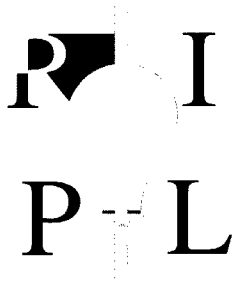


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TRADEMARKS AND THE BEIJING OLYMPICS: GOLD MEDAL CHALLENGES

DORIS ESTELLE LONG

ABSTRACT

There is no question that the Summer Olympics in Beijing pose a tremendous marketing opportunity. They also pose a great opportunity for the development of effective techniques for enforcing intellectual property rights. China has already enacted special regulations governing the protection of Olympic symbols and has established special regulations governing the enforcement of those regulations. Yet many of the cultural and political issues that impact China's enforcement activities in other arenas (including counterfeiting and piracy of IP protected goods and services) remain problematic. Furthermore, while the Olympic symbols may be the subject of heightened protection, cultural perceptions of the differences between commercial marks and Olympic symbols may make any appreciable "improvement" in IPR protection evanescent. The opportunity, however, for increased dialogue and training should not be lost. In the glow of gold medal competitions, IP owners who follow a rational approach may well find that the benefits of their efforts last long after the closing ceremonies in Beijing.

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DORIS ESTELLE LONG*

INTRODUCTION

In 2001, when Beijing was announced as the host city for the 2008 Summer Olympics,¹ China joined a special club of countries who have faced the challenge and opportunity of hosting an Olympic event.² There is no question that the face of China has already been changed. Physical changes are apparent in the construction of new infrastructures mandated by the Olympics, including new stadiums, housing facilities and transportation improvements.³ In addition, new goods are already flooding the market in China, including reproductions of the new Olympic symbols for the Beijing Olympics⁴ on a diverse array of goods.⁵ Even more critical, at least for

* Professor of Law and Chair, Intellectual Property, Information Technology and Privacy Group, The John Marshall Law School (Chicago). I would like to thank the participants of the of the Conference on The Changing Role of Intellectual Property in Asia: Moving Beyond "Producers" and "Consumers," at the University of Illinois at Champagne-Urbana; of the Temple Law Review Symposium Law Without Borders: Current Legal Challenges Around the Globe; of the Thomas M. Cooley ILS Symposium on China and its Effect on the Global Economy; of the New York City Bar International Law Weekend: Toward a New Vision of International Law, and of the Distinguished Professor Speaker Series at The John Marshall Law School (Chicago) whose comments helped shape this Article. I would also like to thank Konstantino Muhtar and Jennifer Maxwell for their research assistance. This Article is dedicated to my students at Jiao Tung University, who first began with me the dialogue that continues to inform my thoughts about China and the role of intellectual property protection in its development. As always, any errors belong solely to me.

** Available at www.jmripl.com.

¹ Official Website of the Olympic Movement, http://www.olympic.org/uk/index_uk.asp (follow the "Beijing 2008" hyperlink) (last visited Apr. 18, 2007). Beijing was selected as the Host City for the 2008 Summer Olympics at the 112th Session of the International Olympic Committee ("IOC") in Moscow on July 13, 2001. *Id.* See generally INTERNATIONAL OLYMPIC COMMITTEE, MANUAL FOR CANDIDATE CITIES FOR THE GAMES OF THE XXIX OLYMPIAD 2008, available at http://multimedia.olympic.org/pdf/en_report_296.pdf [hereinafter MANUAL] (setting forth the International Olympic Committee's submission requirements for cities seeking to host the Olympic Games).

² Official Website of the Olympic Movement, Past Olympic Games Since 1896, http://www.olympic.org/uk/games/index_uk.asp (listing all nations and cities that have previously hosted the Olympic games).

³ See Yu Yilei, *Olympic Preparations Praised*, CHINA DAILY, Aug. 10, 2002, available at 2002 WLNR 7525117 (noting that "Beijing is launching a multi-billion-dollar program to build 16 new stadiums and gymnasiums for Olympic competitors, add 500 kilomet[er]s to its expressways and 41 kilomet[er]s to the existing 54-kilomet[er]s subway line; see also Ju Chuanjiang, *Olympics to Trigger Great Changes*, CHINA DAILY, Mar. 10, 2007, available at 2007 WLNR 4513493 (noting that "construction of transportation, environmental and tourism facilities will be strengthened, in order to create an excellent environment for the upcoming event").

⁴ See The Official Website of the Beijing 2008 Olympic Games, Official Mascots of the Beijing 2008 Olympic Games, <http://en.beijing2008.cn/spirit/beijing2008/graphic/n214068254.shtml> (last visited Apr. 18, 2007) [hereinafter Official Mascots]. These symbols include not only the traditional interlocking five circle design, but also five special Chinese mascot designs that have been created specifically for the Beijing Olympics. *Id.* The mascots are called "Fuwa" and are designed to express the playful qualities of five little children who form an intimate circle of friends. *Id.* While one

purposes of this Article is the change that is already occurring in Chinese law governing the protection of these Olympic symbols, both in fact and in law.⁶

I. THE BEIJING OLYMPICS: OPPORTUNITY OR INSURMOUNTABLE ENFORCEMENT CHALLENGE?

There is no question that holding the Olympics in Beijing poses a tremendous marketing opportunity. With the influx of foreign travelers, new Olympics-related products and long term potentially heightened demand for unique Chinese traditional goods, the Olympics provides a rare injection of economic activity tied to a single “mega” sporting event.⁷ It may also provide a great opportunity for the development of effective techniques for enforcing intellectual property rights in

Fuwa (Huanhuan) represents the Olympic torch, the other Fuwa embody the natural characteristics of four of China’s most popular animals: the fish, the panda, the Tibetan antelope, and the swallow. *Id.*

⁵ See Li Jing, *More Firms to Make, Sell Licensed Products*, CHINA DAILY, Aug. 25, 2006, available at 2006 WLNR 14773330. By 2008, it is estimated that six to seven-thousand different types of licensed products bearing the Olympic Games logo will be showcased at more than ten-thousand stores nationwide. *Id.* The types of licensed products include items such as badges, toys, garments, decorations, handicrafts, household supplies, and stationery. *Id.* See also Official On-Line Beijing Olympics Store, available at <https://www.bj2008eshop.com>

⁶ See, e.g., Liu Li, *Committee Pledges Effort to Protect Beijing Olympic Logo*, CHINA DAILY, Aug. 14, 2003, available at 2003 WLNR 9226983. The Beijing Organizing Committee for the Games of the XXIX Olympiad pledged to work harder alongside the relevant authorities to protect the intellectual property rights of the 2008 Olympic Games logo. *Id.* As evidence of the heightened effort to provide IP protection, authorities cited the confiscation of unauthorized Olympic goods and the levying of stiff fines on parties selling unauthorized Olympic goods. *Id.* See also notes 16 - 76 *infra* and accompanying text for additional changes in Chinese law and enforcement activities to meet its obligations.

⁷ See PRICEWATERHOUSE COOPERS, BUSINESS AND ECONOMIC BENEFITS OF THE SYDNEY 2000 GAMES—A COLLATION OF EVIDENCE 3 [hereinafter ECONOMIC BENEFITS] (2002), available at <http://www.gamesinfo.com.au/pi/ARPICOE.html>. While it is always difficult to determine precisely the economic benefit of a single “mega” sporting event, this report estimates that the economic benefit to Sydney and its environs following the 2000 Olympics was \$3 billion U.S. dollars in “business outcomes.” *Id.* This \$3 billion dollar estimate included \$600 million in “new business investment,” \$288 million in “new business under the Australian Technology Showcase,” and almost \$2 billion in “post-Games infrastructure and service contracts.” *Id.* In addition, as a result of the Olympics, over \$500 million was “secured in contracts, sales and new investment by businesses” located in the region. *Id.* These figures do not include the various costs incurred in connection with hosting an Olympic event, including costs for creating the necessary infrastructure, including in recent years heightened security measures; see also *2008 Beijing Olympiad: Profit or Loss?*, CHINA TODAY, Nov. 5, 2004, available at <http://www.chinatoday.com.cn/English/e2004/e200411/p1002.htm> (listing the profits made by host countries for the Summer Olympics since 1984); Jeffrey G. Owen, *Estimating the Cost and Benefit of Hosting Olympic Games: What Can Beijing Expect from Its 2008 Games?*, 3 INDUS. GEOGRAPHER 1 (2005), <http://igeographer.lib.indstate.edu/owen.pdf> (estimating the potential impact of the Olympic Games on host countries); cf. *Germany Hopes World Cup Will Boost Economy*, MSNBC, Apr. 14, 2006, <http://www.msnbc.msn.com/id/12303396/>. Similar economic benefits accrue from other mega sporting events such as the World Cup. *Id.* For instance, South Korea estimated that hosting the 2002 World Cup brought the nation \$4.1 billion in direct economic benefits. *Id.* But cf. *id.* (stating that the public sector spent over \$1.9 billion on Games related infrastructure and the private sector spent another \$1.1 billion on Games related venues, but no information is provided as the costs of security measures).

