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How China Succeeded in Protecting Olympic Trademarks and Why this Success Will Not Generate Immediate Improvements in Intellectual Property Protection in China

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By Aileen M. McGill*

[The Olympics] brought many tangible and intangible benefits to China, especially in terms of public infrastructure improvements. While some of the positive benefits were immediately apparent, others will emerge with time.¹

1. Introduction

Imagine yourself as a young man from a small town in China. Due to years of Communist rule, your education ended almost as soon as you reached a level of literary and mathematical proficiency sufficient to make you a contributing member of the working class. Most of your peers enlisted to work in the local factory but you decided instead to move to Beijing where the steady influx of tourists and local businessmen provide sources of disposable income, if only you can find products they want to buy.

You quickly discover the highly profitable sale of counterfeit goods. You discover that the same factory you left in your hometown runs their machinery after hours and marks their goods with the identical logos—The North Face, Louis Vuitton, Nike—that you see Beijing residents and foreign tourists wearing every day. You get in touch with a couple distributors, rent a stand at one of the Beijing markets, and begin selling these goods. You send some of your

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¹ Katie Thomas, *Assessment Praising '08 Games is Criticized*. THE NEW YORK TIMES Nov. 8, 2008 available at <http://query.nytimes.com/gst/fullpage.html?res=940CE6DF1539F93BA15752C1A96E9C8B63> (quoting the closing statements of the International Olympic Committee).

earnings back to your mother and you are lauded as the pride of your family. Nothing about this process feels morally or legally wrong: you are selling a product in an open market with hundreds of your peers and supporting your family. Although authorities occasionally pass through your market and tell you to stop selling these goods, these visits are relatively infrequent, resemble many of the seemingly arbitrary actions of local authorities, and you easily pay the fine of that day's profits. Since you have developed a keen sense of business costs and expected profits, you keep a schedule of the frequency of these impositions and calculate them into the costs of your business, recognizing that you can still profit easily if you keep funds readily available to pay these fines quickly and quietly.

When the government announces the city will be the host of the 2008 Olympics, you are excited, as is the rest of the country. Soon after this announcement the government unveils a variety of Olympic logos and mascots which your supplier quickly attaches to the preexisting market of knock-off goods. These products sell even greater than the usual array of North Face jackets and Nike shoes. You increase your order of counterfeit Olympic merchandise, and your profits double. You send more money back to your mother and your family continues to exude your praises to their neighbors. Surely, you are fulfilling your duty of service to your family and your country.

Although you are not cognizant of the notion of trademarks and counterfeiting, crackdowns on sales of your Olympic-branded merchandise from local authorities become more frequent and the fines increase dramatically. Selling knock-off Olympic merchandise actually hurts your business due to the frequent, hefty fines imposed by these specialized Olympic officials, who are both more organized and more efficient than the usual authorities who visit your market. With every visit, they seize all of your Olympic merchandise, and you decide to

stop ordering Olympic goods from your supplier. You begin to question your business enterprise and fear your business may be hurting your country given the frequent, aggressive, raids by local authorities. You also fear that the debilitating fines for the sale of Olympic knock-off goods may increase the fines for your general counterfeit goods. Officials appear only to target Olympic merchandise, however, and the steady influx of more tourists coming to see the Olympic preparations feeds your business as usual, and you watch as the city seemingly never stops moving in its preparation for this event.

The 2001 announcement that Beijing would host the 2008 Olympics created a surge of opportunities and challenges for the Chinese government, eager to catapult itself onto the world stage. One task beyond the tangible projects of improving Beijing's infrastructure to host thousands of international visitors was the protection of the Olympic trademarks in a country considered by many to be a "black hole" for intellectual property rights.² Widely recognized and symbolic of one of the most beloved international events,³ the Olympic symbols were profitable targets for counterfeiters nationwide.⁴ The government responded by enacting legislation protecting the marks and creating new enforcement mechanisms which had some success in limiting counterfeit products in the years prior to and during the Games.⁵ Now that China has

² See Stacey H. Wang, *Great Olympics, New China: Intellectual Property Enforcement Steps Up to the Mark*, 27 LOY. L.A. INT'L & COMP. L. REV. 291, 291 (2005) ("China's reputation for being an intellectual property black hole is not undeserved").

