have an array of enforcement tactics that, particularly in combination, can help turn the tide towards a controlled state in the market.

F. Enforcement of Distribution/Reseller Agreements

Brands can enforce Distribution or Reseller Agreements under Chinese law through arbitration, mediation, or civil action, especially if the brand's primary objective is to prevent domestic product diversion. Chinese law allows interim injunctive relief, helping to prevent further damage caused by an unruly distributor or reseller. According to Articles 85 and 105 of the Civil Procedure Law (effective January 1, 2024)²², and the Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Review of Act Preservation in Intellectual Property Disputes (effective January 1, 2019)²³, a Chinese court is required to accept an application for preservation measures (similar to interim injunctions) before an arbitral award takes effect.

When brands enter into a distribution or reseller agreement covering multiple markets, including China, it can be practical and convenient to include select US law choice of law provisions. In such cases, arbitration should be encouraged as the preferred method of dispute resolution for issues related to China. Since China is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), Chinese courts generally recognize and enforce foreign arbitral awards, provided the agreements' terms do not conflict with Chinese law. Conversely, China typically does not recognize or enforce foreign court judgments.

Enforcement Tactics	Current Legal State
Trademark Infringement Claims against Parallel Importers	Limited
Trademark Infringement Claims against Unauthorized Domestic Resellers	Limited
Other Legal Rights and Claims	Viable
Authorized Reseller Program / Selective Distribution	Viable
Prohibit Online Resellers	Viable
Restrict Online Resellers	Viable
Restrict Online Marketplace Resellers	Viable
Implementation of Do-Not-Sell List	Viable
Termination of Resellers Without Notice and Cause	Viable
Root Cause / Diversion Diagnostics	Viable
MAP / UPP Policies	High Risk / Not Recommended

22 <https://flk.npc.gov.cn/detail2.html?ZmY4MDgxODE4YTlxZGMxMzAxOGI0MjUzMDNiNzA4NmQ%3D>

23 <http://gongbao.court.gov.cn/Details/3485741fc1d04e68f9df633dc791e6.html?sw>

Leveraging Econtrol Programs In Other Countries: Stopping The Source

For many brands, asserting necessary levels of control over their authorized customers on a global level, both in China and other countries and regions, is critical for preventing parallel importation into China and further domestic diversion. This is typically accomplished through effective distribution policies with brand customers, coupled with a strong monitoring and investigative approach focused on identifying leaks in distribution channels.

As noted above, parallel importers in China must disclose foreign sources of unauthorized goods to avoid being found trademark infringement by local courts or administrative agencies. If a brand has a strong distribution control program in the source country, it becomes easier to cut off the supply of unauthorized goods.

For this reason, the most successful brands leverage eControl programs in common source countries and regions like the US, Europe, and Australia to manage disruption in China. This can take various forms, including the following:

- Prohibiting transshipment to China in applicable distribution policies.
- Requiring that distributors provide sell through data.
- Leveraging any existing batch codes, lot codes and the like to uncover foreign sources of product diverted to China.
- Monitoring bills of lading to understand potential product sources.
- Enforcing against foreign suppliers in source countries that divert products into China.

VII. CONCLUSION

The vast and rapidly expanding financial opportunities in the Chinese eCommerce market make it impossible to ignore. Even if you have not yet intentionally entered the market, it is likely that your products are already there and being controlled by others. Global growth strategies must include China, and a key component of your China strategy needs to be maintaining brand control. Vorys eControl is here to help.



Daren Garcia is the managing partner of the Vorys London office where he leads eControl's international program. Daren dedicates his practice to the development and implementation of strategies and enforcement systems designed to protect brand value in the omnichannel world. He has counseled many hundreds of brands and manufacturers confronting unauthorized sellers, channel conflict and other activities disruptive to brand revenues and value. Daren has also led litigation matters against significant gray market sellers disrupting brand value for Vorys' clients.



www.vorysecontrol.com

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