China, but only if the nature of the opportunity is understood and if this limited-in-time opportunity is not squandered.

The difficulty of protecting intellectual property in China has been a constant irritant in U.S.-China relations since before China became a member of the WTO in 2001.⁸ Even at the time that this Article goes to press, there are currently several WTO complaints filed by the United States against China with a primary focus on alleged failures to provide enforcement of protections required under the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").⁹ Thus, in

⁸ See WTO Member Information, China and the WTO, http://www.wto.org/english/thewto_e/countries_e/china_e.htm (last visited Apr. 18, 2008). As a member of the WTO, China is bound by the obligations of the diverse WTO Agreements, particularly the Agreement on Trade-Related Aspects of Intellectual Property Rights. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1197 [hereinafter TRIPS Agreement]; World Trade Organization, *Protocol on the Accession of the People's Republic of China*, WT/L/432 (Nov. 23, 2001), available at <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/L/432.doc> (detailing the obligations China must fulfill in order to join the WTO). A complete examination of what I refer to as the "intellectual property dance" between the United States and China is beyond the scope of this Article. However, briefly, the twenty year period leading up to China's accession to the WTO is marked by a series of trade disputes, followed by agreements including heightened protection by China of intellectual property rights, followed by subsequent trade disputes. See Ping Wang, Kristie Thomas & Fanshu Yang, *Recent WTO Disputes Involving the Protection and Enforcement of Intellectual Property Rights in China: Legal and Political Analysis* 4 (China Policy Institute, University of Nottingham, Briefing Series No. 24, Aug. 2007), available at http://www.nottingham.ac.uk/shared/shared_cpi/documents/policy_papers/Briefing_24_China_intellectual_property_rights.pdf (providing a brief history of United States and China trade relations); see also Li Zhongzhou, Commentary, *China Must Be Ready to Play the WTO Game*, CHINA DAILY, Apr. 18, 2007, available at http://www.chinadaily.com.cn/opinion/2007-04/18/content_853060.htm (noting that the U.S. Trade Representative has filed two IP cases against China in the WTO, in spite of China's heightened IP right protection); see generally ANDREW C. MERTHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* (Cornell Univ. Press 2005) (imparting a number of intriguing insights into the diverse array of bilateral negotiations between China and the United States since the 1980's); CHARAN DEVEREAUX ET AL., *CASE STUDIES IN U.S. TRADE NEGOTIATION, VOL. 1: MAKING THE RULES* (Institute for International Economics 2006) (discussing IP enforcement and other issues regarding China's accession to the WTO); KA ZENG, *TRADE THREATS, TRADE WARS: BARGAINING, RETALIATION, AND AMERICAN COERCIVE DIPLOMACY* (Univ. of Mich. Press 2004) (discussing the trade disputes between China and the US). See generally SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* (Cambridge Univ. Press 2003) (discussing the coercive nature of IP rights protection under TRIPS); MICHAEL P. RYAN, *KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY* (The Brookings Inst. Press 1998) (discussing the impact of bargain linkage diplomacy under TRIPS). The protection standards set down in TRIPS will most assuredly continue to play an important role in this "intellectual property dance" between signatory nations, such as the United States and China, even as the "dance" itself moves more clearly into bilateral and regional fora. See "Democratizing" Globalization: *Practicing the Policies of Cultural Inclusion*, 10 CARDOZO J. OF INT'L & COMP. L. 217 (2002) (discussing the emerging trend of regionalization in IPR harmonization).

⁹ See, e.g., Request for Consultation by the United States, *China—Measures Effecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1 (Apr. 16, 2007), available at [http://www.worldtradelaw.net/cr/ds362-1\(cr\).pdf](http://www.worldtradelaw.net/cr/ds362-1(cr).pdf) [hereinafter *China Protection and Enforcement*] (concerning thresholds under Chinese law for criminal procedures and penalties); Request for Consultation by the United States, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-Visual Entertainment Products*, WT/DS363/1 (Apr. 16, 2007), available at [http://www.worldtradelaw.net/cr/ds363-1\(cr\).pdf](http://www.worldtradelaw.net/cr/ds363-1(cr).pdf) [hereinafter *Trading and*

determining what impact, if any, the Olympics might have on China and intellectual property protection, we need to focus on what I refer to as “The Gold Medal Challenges.” Simply put, to what extent are the Olympics a Great Marketing and Law Development Opportunity or are they just Another Counterfeiting Quagmire? If the Olympics actually do provide an opportunity for developing stronger enforcement laws, techniques and models, how can this opportunity be turned into Olympic Gold? What are the stumbling blocks to achieving such Gold? And, perhaps, most significantly of all, can these stumbling blocks actually be reduced in a significant fashion to allow China to continue its movement into the international intellectual property protection community with greater assurance.

As part of the candidature process to host an Olympic Games, the International Olympics Committee (“IOC”) requires that organizing committees secure various guarantees regarding the conduct of the Olympics in the host country, including “a declaration by the government of your country stipulating that all the necessary legal measures will be taken to facilitate the protection of Olympic marks.”¹⁰ This obligation is further enforced by the Host Country Agreement signed by the IOC and the Organizing Committee directly upon the announcement of the successful candidature of the city in question.¹¹ Such a declaration was contained in the candidature file of the Beijing Organizing Committee for the Games of the XXIX Olympiad (“BOCOG”)¹² and in the Host Agreement signed in connection with the Beijing Summer Olympics to be held in 2008.¹³

By November 2001, the Beijing Municipality enacted Provisions for the Protection of Olympic Intellectual Property (“Beijing Declaration”) effective November 1, 2001, which provided for protection for a broadly defined category of covered Olympic Intellectual Property.¹⁴ Article 2 of the Beijing Declaration defined the covered intellectual property as including “any trademarks, special symbols,

Distribution] (regarding market access for certain copyrighted goods).

¹⁰ See MANUAL, *supra* note 1, at 31.

¹¹ See *id.* at 2; BEIJING ORGANIZING COMM. FOR THE GAMES OF THE XXIX OLYMPIAD, BEIJING CANDIDATURE FILE 39 (2000), available at <http://en.beijing2008.cn/65/68/column211716865.shtml> (follow “Theme 2 Legal Aspects” hyperlink) [hereinafter CANDIDATURE FILE]; see also Human Rights in China, *Winning Press Freedom Conference, Beijing’s Legal Obligations as Olympics Host: A Human Rights in China Briefing Paper* (2008), available at <http://www.beijing2008conference.com/articles.php?id=38> [hereinafter Beijing Conference] (stating that the legal, commercial, and financial rights and obligations of the IOC and Beijing are set forth in the Host City Contract, which is still not publicly available).

¹² See CANDIDATURE FILE, *supra* note 11, at 39 (stating that immediately upon being elected to Host City for 2008 Olympic Games, BOBICO and the Chinese Olympic Committee will sign the Host City Contract). The official title of the Beijing Bid Organization was the Beijing 2008 Olympic Games Bid Committee (“BOBICO”). This group was later re-instituted as the Beijing Organizing Committee for the Olympic Games (“BOCOG”) upon the acceptance of the bid to host the 2008 Summer Olympics in Beijing. For the sake of convenience, I will use the term “BOCOG” to refer to the actions of both Committees since they fill largely the same function and are composed of many of the same officials.

¹³ *Id.* at 39, 41 (stating that the “Chinese government will take all necessary legal measures to strengthen protection of the Olympic marks”).

¹⁴ See Regulations of Beijing Municipality for the Protection of Olympic Intellectual Property (promulgated by the Beijing Mun. Gov’t, Oct. 11, 2001, effective Nov. 1, 2001) art. 1, available at <http://www.beijing12312.com/newsshow.asp?id=A200712191653506083091> [hereinafter Beijing Declaration].

patents, works and other creations related to the Olympics as stipulated in the Olympic Charter and any agreements concluded by the Beijing Municipal People's Government and the Chinese Olympic Committee ("COC") with the International Olympic Committee ("IOC").¹⁵ Article 3 further defined the "trademarks, special symbols, patents, works and other creations related to the Olympics mentioned in these Provisions" as referring to the following:

1. the Olympic symbol (five Olympic Rings), Flag, Anthem, Motto as well as the terms or designs containing the words OLYMPIC, OLYMPICS, OLYMPIAD, OLYMPIC GAMES, or any type of combination thereof;
2. the emblem and title of the COC;
3. the logos, mascots, names, symbols (including Beijing 2008), anthem and slogans developed by the Beijing 2008 Olympic Games Bid Committee and the BOCOG or others entrusted by them for their use during the period when Beijing bid for or host the Games of the XXIX Olympiad; and
4. other Olympic intellectual property rights objects related to the Olympics.¹⁶

This broad definition for covered intellectual property includes an equally expansive definition of prohibited unauthorized uses, including:

1. using the same or similar trademarks, special symbols, patents, works and other creations without authorization in production, business operations, advertising, propaganda, performance and other activities;
2. forging or making without authorization representations of the same or similar trademarks or special symbols, or selling representations of the same or similar trademarks or special symbols that are forged or made without authorization;
3. using the same or similar trademarks, special symbols, patents, works and other creations in a disguised form;
4. using the same or similar trademarks, special symbols, patents, works and other creations without authorization in registration of enterprises, social organizations, institutions, private non-profit-making work units, and in the names of websites, domains, toponymy, buildings, structures, places, etc.;
5. assisting in acts of infringement by providing convenient conditions such as venues, storage, transportation, mail service or concealment; or

¹⁵ *Id.* art. 2.