³ Consumer research conducted from 1998-2000 underwritten by the IOC in eleven countries demonstrated that unaided brand awareness for the Olympic rings was ninety-three percent. Anne M. Wall, *The Game Behind the Games*, 91 TRADEMARK REP. 1243-44 (2001). For further discussion regarding marketing and licensing of Olympic marks and other corporate sponsorship, see Jason K. Schmitz, *Ambush Marketing: The Off-Field Competition at the Olympic Games*, 3 NW. J. OF TECH. & INTELL. PROP. 203 (discussing marketing, advertising, and the trademark implications of the Olympics).

⁴ See Hamish McKenzie, *Faking It: Piracy Poses Headache for Olympics*, CNN, July 31, 2007, available at <http://www.cnn.com/2007/WORLD/asiapcf/07/24/olympics.piracy/> (noting that the value of seized counterfeit Olympic goods in 2004 and 2005 totaled 14.8 million yuan, or approximately \$1.9 million).

⁵ See notes 119—122, *infra*, and accompanying text.

proven it is capable of protecting some trademarks,⁶ many critics are wondering if there is hope for intellectual property in China, after all, and if so, how China should move forward in light of increasing international demand for improved trademark protection.⁷

This article will explore the cultural and administrative barriers that have impeded adequate trademark protection throughout Chinese history and how China can utilize the Olympics to improve trademark protection. Part I will address the development of intellectual property in China in light of its tumultuous history in the twentieth century, and how the government has implemented trademark laws as part of its political agenda to appease foreign interests. Modern international conventions and, most recently, the Trade Related Aspects of Intellectual Property Rights (TRIPS) promulgated by the World Trade Organization (WTO) have dictated the standards of Chinese trademark laws.⁸ This legislation has been largely ineffective at protecting trademark rights in China due to cultural mores inconsistent with the idea of intellectual property rights,⁹ China's history of isolation from foreign brands, and very poor enforcement of trademark laws by Chinese authorities.¹⁰

Part II will discuss the cultural importance of the Beijing Olympic Games to the Chinese people after a history of oppression and national isolation.¹¹ The Olympics were much more

⁶ See McKenzie, *supra* note 4 (discussing how China's success in protecting Olympic trademarks is indicative of Beijing's "selective enforcement" of trademark rights).

⁷ The United States filed a formal complaint with the World Trade Organization in 2007 demanding improved intellectual property protection in China. Request for Consultations by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1 (Apr. 16, 2007)

⁸ Agreement Trade Related Aspects of Intellectual Property Rights (TRIPS), GATT Annex 1c (1994).

⁹ See generally Jennifer A. Crane, *Riding the Tiger: A Comparison of Intellectual Property Rights in the United States and the People's Republic of China*, 7 CHL-KENT J. INTEL. PROP. 95, 97 (noting that "Chinese culture ... remains at odds with monopolistic and exclusionary property rights for innovations, instead maintaining that knowledge is to be shared.").

¹⁰ See Peter K. Yu, *Causes of Pirating and Counterfeiting in China*, GUANXI, THE CHINA LETTER (Apr., 2007) (discussing China's minimal enforcement of intellectual property rights).

¹¹ See generally JOHN KING FAIRBANK AND MERLE GOODMAN, *CHINA: A NEW HISTORY*, (1998) (discussing China's history of isolationism and the effects of the opening of China to international trade).

than an athletic event for the Chinese;¹² the Olympics presented an opportunity for the Chinese to display their diverse accomplishments to other countries, previously cut off from them by its authoritarian government.¹³

Part III will discuss how this international event bolstered trademark protection for Olympic marks and how the government can use these mechanisms—both cultural and legal—to change China’s attitudes towards intellectual property and improve enforcement of trademark rights. Due to the unique cultural importance of the Olympics and Olympic symbols,¹⁴ it is unrealistic to expect the Chinese to translate this success into the immediate improvement of other trademark protection. China should use the excitement surrounding the Olympics and awareness of Olympic trademark rights to reiterate the importance of general trademark protection as China emerges in the global marketplace. China’s participation in the international economic community will rely, in part, on its ability to improve intellectual property protection.¹⁵ Informing the greater population about the role of trademark protection in China’s economic development and participation in the international community¹⁶ will increase the reporting of counterfeit operations, facilitate enforcement of trademark laws, and in turn decrease

¹² See Orville Schell, *What Drives China*, NEWSWEEK (Cover Story) July 27, 2008 (discussing how the Beijing Olympics will give China the opportunity to “move past national inferiority complex.”).