¹⁶ *Id.* art. 3.

6. other infringements in violation of relevant laws and regulations of the State.¹⁷

The Beijing Declaration authorized municipal intellectual property, cultural, and enforcement offices, including the Beijing Administration for Industry and Commerce ("BAIC"), to enforce its provisions¹⁸ and cited the "principles of safeguarding the dignity of the Olympic Games" as the basis for protection.¹⁹

The Chinese Government also moved quickly to provide special legal protection for the intellectual property associated with the Olympic Games. In 2002, it enacted special regulations for the protection of the Olympic symbols ("Symbol Regulations").²⁰ While these Symbol Regulations have many provisions similar to those contained in the Beijing Declaration, they are not identical.²¹ In fact, it appears that the Regulations were based primarily upon then existing trademark law in China, which it largely mirrors.²² Similar to the Beijing Declaration, the

¹⁷ *Id.* art. 8.

¹⁸ *Id.* art. 10. In keeping with the traditional "two paths" of enforcement, the Beijing Declaration provides that intellectual property owners also have the right to choose to file a lawsuit with the civil courts in lieu of pursuing administrative relief. *Id.* art. 15. It should be noted, that unlike the United States, Chinese IP administrative tribunals generally have enforcement powers, including the ability to investigate claims, secure evidence, seize infringing goods and adjudicate liability. See generally PETER GANEA & THOMAS PATTLACH, *INTELLECTUAL PROPERTY LAW IN CHINA* 289–341 (Kluwer Law Int'l 2005). These tribunals include: State Administration for Industry and Commerce ("SAIC") which has primary administrative jurisdiction for trademark enforcement matters; National Copyright Administration ("NCAC") which has primary administrative jurisdiction for copyright enforcement matters; and, State Intellectual Property Office ("SIPO") which has primary administrative jurisdiction for patent enforcement matters. These administrative bodies also have the power to issue injunctive relief (usually in the form of a cease and desist order) and to impose fines. *Id.* They do not, however, have the ability to secure compensation for the intellectual property owner. Such relief is generally available, if at all, through civil litigation. *Id.* This is an extremely telescoped explanation of Chinese enforcement modalities. The reality is far more complex, with numerous overlapping jurisdictions between the agencies listed above and several other agencies, including for example the Technical Supervisory Bureau. *Id.* (discussing the aforementioned issues).

¹⁹ See Beijing Declaration, *supra* note 14, art. 5 (stating in full, "[t]he protection of Olympic intellectual property rights shall comply with the principles of safeguarding the dignity of the Olympic Games, prohibiting any infringement of proprietary rights, as well as protecting and using such rights according to law") (emphasis added).

²⁰ Regulations on the Protection of Olympic Symbols, (promulgated by Decree No. 345 of the State Council of the People's Republic of China, Feb. 4, 2002, effective Apr. 1, 2002), art. 1, available at <http://www.china.org.cn/english/China/208301.htm> [hereinafter Symbol Regulations]. These Symbol Regulations and the Beijing Declaration are not the only special laws and regulations enacted in China in connection with protection of the Olympic Symbols. China also enacted a special registration processes to assure protection of the Olympic Symbols. See Kenny Wong, *Hong Kong: China's Pledge to Protect Olympic IP Rights*, HONG KONG LAW., Oct. 2002, at 45–49, available at <http://www.hk-lawyer.com/2002-10/Oct02-ip.htm> (noting China's implementation of Measures for the Recordal and Administration of Olympic Insignia, and briefly detailing their effects).

²¹ See Yu Yilei, *Olympic Slogans Get New IPR Protection*, CHINA DAILY, Mar. 8, 2002, available at 2002 WLNR 7383805 (stating that the regulations, which come into effect on April 1, 2002, encompass a wider definition of Olympic slogans). See also discussion note 25 *infra*.

²² The precise relationship between the Beijing Declaration and the Symbol Regulations with Chinese Trademark Law is, like much of Chinese intellectual property law, both complex and evolving. For example, the simple issue of the types of relief available in cases of trademark infringement demonstrates a dynamic relationship between the three. Under existing Trademark

Symbol Regulations define the “Olympic symbols” to be protected in broad terms. Under the Symbol Regulations, protected Olympic Symbols are defined as:

- (1) The Five Olympic Rings of the International Olympic Committee Flag, Motto, Emblem, and Anthem of the Olympic Games;
- (2) The special terms of OLYMPIC, OLYMPIAD, OLYMPIC GAMES and their abbreviations;

Law in existence at the time of China's successful bid to host the Olympics, remedies for infringement of a registered trademark were limited to administrative actions, except for the right to appeal such actions to the courts. Trademark Law of 1982, as amended in 1993, art 39 (“Where any party has committed any of such acts to infringe the exclusive right to use a registered trademark as provided for in Article 38 of this Law, the infringed may request the administrative authority for industry and commerce at or above the county level for actions.”), *available at* <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/intellectual-property/trademark-law-of-the-peoples-republic-of-china-1993.html> [hereinafter Trademark Law 1993]. The 1994 Trademark Regulations similarly reflected an administrative bias in trademark enforcement, providing that “where the exclusive right to use a registered trademark has been infringed, any person may lodge a complaint with or report the case of infringement to the administrative authority for industry and commerce at or above the county level of the infringer's location or of the place where the infringing act was done. The infringer may otherwise institute legal proceedings directly with the people's court.” Implementing Regulations for the Trademark Law of the Peoples Republic of China—1993, *available at* <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/intellectual-property/implementing-regulations-for-the-trademark-law-of-the-peoples-republic-of-china-1993.html>. In October 2001, after the successful Olympic candidature, Chinese Trademark Law was amended to include both administrative and court remedies for infringement, however, mediation was required prior to such actions. Trademark Law, as amended in 2001, art. 53 (providing that where the issue of trademark infringement arises “the interested parties shall resolve the dispute through consultation; where they are reluctant to resolve the matter through consultation or the consultation fails, the trademark registrant or interested party may institute legal proceedings in the People's Court or request the administrative authority for industry and commerce for actions.”), *available at* <http://www.chinaipr.com/english/laws/laws11.htm> [hereinafter Trademark Law (PRC)]. Under the Beijing Declaration, established November 2001, remedies similarly include both administrative and court actions, however, administrative tribunals are granted the power to compel mediation at their discretion. Beijing Declaration, *supra* note 14, art. 15.

In the event that the rights of the proprietor have been infringed upon, the respective proprietor may lodge a complaint with the relevant department at the place where the infringement occurred or directly file a lawsuit with the people's court. When dealing with an infringement case, the relevant administrative department may carry out mediation according to law; where the mediation fails, the proprietor may file a lawsuit with the people's court.

Id. By contrast, the Symbol Regulations similarly track the obligation of mediation prior to enforcement activity contained in the then-existing Trademark Law, but added a significant variation by allowing the *litigants* to chose whether or not to pursue mediation. Symbol Regulations, *supra* note 20, art. 10 (“The dispute over the infringement of the exclusive right of the Olympic Symbols may be settled by mediation. If one of the parties refuses to mediate or the mediation is unsuccessful, the right owner of the Olympic Symbols or other interested persons may litigate it to the court, or claim for the resolution to the administration departments for industry and commerce.”). On a practical basis, while the Beijing Declaration contains some important advances in trademark protection, the Symbol Regulations *might* ultimately have a more wide-spread impact since they are not region specific in their applicability. *See* note 75 *infra* and accompanying text.