¹³ *Id.*

¹⁴ See HARRY T. MORGAN, *CHINESE SYMBOLS AND SUPERSTITIONS* (1942) (discussing the importance of symbolism in Chinese culture). See also The Official Website of the 2008 Beijing Olympic Games: The Official Mascots of the Beijing 2008 Games (reflecting the Chinese government’s intention to spread “Chinese good cheer” through the playful mascots. The names of the five mascots when spoken together read “Beijing Welcomes You.”) (last visited Mar. 18, 2009).

¹⁵ See Peter K. Yu, *Intellectual Property, Foreign Direct Investment and the China Puzzle* in *INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA* (Daniel J. Gervais, ed., Oxford University Press 2007) 169-216 (“[I]t would not be far-fetched to argue that China might still remain outside the WTO had it not strengthened its protection of intellectual property rights”).

¹⁶ China’s continued membership in the WTO is contingent on its compliance with WTO agreements, including TRIPS. The United States and other countries have vowed to seek WTO sanctions if China does not come closer to TRIPS compliance. See Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009). See also Donald P. Harris, *The Honeymoon is Over: Evaluating the United States’ WTO Intellectual Property Complaint Against China*, 32 *FORDHAM INTNL L. J.* 801 (2008) (discussing the conditions that prompted the United States to file the complaint, and how it will affect diplomatic relations between the two countries).

deliberate trademark infringement. Reducing counterfeiting in China will support continued direct investment from foreign consumer brands.¹⁷ In turn, improved enforcement of trademark legislation will quell threats from the United States of pursuing further WTO sanctions against China for the vast counterfeiting throughout China that has kept it out of compliance with TRIPS¹⁸ and given it a reputation of intellectual property apathy.¹⁹

2. Intellectual property laws in China throughout the past century have not reflected the values of the people, but rather the economic and political agenda of its leaders.

2.1 Traditional Chinese values do not align with the concept of ideas as capital for individual gain.

Intellectual property is a concept somewhat foreign to Chinese legal morality, in which individual rights and private property have historically been subjugated to the interests of greater society.²⁰ Although China has undergone a rapid political and economic transformation over the past century, changing regimes and the extent of individual rights at a dizzying pace, the cultural mores and the laws that reflect them have consistently retained a Confucian and Marxist basis of subjugation of individual interest to the greater good of society.²¹ Traditional Chinese culture placed high emphasis on informal mechanisms of social ordering such as hierarchy, morality, and ritual propriety, relying on state laws only as a last resort.²² Citizens will “adjust their views

¹⁷ Yu *supra* note 15.

¹⁸ The United States filed a formal complaint through the WTO against China in April, 2007 for China’s alleged failure to comply with its TRIPS obligations. Argentina, Australia, Brazil, Canada, European Communities, India, Japan, Korea, Mexico, Chinese Taipei, Thailand, and Turkey have joined as third parties. Request for Consultations by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1 (Apr. 16, 2007).

¹⁹ Wang *supra* note 2.

²⁰ See generally Crane, *supra* note 9 at 95 (“Chinese culture ... remains at odds with monopolistic and exclusionary property rights for innovations, instead maintaining that knowledge is to be shared.”).

²¹ Tao-Tai Hsia and Kathryn A. Huan, *Laws of the People's Republic on Industrial and Intellectual Property*, 5 LAW & POL'Y INT'L BUS., 743, 750 (1973) (discussing how Marxist ideology renders individual inventions to be social productions and should not be used for personal profit).

²² TAN LOKE KHOON, *PIRATES IN THE MIDDLE KINGDOM: THE ART OF TRADEMARK WAR* (2004) at 4-5.

and demands to accommodate other people's needs and desires, to avoid confrontation and conflict, and to preserve harmony.”²³

The assertion of intellectual property rights to the exclusion of others is a concept intuitively at odds with this communal social order: products should be created and branded for the good of society at large, not for the benefit of individuals.²⁴ Intellectual property rights, thus, have not developed organically, but rather as a result of foreign influence.

2.2 Foreign governments pressured China to enact trademark legislation in the early 20th century to protect their product brands in future trade.