(3) The name, emblem and symbol of the Chinese Olympic Committee (“COC”);

(4) The name, emblem and symbol of the Beijing 2008 Olympic Games Bid Committee;

(5) The name and emblem of the Organizing Committee of Games of the XXIX Olympiad; the mascots, anthem and slogans of the XXIX Olympic Games; the ‘Beijing2008’, the XXIX Olympic Games and their abbreviations;

(6) Other symbols related to the XXIX Olympic Games prescribed in Olympic Charter and Host City Contract for the Games of the XXIX Olympiad.²³

Under these Regulations, the rights holders of the Olympic Symbols are granted “exclusive rights.”²⁴ Unauthorized uses of the Symbols “for business purposes” (commercial use)²⁵ are expressly prohibited.²⁶ Under the Symbol Regulations, “business purposes” is defined as “using the Olympic Symbols to make profits in the following ways:

(1) To use the Olympic Symbols on the commodities, the package or the container of the commodities, and the related trade documents;

(2) To use the Olympic Symbols in the service items;

²³ Symbol Regulations, *supra* note 20, art. 2. With its reference to protection of “other symbols prescribed in the Host Contract for the Games,” the Symbol Regulations are clearly designed to assure that any Olympic Symbol required to be protected in accordance with the Host Contract with the IOC falls within their scope of protection. Unfortunately, it is not clear precisely which additional terms fall within the scope of this protection since the Host Contract is not publicly available. Moreover, the guarantees required during the candidature process include protections for Olympic-related intellectual property. *See* MANUAL, *supra* note 1, at 19 (requiring “adequate and continuing legal protection” of “the Olympic symbol by, the host country”). For purposes of this Article, I will be focusing largely on efforts to protect the traditional Olympic symbols, including the five circle design, as well as the specialized symbols of the Beijing Olympics itself, including the five “mascots” of the Beijing 2008 Olympics. The Beijing-specific symbols are generally referred to as “fuwa,” with each character representing one of the colors of the Olympic Rings. *See* Official Mascots, *supra* note 4.

²⁴ Symbol Regulations, *supra* note 20, art. 4.

²⁵ As with any document which is translated, the English language translations of the Beijing Declaration and other regulations on which I rely are those I have cited. I have compared several different English language versions and the ones cited appear to me to be the most accurate (literal) translation I could find. Such literalness is particularly important in understanding the scope of remedies afforded under the Beijing Declaration, the Symbol Regulations and present Chinese Trademark Law because they appear to convey more accurately the practical application of the laws. Other translation may scan better as a translation but in the effort to translate Chinese into English some translators take liberties that actually end up changing the meaning. *See* note 33 *infra*.

²⁶ Symbol Regulations, *supra* note 20, art. 4.

- (3) To use the Olympic Symbols in advertisements, commercial exhibitions, commercial performance and other commercial activities;
- (4) To sell, import and export the commodities with the Olympic Symbols;
- (5) To produce or sell the Olympic Symbols;
- (6) Any other activities may make the third parties believe that there is sponsorship or other support relationships between the users and the right owners of the Olympic Symbols.²⁷

The enforcement of these Symbol Regulations is given to the State Administration for Industry and Commerce ("SAIC").²⁸ The Symbol Regulations, however, do not grant the SAIC exclusive jurisdiction over Olympic Symbol violations.²⁹ Instead, they expressly recognize that Customs shall have jurisdiction over "import and export cargoes . . . suspected of infringing the exclusive rights of the Olympic Symbols."³⁰ In addition, Article 14 of the Symbol Regulations provides that Olympic Symbols shall "also be protected according to the provisions of other laws and administrative regulations such as the Copyright Law . . . , Trademark Law . . . , and the Regulations on the Administration of Special Symbols."³¹ Furthermore, Article 10 specifically recognizes the right of the owner to seek relief in court if it so chooses.³²

Under the Symbol Regulations, where a person makes unauthorized use of an Olympic Symbol, such as manufacturing or selling counterfeit Olympic mascots, an injunction must issue and the infringing goods must be "confiscated and defaced,"³³

²⁷ *Id.* art. 5. In addition to protecting Olympic *trademarks* and other Olympic symbols, Article 5(6) of the Regulations also provides protection against ambush marketing activities (among other unauthorized uses). See Doris Estelle Long, *Ambush in Beijing: New Effort to Curb Ambush Marketing at the Beijing Olympics*, Conference Proceedings of the 2008 Fordham Annual Conference on Intellectual Property Law and Policy (2008) (forthcoming) (copy on file with author) [hereinafter, Long, *Ambush Marketing*].

²⁸ *Id.* art. 6. This agency is sometimes referred to as "AIC" for Administration for Industry and Commerce. Like the other administrative agencies referred to in this article, SAIC has diverse offices including those at the local level such as the Beijing Administration for Industry and Commerce ("BAIC") which would be one of the agencies with primary responsibility for enforcement activities around Olympic sites.

²⁹ *Cf.* Symbol Regulations, *supra* note 20, arts. 12, 14 (giving customs the power to investigate infringement of imports and exports and stating that Chinese patent and trademark laws also protect Olympic symbols).

³⁰ *Id.* art. 12.

³¹ *Id.* art. 14.

³² *Id.* art. 10 (discussing the "two paths" of intellectual property enforcement under Chinese law).

³³ *Id.* The term "defaced" is significant. While other translations use the term "destroy," the reality is that under present Chinese trademark law, such items do NOT have to be destroyed. See Regulations for the Implementation of Trademark Law, art. 44 (promulgated by the Decree No. 358 of the State Council, Aug. 3, 2002, effective Sept. 15, 2002), *reprinted in* STATE INTELLECTUAL PROPERTY OFFICE OF PEOPLE'S REPUBLIC OF CHINA, INTELL. PROP. LAWS AND REGS 121 (P.R.C) (2003) [hereinafter Trademark Regulations]. To the contrary, infringed goods may even be resold at public auction after seizure so long as the trademark has been removed. See *id.*

along with the “special tools for producing the infringing commodities.”³⁴ The Symbol Regulations further provide that the illegal gains of the infringers may be confiscated and the infringers shall also be fined under [up to] “five times of the illegal gains.”³⁵ In the absence of illegal gains, the infringers may still be fined.³⁶

These provisions bear a strong facial similarity to existing Chinese trademark law, which similarly provides for confiscation and destruction of infringing goods,³⁷ injunctions,³⁸ and the award of fines for trademark infringement.³⁹ Yet beyond this facial similarity to then-existing Chinese trademark law, the Olympic Symbol Regulations provide several benefits to Olympic Symbols that trademarks do not presently enjoy.⁴⁰ These new developments, I believe, demonstrate that there is a *possibility* for a resolution of many current areas of contention between China and the United States over enforcement modalities.

The disputes between the United States and China over IPR enforcement are varied and not readily quantifiable. One of the present disputes between the parties concerns the threshold levels at which criminal actions can be initiated against pirates and counterfeiters.⁴¹ In April 2007, the United States initiated dispute resolution proceedings before the WTO with regard to several issues concerning China’s alleged failure to meet its obligations under TRIPS for the protection of intellectual property rights and intellectual property-based goods.⁴² Contrary to popular opinion, the United States did not raise a direct claim regarding the definition of “effective enforcement” under Article 41.⁴³ It did, however, challenge the

³⁴ Symbol Regulations, *supra* note 20, art. 10.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Trademark Law (PRC), *supra* note 22, art. 53. It should be noted, however, that Chinese trademark law currently establishes a hierarchy of relief, which allows for removal of the trademark as opposed to the goods destruction where such removal is possible. Trademark Regulations, *supra* note 33, art. 44 (providing that if it is difficult to detach “the representations” of the trademark, then both the representations and the goods “shall be confiscated and destroyed”). See generally GANEA & PATTLOCH, *supra* note 18, at 312–14.

³⁸ Trademark Law (PRC), *supra* note 22, arts. 13.

³⁹ Compare Trademark Law (PRC), *supra* note 22, arts. 45 & 48 and Trademark Regulations, *supra* note 33, art. 42 with Symbol Regulations, *supra* note 20, art. 10.

⁴⁰ See *Olympic Logos, Images Get Protection*, CHINA DAILY, Apr. 18, 2007, available at 2007 WLNR 7264280 (noting that “[t]his is China’s first regulatory effort specifically designed to protect Olympic intellectual properties in accordance with international practice”).

⁴¹ See *China Protection and Enforcement*, *supra* note 9.

⁴² See *id.*; *Trading and Distribution*, *supra* note 9; see also *China’s IPR Action to be Probed*, CHINA DAILY, Sept. 27, 2007, available at 2007 WLNR 18897927 (noting that the United States “filed a complaint against China’s legal regime for protecting and enforcing copyrights and trademarks”). Presently, a panel has been established, briefs have been filed and the first round of oral statements have been made. See generally *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm. For a copy of all U.S. filings in the case to date, see U.S. Briefs Filed in WTO Dispute Settlement Proceedings—Pending, http://www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Index_-_Pending.html.

⁴³ See TRIPS Agreement, *supra* note 8, art. 41. Article 41 of TRIPS requires that members provide “effective” and “deterrent” enforcement of intellectual property rights. *Id.* Present proceedings before the Dispute Settlement Body of the WTO do not directly address whether the sum of China’s enforcement efforts meet these requirements. Instead, present consultation requests outline specific procedural or substantive failures in providing the necessary infrastructure for

procedural and structural effectiveness of required criminal enforcement modalities under TRIPS.⁴⁴

Under TRIPS, in addition to requiring effective and deterrent enforcement of intellectual property rights through fair and equitable civil processes,⁴⁵ member countries must also provide effective criminal enforcement against “copyright piracy on a commercial scale”⁴⁶ and “willful trademark counterfeiting.”⁴⁷ Such effective enforcement requires not merely the *possibility* of criminal enforcement, but process and procedures that make such enforcement practically and *actually* available to combat trademark counterfeiting.⁴⁸ It further requires that all penalties and fines imposed “provide a deterrent.”⁴⁹ One of the issues at the heart of the present IPR dispute between China and the United States includes the critical issue of whether the threshold requirements for criminal sanctions against trademark counterfeiters under Chinese law is so high that it effectively precludes such sanctions.⁵⁰

The valuation of the harm caused by the unauthorized production, distribution, and sale of counterfeit goods is a particularly problematic issue for trademark owners in China. Not only is valuation fundamental to the determination of when the threshold for criminal enforcement arises,⁵¹ but it is also critical in the determination

effective enforcement. See *China Protection and Enforcement*, *supra* note 9; *Trading and Distribution*, *supra* note 9.

⁴⁴ See *Officials: Different Practices Will Not Hinder IPR Fight*, CHINA DAILY, Apr. 17, 2006, available at 2006 WLNR 647945 (stating “[a] number of countries, including the United States, claim that China’s criminal procedures and penalties are inconsistent with the World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights”).

⁴⁵ See generally TRIPS Agreement, *supra* note 8, arts. 41–50. A complete discussion of the enforcement obligations imposed under TRIPS is beyond the scope of this Article. Briefly, TRIPS obligates member countries to establish minimum procedures for the effective enforcement of intellectual property rights. These minimum procedures include the availability of adequate compensation, as well as ex parte relief, including injunctions, seizure and destruction of infringing goods and equipment. See generally Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C. J. INT’L L. & COM. REG. 229, 248–62 (1998) (briefly summarizing the provisions governing effective enforcement of intellectual rights, including trademarks, under TRIPS).

⁴⁶ TRIPS Agreement, *supra* note 8, art. 61. Criminal penalties may also be imposed by member states against other forms of intellectual property violations, but the application of such penalties remains at each Member Country’s discretion. *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* In addition to imprisonment and/or monetary fines “consistent[] with the level of penalties applied for crimes of a corresponding gravity,” Article 61 also requires that “in appropriate cases,” additional remedies, including seizure, forfeiture and destruction of the infringing goods “and of any materials and implements the predominant use of which has been in the commission of the offence” be available. *Id.*

⁵⁰ See *China Protection and Enforcement*, *supra* note 9 (noting U.S. concerns about “the thresholds that must be met in order for certain acts of trademark counterfeiting . . . to be subject to criminal procedures and penalties”). The subject matter of the dispute is not limited to trademark threshold requirements but also includes threshold requirements for copyright piracy. *Id.*

⁵¹ Under Article 59 of Chinese Trademark Law, criminal liability is only available if “the case is so serious as to constitute a crime.” Trademark Law (PRC), *supra* note 22, art. 59. The determination of “seriousness” is based on the amount of profit that the infringer makes. Interpretation by the Supreme People’s Court and the Supreme People’s Procuratorate on Several Issues of Concrete Application of Laws in Handling Criminal Cases of Infringing Intellectual Property (promulgated by the 1331st Session of the Judicial Comm. of the Supreme People’s Court

of administrative fines and the amount of compensation awarded to intellectual property owners.⁵² Under present Chinese Trademark Law, penalties and damage awards are based upon valuations which use the actual sales price (the counterfeiter's price) or the "labeled" price, which largely amounts to the same thing.⁵³ According to Article 12 of the Judicial Interpretation by the Supreme People's Court,

Value of the products produced by infringing on intellectual property shall be computed according to the prices at which such products are actually sold. Value of the products produced by infringing on intellectual property produced, stored, transported, and those not sold shall be computed according to the labeled prices or the actual prices found to be sold at after investigation. Value of the products produced by infringing on intellectual property without labeled prices or whose actual prices are impossible to be ascertained shall be computed according the middle market prices of such products.⁵⁴

Any focus on the counterfeiter's price for establishing harm necessarily undervalues such harm and fails to provide the necessary deterrent effect to provide for effective enforcement.⁵⁵ As I have said in many venues, piracy and counterfeiting are businesses. So long as awards and fines remain small, and profits large, deterrence is a pipe dream. The Symbol Regulations, however, on their face appear to provide the means for substantially ameliorating this situation.⁵⁶

and the Tenth Procuratorial Comm. of the Supreme People's Procuratorate, Nov. 11, 2004, effective Dec. 22, 2004), art. 1, *available at* http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=2038&col_no=121&dir=200603 [hereinafter Judicial Interpretation] ("establishing seriousness thresholds if "the amount of illegal business volume being more than RMB 50,000 or that of illegal gains being more than RMB 30,000; [or] (2) forging more than two registered trademarks, the amount of illegal business volume being more than RMB 30,000 or that of illegal gains being more than RMB 20,000.").

⁵² Trademark Law (PRC), *supra* note 22, arts. 45, 47, & 48 (authorizing the imposition of a fine on parties who improperly use trademarks); *id.* arts. 53 & 59 (authorizing the owner of the infringed trademark to seek compensation for the damages caused by the infringement). Even Chinese law recognizes the difficulty in establishing compensation rates in cases of trademark violations. *Id.* art. 56 (noting that there might be circumstances where "it is difficult to determine the profit that the infringer has earned because of the infringement in the period of the infringement or the injury that the infringer has suffered from the infringement in the period of the infringement").

⁵³ See Judicial Interpretation, *supra* note 51, art. 12, (stating that the "[v]alue of the products produced by infringing on intellectual property produced, stored, transported, and those not sold shall be computed according to the labeled prices or the actual prices found to be sold at after investigation").

⁵⁴ *Id.*

⁵⁵ See David J. Goldstone & Peter J. Toren, *The Criminalization of Trademark Counterfeiting*, 31 CONN. L. REV. 1, 74 (1998) (discussing the criminalization of trademark counterfeiting in the United States and suggesting that "the most obvious way to avoid such valuation problems would be to base the 'loss' figure on the retail price of the genuine merchandise, [which is] precisely the price the counterfeiter tries to undercut").

⁵⁶ See Symbol Regulations, *supra* note 22, art. 13 (stating the basis for the amount of compensation for losses caused by infringement will be "determined on the basis of the loss that right holder has suffered from the infringement or the profit the infringer has obtained through the infringement"). See also discussion *infra* notes 62–74 and accompanying text.

As opposed to relying on the actual value or labeled value for determining the fines to be levied, the Regulations specifically allow such fines to be tied to the license fee for the use of the Olympic Symbol.⁵⁷ Under Article 13, compensation for the unauthorized use of a Symbol shall be “according to the loss of the infringed, or the gain of the infringer caused by the infringement.”⁵⁸ This language mirrors traditional Chinese Trademark Law.⁵⁹ Significantly, however Article 13 provides that if such loss or gain cannot be determined, “the compensation shall be reasonably determined with reference to the licensing fees for using [the] Olympic symbol.”⁶⁰ This focus on a tangible valuation based *not* on pirate values, but instead based clearly on the value to the trademark owner is a major step forward and could result in significant fines, given the relatively high license fees charged for use of the Olympic Symbols.⁶¹

This advance in relief for Olympic Symbol protection is combined with an increase in the amount of fines for engaging in the unauthorized use of intellectual property. Current Trademark Law provides that fines for unauthorized use of registered trademarks shall be up to three times the amount of the “illegal business turnover.”⁶² Where it is impossible to determine the amount, then a fine of up to 100,000 RMB may be imposed.⁶³ By contrast, under the Regulations governing the Protection of the Olympic Symbols, fines are increased to up to five times the amount of the illegally obtained income.⁶⁴ Where no such illegal income can be ascertained (including presumably where the unauthorized use has been stopped before any sales have occurred), fines up to 50,000 RMB may be imposed.⁶⁵ The monetary fines levied on counterfeiters who fail to keep accurate records (the vast majority, no doubt) are markedly lower under the Symbol Regulations.⁶⁶ Given that the Regulations, however, provide that values will be based on Olympic licensing fees in the absence of other proof, it is likely that most infringers will be subjected to the significantly

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Trademark Law (P.R.C.), *supra* note 22, art. 56 (stating “[t]he amount of damages shall be the profit that the infringer has earned because of the infringement in the period of the infringement or the injury that the infringer has suffered from the infringement in the period of the infringement”). Notably, Article 13 of the Symbol Regulations also provides for consideration of “the reasonable costs to deter the infringements.” Symbol Regulations, *supra* note 20, art. 13, which is also mirrored in Chinese trademark law. Trademark Law (P.R.C.), *supra* note 22, art. 56.

⁶⁰ Symbol Regulations, *supra* note 20, art. 13.