The push for greater trademark protection has come from foreign investors eager to see a stable environment for conducting business with China.²⁵ The Chinese Government promised the United States, Japan, and Great Britain greater trademark protection throughout the early 20th century, and enacted legislation in 1904, 1923, and 1930 to appease these foreign governments.²⁶ Disputes over trademark rights during this period reflect an environment in which foreign powers repeatedly attempted to impose a system of trademark protection of their marks to establish regulated trade with China.²⁷ China resisted this imposition, and established trademark legislation only when required for trade. Intellectual property law in China evolved “slowly, sporadically, and with a clear bias against foreigners.”²⁸

In 1950, the newly formed People’s Republic of China established a new trademark statute featuring a central trademark registration authority in Beijing and guaranteeing protection

²³ Yu, *supra* note 10.

²⁴ Hsia and Huan *supra* note 21 at 750.

²⁵ See KHOON *supra* note 22 at 4-12 (discussing the historical development of Chinese trademark law).

²⁶ *Id.*

²⁷ Crane *supra* note 9 at 95-96.

²⁸ PAUL GOLDSTEIN, INTERNATIONAL INTELLECTUAL PROPERTY LAW: CASES AND MATERIALS (2001) at 139.

only to trademarks registered under the new regime, purging the country of all marks registered under the Nationalist period with apparent links to imperialist countries.²⁹ Further amendments during the 1960s were characterized by an emphasis on product quality oversight and simplified review procedures.³⁰ Trademarks were seen not as a means of identifying competing products, but rather as a method of government control over product branding.³¹ Treating trademarks as a tool for product control would have profound implications for the influx of foreign products that arrived in China in the later 20th and 21st centuries. Because quality control of foreign goods is not directly controlled by the Chinese government, the primary motivation for protecting trademarks vanished.

The Cultural Revolution beginning in 1966 moved trademark protection into the growing category of legal measures rendered “redundant” in a communist state. “The very idea of trademarks, even as a way to assure the quality of goods, was seen as a loathsome concession to a quasi-capitalist commodity economy, inappropriate for the new China.”³² Many well-known marks were contrived to be counter-revolutionary and replaced with propagandist messages, their products seized and their manufacturers arrested under charges of lack of state loyalty.³³

2.3 Trademark Law in Post-Mao China began to take a firmer stance on intellectual property protection, but enforcement still lagged.

The death of Mao Zedong in 1976 and the opening of China in 1978 to widespread international trade led to a series of developments in trademark law in an attempt to centralize trademark registration and develop ties to foreign companies to establish systemized trade.

²⁹ *Id* at 17.

³⁰ *Id* at 17-18.

³¹ *Id.*

³² KHOON *supra* note 22 at 10 (citing WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENCE, INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* (1995) at 64).

³³ KHOON *supra* note 22 at 10.

Foreign countries viewed China as a valuable future trading partner and were eager to establish a workable trademark regime, a well-established element of American and European commerce by this time.³⁴ In 1982, the first trademark law in post-Mao China was passed.³⁵ The law retained much of the earlier emphasis on quality control, but the seeds of the ideals of exclusivity, property rights, and consumer interests, the roots of modern international trademark law, had begun to emerge as China began its precarious venture into a hybrid socialist market economy.³⁶ Following a US-China bilateral treaty in 1992,³⁷ China amended its trademark law in 1993 broadening the types of marks that could be protected and providing for steep criminal offenses for counterfeiting, though the law was (and continues to be) minimally enforced.³⁸

The legislation of the 20th Century reveals how trademark law has grown into a tangled knot in the cultural, political, and economic tug of war that has characterized modern Chinese history. The push for intellectual property protection has not come from the Chinese people, but rather as a reluctantly necessary requirement of participation in the world economy.³⁹ Imparting intellectual property ideals onto a citizenry that finds this individualized right counter-intuitive to its core values has led to rampant trademark infringement.⁴⁰ The popular feeling that trademark

³⁴ See, e.g. RESTATEMENT OF THE LAW (THIRD) UNFAIR COMPETITION CHAPTER 1. THE FREEDOM TO COMPETE (providing the foundation for established legal principles of trademark laws in the United States); See generally MICHAEL BLAKENEY TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A CONCISE GUIDE TO THE TRIPS AGREEMENT (1996) at 1 (describing actions between the United States and the European Community in the 1970s to combat counterfeiting in international trade).

³⁵ Trademark Law of the People's Republic of China, Adopted at the 24th Session of the Standing Committee of the Fifth National People's Congress, Aug. 23, 1982.

³⁶ See 1982 Chinese Trademark Law Article 3, (protecting one's "exclusive rights" in a trademark); see generally KHOON *supra* note 22 at 11 (discussing Chinese trademark legislation).

³⁷ Memorandum of Understanding Between the Government of the People's Republic of China and the Government of the United States of America on the Protection of Intellectual Property, PRC—U.S., 1992 available at http://untreaty.un.org/unts/144078_158780/4/4/12279.pdf. See generally THE INTERNATIONAL CHAMBER OF COMMERCE, INTELLECTUAL PROPERTY & INTERNATIONAL TRADE: A GUIDE TO THE URUGUAY ROUND TRIPS AGREEMENT (1996) at 14 (characterizing bilateral agreements, such as this 1992 treaty as having a "beneficial and complementary impact" on multilateral agreements).

³⁸ See KHOON *supra* note 22 at 11-12 (describing the 1993 amendments).

³⁹ Crane, *supra* note 9 at 95-96.

⁴⁰ Yu *supra* note 15 at 153.

rights are at odds with Chinese values has been reinforced by lax enforcement of trademark legislation.

Failing to develop a sense of intellectual property rights before passing laws that enforce them has been exceptionally problematic, especially in a country so diverse and densely populated. “When intellectual property rights develop organically, it reflects the needs and understandings of a nation's citizenry. ...a society must recognize ‘the value of the intellect in intangible form could also have commercial value.’”⁴¹ Where, as in China, intellectual property rights have developed largely in response to international pressures without an organic sense of the commercial and proprietary value of intellectual innovation and investment, the social conscience does not feel that pirating, counterfeiting, or simply palming off an established brand name is fundamentally wrong.

Adhering to international trademark law and developing a stronger sense of the value of intellectual property protection, however, is an essential component of stabilizing investments in China's market.⁴² The Olympics may serve as this turning point in strengthening the public awareness for the societal benefits of stronger trademark protection.

2.4. International parties, individually and through WTO multilateral agreements such as TRIPS, imposed increasing pressure on China to legislate and enforce trademark rights.

Like much of the trademark legislation of the early 20th century, trademark law since the 1970s has been driven by international agreements requiring greater protection for foreign

⁴¹ Crane, *supra* note 9, at 95, (citing EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 39 (2002)).

⁴² See PETER YU, INTELLECTUAL PROPERTY, FOREIGN DIRECT INVESTMENT, AND THE CHINA EXCEPTION (2006) (discussing how, although foreign direct investment has not yet suffered due to low intellectual property protection, the strength of China's economy in the future will depend heavily on intellectual property rights).

trademarks in trading with China, culminating with China's entry into the WTO and its required compliance with TRIPS. In 1984, China joined the Paris convention creating new requirements for the protection of foreign and domestic well-known marks.⁴³ The Chinese Trademark Office recognized Pizza Hut as the first well-known trademark in 1987, and certified a Chinese state-owned medical brand as the first domestic well-known trademark two years later.⁴⁴ Since the beginning of trademark protection enacted in compliance with the Paris Convention, the United States and a number of other foreign governments have reiterated their push for greater trademark protection through a series of bilateral agreements and threats of trade sanctions if China did not improve intellectual property protection.⁴⁵

The push from the United States and other governments for greater trademark protection in China has been driven by China's extraordinary economic growth.⁴⁶ Western governments have sought to extend the intellectual property protection of their native countries to the rapidly expanding Chinese markets and producing companies, increasingly sought after by their constituent firms.⁴⁷ China's accelerated economic growth has made it a huge manufacturer and

⁴³ Paris Notification No. 114, Paris Convention for the Protection of Industrial Property: Accession of the People's Republic of China (Mar. 19, 1985) *available at* http://www.wipo.int/treaties/en/html.jsp?file=/redocs/notdocs/en/paris/treaty_paris_114.html. *See also* Stephanie M. Greene, *Protecting Well-Known Marks in China: Challenges for Foreign Mark Holders*, AM. BUS. L. J. 371, 371 (2008) (discussing China's accession to this agreement and continued challenges for foreign trademark holders).

⁴⁴ Greene *supra* note 43 at 371-72.