⁶¹ *Cf.* INT’L OLYMPIC COMM., SYDNEY 2000 MARKETING REPORT 89–90 (2000), available at http://www.olympic.org/uk/utilities/reports/index_uk.asp (follow “2000—Marketing Report Sydney 2000” hyperlink; then follow “Section 5—Sydney 2000 Olympic Licensing”) (noting that approximately 100 licensees generated licensing revenues in excess of fifty-two million U.S. dollars for the 2000 Olympic games); see generally Licensed Products, *supra* note 5 (stating that “[b]y 2008, it is estimated that 6,000–7,000 kinds of licensed products will be showcased at more than 10,000 licensed stores nationwide”).

⁶² Trademark Regulations, *supra* note 33, art. 52.

⁶³ *Id.* The U.S. dollar equivalent of 100,000 RMB is approximately \$12,289, utilizing a conversion rate of 1 USD=7.00 RMB. Yahoo Finance Currency Converter, <http://finance.yahoo.com/currency/convert?amt=1&from=USD&to=CNY&submit=Convert> (last visited May 4, 2008).

⁶⁴ Symbol Regulations, *supra* note 20, art. 10.

⁶⁵ *Id.*

⁶⁶ *Id.* The absence of such recordkeeping would presumably result in a lack of evidence concerning the amount of profit which the infringer earned through the illegal activity in question. *Id.*

higher mandatory multiple. The remedies available to those infringed upon for the unauthorized use of Olympic Symbols are further strengthened by the Beijing Municipal Declaration, which provides that even if there are uses which are not covered by present laws, fines from 1,000 RMB up to 30,000 RMB may be imposed if those uses are prohibited by the Declaration itself.⁶⁷

The Symbol Regulations represent a significant advance in the protection of trademarks and other commercial symbols. More than simply improving such critical issues as valuation and penalty determinations, these regulations represent a strong declaration by the Government of China of the importance of protection for certain trademarks—trademarks which necessarily are owned at least in part by foreign entities.⁶⁸ Such advances should provide a strong basis for increasing the protection of trademarks generally in China.⁶⁹ As discussed below, however, there may be cultural reasons why such one-to-one enhancement may not occur.⁷⁰

II. THE COUNTERFEITERS START EARLY

In Even with special regulations protecting Olympic symbols, the counterfeiters have started early.⁷¹ Piracy and counterfeiting, at its heart, is a business. In my lengthy experience in international IP enforcement, I have yet to meet or hear of

⁶⁷ See Beijing Declaration, *supra* note 14, art. 14. Presumably, these fines might also be applied in cases of “ambush” marketing which do not fit clearly within current trademark and unfair competition prohibitions. See Long, *Ambush Marketing*, *supra* note 27. The Beijing Declaration becomes more significant in light of the fact that most counterfeit Olympic merchandise will most likely be governed by it since it covers the location of the Olympics where most counterfeit merchandise can be expected to be sold. *Id.*

⁶⁸ See Vince Chong, *Beijing Steps Up Fight Against Fakes*, STRAITS TIMES, Feb. 2, 2008, available at 2007 WLNR 1951437.

⁶⁹ See *Nation Vows Full Protection of IPR*, CHINA DAILY, Mar. 4, 2008, available at 2008 WLNR 4227027 (stating that “the mechanism to protect intellectual property rights (IPR) will be implemented fully across the country this year . . .”). It should be noted that these protection mechanisms are not limited to heightened enforcement but also include such practical efforts as certifying legitimate products available in limited venues, including authorized Olympic stores. See Lei Lei, *Forum Stresses IPR Protection for Games*, CHINA DAILY, Apr. 3, 2004, available at 2004 WLNR 9904636 (stating that techniques to protect intellectual property rights include: (1) ongoing promotion about IPR protection integrated into Olympic Celebrations; (2) a marketing plan that includes only certified products; (3) customer service; (4) enhancing the IPR protection in all pertinent areas; and (5) severely punishing violators).

⁷⁰ See discussion *infra* Part II; see also Dan Martin, *Fakes a Real Fact of Life in China's Heated Economy*, STANDARD, Apr. 11, 2007, http://www.thestandard.com.hk/news_detail.asp?pp_cat=20&art_id=41990&sid=13078355&con_type=1&d_str=20070411 (profiling the existence of a “Fake Disneyland” in the heart of Beijing and the lack of concern many Chinese citizens have for violation of intellectual property rights).

⁷¹ See, e.g., *Beijing Seizes Nearly 30,000 Fake Olympic Products*, PEOPLE'S DAILY ONLINE, June 18, 2007, http://english.people.com.cn/200706/18/eng20070618_385151.html (noting nearly thirty-thousand stuffed-animal Olympic mascots were seized); *Beijing to Crackdown on Street Peddlers Selling Fake Olympic Mascots*, PEOPLE'S DAILY ONLINE, July 3, 2007, <http://english.people.com.cn/90001/90776/6205335.html> (stating Beijing police are shifting their focus from counterfeit manufacturers to street peddlers); Grant Clark & Wing-Gar Cheng, *China Aims at Olympic Knockoffs: Crackdown Ordered on Fake Souvenirs*, INT'L HERALD TRIB., Apr. 26, 2007, at 10 available at 2007 WLNR 7987447 (noting that four-percent of trademark violations in Beijing last year were trademark-related, and anticipating a rise in that number).

what I refer to as the “patriotic pirate.” Pirates sell whatever goods are popular. If there is a market demand for a particular sound recording, it does not matter if the singer is local or foreign.⁷² If there is money to be made, the pirate will sell it. Statistics on the amount of pre-Game counterfeiting activity of Olympic Symbols in China are difficult to obtain. News stories derived from English language newspapers and websites, however, demonstrate that everything from stuffed animal mascots to mascot shaped phones to decals are already being pirated in large enough numbers to warrant publicized seizures of the goods.⁷³ Thus, even in connection with goods for which the Chinese Government has taken strong measures to prohibit counterfeiting,⁷⁴ the pirates continue to violate the laws.

III. PIRACY IN CHINA IS NOT LIMITED TO HARD GOODS COPIES

While trademark owners are used to policing hard goods markets (a difficult task admittedly in a country as large and populous as China),⁷⁵ China has become a significant member of the Internet Club.⁷⁶ Present internet use statistics indicate that there are more Chinese language websites than English language ones.⁷⁷ Infrastructure has similarly kept pace, with over 220 million users as of February 2008,⁷⁸ and over nine million domain names registered using the “.cn” country code in China.⁷⁹ The counterfeiters have already begun to take advantage of the commercial opportunities of the Olympics and the internet by launching shadow sites purporting to offer tickets, travel and other Olympic sponsored goods and services.⁸⁰ This development means trademark owners must go beyond traditional concepts of trademark protection in China. Potential counterfeiting activities that may occur on shadow sites, or even on internet auction sites, are becoming realities in China and

⁷² See generally Press Release, Int’l Intellectual Prop. Alliance, USTR Again Names China as a Priority Foreign Country Under Special 301 (Apr. 30, 1996), http://www.iipa.com/pressreleases/1996_Apr30_china_pressrelease.html (stating levels of piracy in China run from fifty to ninety-nine percent depending upon the genre).

⁷³ *Beijing Seizes Nearly 30,000 Fake Olympic Products*, *supra* note 71.

⁷⁴ See discussion *infra* notes 63–72 and accompanying text.

⁷⁵ Enforcement becomes even more difficult when the reality of Chinese geography and development is taken into consideration. Like most countries, China presents a diverse array of IP protection challenges. From the coastal areas, where China resembles a developed country to the interior where development is markedly lower yet many pirate factories are allegedly located; from the Economic Development Zones to the mountainous borders on China’s western frontiers, China’s geography is as diverse as the enforcement challenges such diversity presents.

⁷⁶ See *Numbers*, TIME, May 5, 2008, at 16 (revealing that 220 million Chinese were using the Internet as of February 2008, compared to 216 million U.S. citizens).

⁷⁷ See CHINA INTERNET NETWORK INFORMATION CENTER, STATISTICAL SURVEY REPORT ON THE INTERNET DEVELOPMENT IN CHINA 26 (2008) [hereinafter SURVEY REPORT], available at <http://www.cnnic.net.cn/uploadfiles/pdf/2008/2/29/104126.pdf> (stating China currently has over one million five hundred thousand websites, with a growth rate of over seventy-eight percent since 2006).

⁷⁸ *Numbers*, *supra* note 76, at 16.

⁷⁹ SURVEY REPORT, *supra* note 77, at 9.

⁸⁰ See, e.g., Cindy Loose, *Going for Your Gold*, WASH. POST, Mar. 2, 2008, at 9; *Fake Olympic Site ‘Tricks Users’*, BBC NEWS, Oct. 1, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/7021608.stm>; *In Brief*, S. CHINA MORNING POST, Oct. 1, 2007, at 5, available at 2007 WL 19154350.

must form part of a trademark owner's enforcement efforts.⁸¹ Admittedly, the challenge to such practices is relatively new in China. But, in October 2007, police arrested a man in Southern China for running a shadow Beijing Olympics website which he used to defraud consumers through fake contests.⁸² Given the present determination of the Chinese government to protect the Olympic Symbols, we will undoubtedly see new ground plowed in this area.