⁴⁵ The United States has threatened China twice with the imposition of 'Super 201' tariffs in attempts to force China to improve intellectual property protection, once in 1992 and again in 1994. For a summary discussion of the purposes and effects of these threats, see TAN LOKE KHOON AND CLIFFORD BORG-MARKS, *TRADEMARK LAW AND THE PEOPLE'S REPUBLIC OF CHINA* (1998) at 31-33. Most recently, the United States moved to a multilateral approach and took the drastic step of filing a formal complaint through the WTO in 2007 for China's failure to meet its TRIPS obligations. Request for Consultations by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1 (Apr. 16, 2007).

⁴⁶ *See* Wen Jiabao, Primer of the State Council. Report on the Work of the Government. Mar. 5, 2007. *available at* http://english.peopledaily.com.cn/docs/2007_gov_work.pdf (providing a detailed report of China's economic growth and prediction of continued economic vitality).

⁴⁷ American companies with a strong presence in China such as Budweiser and Starbucks have struggled to protect their brand names from blatant, deliberate trademark infringement in China due to China's ambiguous trademark legislation and lax enforcement. However, Starbucks won a landmark suit in 2006 that some commentators believe, in addition to Olympic trademark enforcement, may be a major turning point in improving trademark rights in China. *See World Business Briefing: Asia: China: Starbucks Wins Trademark Infringement Suit*. THE NEW YORK

exporter of consumer goods,⁴⁸ broadening the problem of lax trademark enforcement given China's extraordinary capabilities to manufacture and export counterfeit goods using the same machinery used for other manufacturing. Since China opened itself to international trade in the 1970s, China has had an astounding average annual growth rate of 9.8% between 1979 and 1997.⁴⁹ China's exports to China have grown 1600% over the past fifteen years and U.S. Exports to China have grown by 415%.⁵⁰ Furthermore, China has become a huge manufacturer and exporter of consumer goods, producing, for example, two thirds of the world's copiers, microwave ovens, DVD players, shoes, and toys.⁵¹ China's consuming market has grown, as well, as the growing economy has created a higher standard of living, enabling more Chinese citizens to become consumers of previously prohibitively expensive western products.⁵²

This international trade and the increasing globalization of world brands have necessitated stronger trademark protection worldwide, and especially in China.⁵³ Many commercial goods are produced thousands of miles away from where they are sold; consumers

TIMES, Jan. 4, 2006 available at <http://query.nytimes.com/gst/fullpage.html?res=9A07E5DB1130F937A35752C0A9609C8B63> (discussing the victor for Starbucks and the \$61,000 damage award, one of the largest awards against a Chinese company for trademark infringement)

⁴⁸ John H. Matheson, *Convergence, Culture, and Contract Law in China*, 15 MINN. J. OF INTL L 329, 335 (2006).

⁴⁹ Eric M. Pedersen, *The Foreign Corrupt Practices Act and its Application to U.S. Business Operations in China*, 7 J. INTNL BUS. L. 13, 22 (Spring 2008).

⁵⁰ Fareed Zakaria, *Does the Future Belong to China?*, NEWSWEEK, at 28 (May 9, 2005).

⁵¹ *Id.*

⁵² *See, e.g.* Jinbao *supra* note 46 at 2 (discussing how people's living standards have dramatically improved in the twenty-first century).

⁵³ *See* Statement of the Honorable Jon W. Dudas, Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office Before the Committee on Homeland Security and Governmental Affairs Subcommittee on Oversight of Government Management, The Federal Workforce, and the District of Columbia, June 14, 2005 ("The importance of intellectual property in a global economy cannot be overstated.") *See also* Sabra Chartrand, *New Economy: Solidifying Trademark Protection in a Global Market, where Logos Can Transcend Language*. THE NEW YORK TIMES Oct. 1, 2001 available at <http://www.nytimes.com/2001/10/01/business/new-economy-solidifying-trademark-protection-global-market-where-logos-can.html> (discussing the importance of trademarks in a global economy).

increasingly rely on brand names to insure consistent quality, and producers rely on the protection of their trademarks for a steady market of trusting consumers.⁵⁴

China passed intellectual property legislation in compliance with international agreements because of the market advantages they receive from their position as a member of the WTO.⁵⁵ Intellectual property protection in China has largely evolved as a reluctant requirement of their participation in the world economy.⁵⁶ When China sought to enter the dynamic web of complex international trade through the WTO, they were confronted by TRIPS.⁵⁷ China responded favorably to their new trading partners because the benefits of entering this world market outweighed cost of legislating and enforcing this new set of legal restrictions.⁵⁸

China has enacted an extraordinary amount of legislation in compliance with TRIPS but it has failed to enforce these intellectual property laws and it lacks the cultural foundation to prevent its citizens from infringement.⁵⁹ Legislation has traditionally been modeled after foreign laws⁶⁰ and has been incompatible with China's morals, culture, and governmental structure.⁶¹

Modeling legislation after foreign nations has proven ineffective in a country with no traditional

⁵⁴ See Dudas *supra* note 53 (discussing the importance of intellectual property rights in a global economy). See also William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective* J. L. & ECON. 265, 268-70, 273-75 (discussing the economic value of trademarks for both consumers and producers).