IV. ENFORCEMENT PLUS: A FUTURE TREND?

The advances in protection represented by the Regulations to Protect the Olympic Symbols are only part of the significant developments in intellectual property protection in China as a result of the Beijing Olympics. In fact, one of the most significant developments is the active enforcement campaign undertaken by the Chinese Government to assure protection of the Olympic Symbols.⁸³ This effort has no present equivalent in general trademark enforcement protection in China.

First, in addition to involving the administrative tribunals and the courts in the enforcement, the Regulations expressly gave Chinese Customs the obligation to investigate suspected infringements of the Olympic Symbols for both exported and imported cargoes.⁸⁴ These new measures have been supported by training programs aimed directly at improving customs expertise in this area.⁸⁵ Enforcement training programs for other intellectual property protection organizations have also been conducted and a "rapid city Olympic intellectual property protection linkage mechanism" has been established to provide fast action on potential infringements.⁸⁶ Enforcement is not limited to Beijing. To the contrary enforcement sweeps have been planned for other major cities in China, including Qingdao, Tianjin and Shanghai.⁸⁷

In addition to mobilizing traditional enforcement personnel, the Chinese Government has also mounted a major public relations campaign to educate the public about the importance of protecting the Olympic Symbols.⁸⁸ Articles have appeared stressing the harm that counterfeit products can cause.⁸⁹ In one case,

⁸¹ Cf. *Olympic Logos, Images Get Protection*, China Daily, Apr. 18, 2007, available at 2007 WLNR 7264280 (recommending that "websites should not get involved in sales of counterfeits, otherwise they risk punishments given to those in real world marketplaces" but recognizing that the Internet makes fighting counterfeiting more difficult).

⁸² See *Fake Olympic Site 'Tricks Users'*, *supra* note 80.

⁸³ *Olympic Logos, Images Get Protection*, *supra* note 81 (discussing China's new regulations to safeguard Olympic logos and images).

⁸⁴ Symbol Regulations, *supra* note 20, art. 12.

⁸⁵ China Fun, *Protection of the Olympic Symbol: Beijing is Resolutely*, Sept. 26, 2007, <http://www.china-fun.net/2008/preparation/200709261/1510291.shtml> (last visited Apr. 18, 2007).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Tang Yuankai, *Symbol of Protection*, BEIJINGREVIEW.COM, Jan. 16, 2007, http://www.bjreview.com/quotes/txt/2007-01/16/content_54311.htm (describing how enforcement personnel fined a restaurant owner for copyright infringement because he used "the words 'wish the 2008 Beijing Olympics success' on [its] napkins").

⁸⁹ See, e.g., Charles Whelan, *Beijing Fighting to Save Integrity of Olympic Rings*, BUS. DAY (S. AFRICA), Apr. 12, 2007, at 19, available at 2007 WLNR 7003872; Geoffrey A. Fowler, *China's Logo Crackdown—The Nation Is Awash in Phony Western Brands but Draws the Line at Valuable Olympic Symbol*, WALL STREET J., Nov. 11, 2005, at B1.

involving the seizure of 12,800 partially finished Fuwa (the five major mascots of the Beijing Olympics) and more than 12,700 finished products confiscated in February 2007, a local official was quoted in the Beijing Daily Messenger warning people against the health hazard posed by the products, which were sometimes filled with industrial waste that could threaten people's health.⁹⁰

Consumers have been drafted into the enforcement effort. A hot line has been set up in Beijing and rewards are being offered for truthful information regarding infringing activity.⁹¹ Corporations are further being urged to take pledges to avoid infringing the Symbols.⁹² Those who violate the Olympic Symbols may also find themselves subject to public criticism in the press.⁹³

While it is too soon to ascertain the final impact of these efforts, there is some evidence that this concerted effort is having a positive impact on counterfeiting activities connected with the Olympics. Reports indicate that counterfeit Olympic merchandise does not appear readily available at least around major Olympic venues.⁹⁴ This fact alone demonstrates a truth we have long known about international enforcement of intellectual property rights. Once the infrastructure for enforcement is in place,⁹⁵ actual enforcement depends largely on the importance which local governments place on such activities.⁹⁶ The mobilization of the necessary

⁹⁰ *Beijing Seizes Nearly 30,000 Fake Olympic Products*, *supra* note 71.

⁹¹ *Beijing Sets Up Copyright Theft Hotline*, AGENCE FRANCE PRESSE ENGLISH WIRE, Apr. 24, 2007, available at WL, 4/24/07 Agence Fr.-Presse 05:19:00; see also Symbol Regulations, *supra* note 20, art. 11 (providing "[a]ny organization and individual may report any activity in violation of Olympic intellectual property rights to the administrative departments of industry and commerce, intellectual property rights, copyright, etc.; and shall be rewarded if the case reported proves to be true").

⁹² Beijing Declaration, *supra* note 14, art. 9 (providing that "[a]dvertisers, advertising agents and advertisement publisher shall not infringe upon the Olympic intellectual property rights"); see also Yuankai, *supra* note 91 (noting that companies' use of Olympic emblems and other symbols are conditioned on the fact that they are used to fulfill social responsibility).

⁹³ Bi Xiaoning, *Fake Ties*, CHINA DAILY, Mar. 17, 2007, at 9, available at http://www.chinadaily.com.cn/bw/2008-03/17/content_6540586.

⁹⁴ Geoffrey A. Fowler, *In China, Olympic Knockoff Spark Crackdown but State Ignores Other Fake Logos*, GLOBE AND MAIL, Nov. 4, 2005, at B9, available at 2005 WLNR 17832472 (reporting that despite increasing demand the number of counterfeit Olympic goods is small).

⁹⁵ Timothy P. Trainer, *The Fight Against Trademark Counterfeiting*, 29 CHINA BUS. REV. 6, Nov.-Dec., 2002, available at <http://www.chinabusinessreview.com/public/0211/trainer.html> (stating that the Chinese government will need to "involve every aspect of the enforcement system: administrative agencies, police, prosecutors, and judges"). This infrastructure necessarily includes the legal infrastructure, including appropriate legal protection for intellectual property and effective and fair procedures for securing such protection, as well as an adequate level of training for judges, lawyers, police, customs and other enforcement personnel. The development and maintenance of such infrastructure is undeniably an on-going process. *Id.* (stating that many enforcement training seminars have taken place throughout China over the past several years, but "given the scope of the problem and the size of [China] means that] much more education and training is necessary").

⁹⁶ See generally Tang Yuankai, *Cashing In On the Dream*, BEIJINGREVIEW.COM, Sept. 14, 2007, http://www.bjreview.com/olympic/txt/2007-09/14/content_77028.htm (stating that Olympic IPR protections are "also very important carriers of culture"). There are other factors beyond the heightened enforcement efforts that may play a role in the success of Chinese efforts to protect the Olympic Symbols. *Id.* In particular, strict manufacturing controls, including the requiring of specialized holographic identity tags on authorized goods, and strict distribution channels, including limiting the sales of Olympic merchandise to licensed stores, undoubtedly also play a role and may

players in any IP enforcement program—including, significantly, the public as a result of public relations and education campaigns to alert them to the importance of protecting intellectual property, is not an easy undertaking.⁹⁷ The apparent existence of this mobilization in China in connection with the Olympic Symbols is a tremendous advance. On the other hand, unless these efforts spill over into the protection of *other* marks, including those owned by foreign companies, such mobilization may prove unfortunately evanescent.

V. OLYMPIC GOLD: THE TRAINING PERIOD MAY NOT BE OVER

While Olympic *symbols* may currently be the subject of heightened protection, cultural perceptions of the differences between traditional, commercial marks and Olympic symbols may make any appreciable “improvement” in IPR protection temporary at best. The heightened public perception of the importance of protecting the Olympic Symbols from unauthorized uses, and the active role that the public has taken in helping to protect Olympic Symbols may not be readily transferable to other commercial marks.⁹⁸ From the point of view of trademark law, there is no significant difference between an Olympic logo and any other trademark when it comes to the need for protection against counterfeit and other infringing uses. Yet culturally, the Olympic Symbols may not be *perceived* as the functional equivalent of a Louis Vuitton logo or the Prada trademark, two popular luxury brands in China.⁹⁹

The Olympic Symbols have been actively promoted as having a double significance; one, commercial and the other as “important cultural carriers of the Olympic movement, a symbol of the Olympic spirit.”¹⁰⁰ The spirit represented by the Olympics has been promoted as more than an athletic contest to be merchandised.¹⁰¹ To the contrary, five “cultural events” have been held, pre-opening day, promoting the strong connection between the Olympic spirit and Chinese culture and tradition.¹⁰² In the Manual for Beijing Olympic Volunteers, the BOCOG stresses the

explain some of the differences in the apparent success of present Olympic Symbol enforcement versus traditional commercial trademark protection. *Id.*

⁹⁷ Brent T. Yonchara, *Enter the Dragon: China's WTO Accession, Film Piracy and Prospects for the Enforcement of Copyright Laws*, 9 UCLA ENT. L. REV. 389, 416–17 (2002) (arguing that educating the mass about intellectual property is key in preventing piracy in China).

⁹⁸ See Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 165 (2000) (stating that Confucian beliefs, socialist economic system, and general skepticism of Western institution present a barrier to intellectual property protection); Yonchara, *supra*, note 974, at 398–401 (discussing how the Confucian concepts of li and fa have hindered enforcement of intellectual property rights).

⁹⁹ Joseph Simone, *In the Courts: Holding the Landlord Liable—New Tools for Counterfeit Crackdown in China*, WIPO MAG., Nov. 2007, http://www.wipo.int/wipo_magazine/en/2007/06/article_0006.html (stating that these are two of the luxury brands that were the focus of the first successful civil action against a landlord in China for providing a venue for counterfeiters).

¹⁰⁰ China Fun, *supra* note 85 (quoting Li Yan Jun, Director Beijing Olympic Organizing Committee).

¹⁰¹ Yuankai, *supra* note 88 (highlighting the importance of delineating between public and commercial activities in order to avoid diminishing the public's fervor for the Olympic games).

¹⁰² 5th Beijing 2008 Olympic Cultural Festival Concludes—The Official Website of the Beijing 2008 Olympic Games, <http://en.beijing2008.cn/culture/festivals/ceremony/n214110895.shtml> (last visited Apr. 19, 2008) (stating that the fifth festival was a gala event that “followed the mantra ‘One

role of the Olympics as a “social movement based upon sports and guided by certain philosophical thoughts, i.e., Olympism.”¹⁰³ The Manual describes the “central ideal” of Olympism as “the harmonious development of man, and it tries to reach the goal through sports. Olympism greatly enlarged the spiritual contents of sports.”¹⁰⁴ In addition to stressing the philosophical, human dignity goals of the Olympics,¹⁰⁵ the Manual places volunteering to assist in the hosting of the Olympics within Confucian goals of social obligation. The Manual states:

China’s ancient educator and thinker, Confucius, believed “benevolence and love” to be the top moral standards of “JUN ZI (a man of honor, a righteous man, or a gentleman).” Confucius also held that one should fulfill his obligations in society and the nature of these obligations were “to love people,” i.e. “benevolence.” One should have a heart of love and benevolence in order to complete his social obligations. Confucius believed that, to some extent, “righteousness” is in opposition to “profit.” The seeking of profit is equal to unrighteousness. Confucius said “The man of honor seeks righteousness, while the man of disgrace only cares for profit.”¹⁰⁶

This socio-cultural overlay of human dignity and social benefit with regard to the meaning of the Olympics and its related symbols is reflected in the basis for the pledges of non-infringement businesses are making, which are described as promises to “fulfill their social responsibility.”¹⁰⁷ The cultural significance of the Olympic Symbols suggests that, without an effort to invest non-Olympic Symbols marks with a similar cultural significance, the strong support for their protection may remain largely non-existent.

Brands undoubtedly carry messages beyond source designation and quality characteristics. As Douglas Atkin recognizes, “Today a brand legitimizes the consumer . . . [Brands] have become so important as cultural representations that people even brand them on their own body much as our predecessors tattooed symbols of social status.”¹⁰⁸ Jean Noel Kapferer similarly describes brands as possessing a “personality” and “a culture.”¹⁰⁹ Yet in order for such brands to be

World One Dream—I participate, I contribute, and I enjoy,’ which integrated sport with culture”); Lin Qi, *Festival Primes Residents with Olympic Spirit*, CHINA DAILY, June 24, 2006, available at 2006 WLNR 10967169 (describing the wide variety of cultural and sporting activities that were scheduled for the 4th Beijing 2008 Olympic Cultural Festival).

¹⁰³ MANUAL FOR BEIJING OLYMPIC VOLUNTEERS 39 (Beijing Olympic Games Volunteer Work Coordination Group ed., 2008), available at <http://en.beijing2008.cn/volunteers> (follow “Manual For Beijing Olympic Volunteers” hyperlinks).

¹⁰⁴ *Id.* at 40.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Yuankai, *Symbol of Protection*, *supra* note 88 (quoting Chen Jian, a researcher on the Beijing Olympics).

¹⁰⁸ DOUGLAS ATKIN, *THE CULTING OF BRANDS: WHEN CUSTOMERS BECOME TRUE BELIEVERS* 115 (2004).

¹⁰⁹ JEAN-NOËL KAPFERER, *THE STRATEGIC BRAND MANAGEMENT: NEW APPROACHES TO CREATING AND EVALUATING BRAND EQUITY CREATING AND SUSTAINING BRAND EQUITY LONG TERM*, 434 (Philip Gibbs trans., Free Press 3d ed. 2004) (1992); see also Doris Estelle Long, *Is Fame All There Is?: Beating Global Monopolists at Their Own Marketing Game*, 40 GEO. WASH. INT’L L. REV

protected with the vigor bestowed upon the Olympic Symbols, brand owners must develop brand cultures that are in keeping with present Chinese socialist ideals. Without such cultural connections, it is highly likely that the improvements in enforcement modalities represented by China's present efforts to protect the Olympic Symbols will be lost.¹¹⁰ The moment for turning opportunity into Olympic Gold for IP enforcement is now. Such Gold can only be achieved, however, if the lessons of China's recent enforcement efforts in connection with the Olympic Symbols are taken to heart. To secure Enforcement Gold, brand owners must continue to strive to invest their brands with cultural meanings for China. More importantly, they must align trademark protection with socialist goals, including the need to protect the public from the harm counterfeit goods may pose.¹¹¹ This harm may include potential threats to health and safety, or even threats to the well-being of society through the sale of false goods, which deny consumers the true value of their purchase. Unless trademark owners work to educate Chinese consumers and enforcement personnel about the cultural significance of their brands, on a socio-cultural level, they may not enjoy the present enhanced enforcement efforts directed to Olympic Symbols.

CONCLUSION

It is not unusual for countries to progress from a stage of imitation before reaching a stage of economic development that prizes innovation.¹¹² China is rapidly approaching the stage where imitation culture should give way to a culture of innovation, if its remarkable economic progress is to continue.¹¹³ Seen in the context of China's development pathway, the techniques and enforcement modalities which

(forthcoming 2008) (describing the emotional role that brands play in the marketplace) (copy on file with author).

¹¹⁰ Compare Yonchara, *supra* note 97, at 401 (stating that traditional Chinese culture view copying as a hallow act), with China Fun, *supra* note 85 (asserting that Olympic symbols carry a cultural significant beyond there commercial importance).

¹¹¹ An Qinghu, *Well-Known Marks & China's System of Well Known Protection*, 95 TRADEMARK REP. 705, 720 (discussing trademark law as a method to guarantee the quality of their goods and services and maintain the reputation of their trademarks, so as to protect the interest of consumers, producers and operators, and to promote the development of the socialist market economy."); Yu, *supra* note 98, at 194 (arguing that United States must help China see that intellectual property protection is in China's interest by focusing on advantage to China such as it ability to protect consumer safety).

¹¹² See generally Doris Estelle Long, *Innovation Culture and the Intellectual Property Divide* (copy on file with author) (working draft) [hereinafter Long, *Innovation Culture*]. See also PAT CHOATE, HOT PROPERTY: THE STEALING OF THE IDEAS IN AN AGE OF GLOBALIZATION (Knopf 2005) (discussing innovation based on "theft" of others' protected inventions as a development theory for diverse countries); Hisamitsu Arai, *Intellectual Property Policies for the Twenty-first Century: The Japanese Experience in Wealth Creation* (World Intellectual Property 2000) (discussing how Japan used its patent system to facilitate its growth in the 20th Century).

¹¹³ Long, *Innovation Culture*, *supra* note 112 (contending that recent developments in China indicate it has reached the point where stronger protection of intellectual property is required to continue its transformation into a modern innovation culture); Yu, *supra* note 98, at 196-97 (arguing that increased integration into the global economy will likely lead to greater intellectual property protection).

form part of China's present efforts to protect the Olympic Symbols arguably represent a critical step forward. Valuable lessons in enforcement techniques are being learned, including the need to involve the public in such efforts. This opportunity for increased dialogue and training regarding the critical role that rationale IPR protection may play in China's steady advance toward a culture of innovation should not be lost. While cultural perceptions of the differences between traditional, commercial marks and the Olympic Symbols may make any appreciable "improvement" in IPR protection uncertain, IP owners who follow a rational approach to protection and enforcement may well find that the benefits of their efforts last long after the closing ceremonies in Beijing. In the glow of gold medal competitions, the potential for converting the advances in protection for Olympic Symbols into lasting benefits for all IP owners must not be wasted.