⁵⁵ Some notable scholars consider China's intellectual property improvements to have been a critical component of their admittance to the WTO in 2001. See, e.g. Peter K. Yu, *supra* note 15 at 169-216 ("It would not be far-fetched to argue that China might still remain outside the WTO had it not strengthened its protection of intellectual property rights.").

⁵⁶ *Id.*

⁵⁷ TRIPS was passed at Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994. For a thorough guide to the background, structure, and implications of TRIPS, see THE INTERNATIONAL CHAMBER OF COMMERCE, INTELLECTUAL PROPERTY & INTERNATIONAL TRADE: A GUIDE TO THE URUGUAY ROUND TRIPS AGREEMENT (1996).

⁵⁸ See Peter K. Yu, *The Copyright Divide*, 25 25 CARDOZO L.R. 331, 371 (noting that China was made to understand that improved intellectual property protection would be required to reap the benefits of nearly every other area of international trade).

⁵⁹ See notes 25-28, *supra*, and accompanying text (discussing early bilateral treaties). See also WILLIAM ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE 36-55 (1995) (discussing the problems with imposing a system of intellectual property rights upon a culture that has no traditional basis for the idea of intellectual property).

⁶⁰ China has a history of modeling its legislation after foreign trademark regulations. See generally KHOON *supra* note 22 at 7 (noting that early twentieth century trademark laws were modeled after foreign legal systems).

⁶¹ *Id.*; Crane *supra* note 9 (describing how Chinese legislation, modeled after foreign laws, has been ineffective at reducing trademark infringement).

basis for intellectual property rights.⁶² Accordingly, China's compliance with international agreements, though ambitious, has not actually created an effective system of intellectual property protection.

2.5 Although China has passed legislation in compliance with TRIPS, China has failed to enforce these laws.

Modern Chinese governmental structure has been dominated by increased power to local, provincial governments, making large-scale international treaties from Beijing difficult to enforce.⁶³ China is massive and diverse. Rather than thinking of China as one homogeneous state, scholars have characterized it as a "country of countries."⁶⁴ Local governors and administrators give low priority to trademark laws, often ignoring them where income is generated from counterfeiting.⁶⁵ The old adage "the mountains are high, and the emperor in Beijing far away" still reverberates through local townships that profit greatly from counterfeit goods.⁶⁶ As scholar Peter Yu has noted, "Beijing's ability to enforce its intellectual property regulations is seriously hampered by local resistance to change, particularly when local authorities sense that such change will take power out of their hands."⁶⁷

⁶² KHOON *supra* note 22 at 7.

⁶³ See Yu *supra* note 15 at 153 (describing China's legal reforms as exceeding its enforcement abilities due to the power of local governments).

⁶⁴ Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in Post-WTO China* in PRACTISING LAW INSTITUTE, INTELLECTUAL PROPERTY ASPECTS OF DOING BUSINESS IN CHINA: CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES (Oct. 2007) 111, 181.

⁶⁵ See ANDREW C. MERTHA, *THE POLITICS OF PIRACY* (2005) 178 ("If there are other sources of income at the local level that conflict with trademark enforcement, there is little incentive for local AICs to enforce trademarks").

⁶⁶ Joseph A. Massey, *The Emperor is Far Away: China's Enforcement of Intellectual Property Rights Protection, 1986-2006*, 7 CHI. J. INT'L L. 231, 234 (2006).

⁶⁷ Yu *supra* note 15 at 153.

This system of decentralized, provincial government has enabled the national government to enter into foreign treaties promising new, sweeping intellectual property legislation without a realistic means of enforcement. In light of their willingness to comply with WTO restrictions, scholars have observed how “a state with an implementation constraint [like China] may make greater concessions knowing that they will not be implemented.”⁶⁸ Although Beijing has attempted to pressure local governments into greater enforcement of trademark laws,⁶⁹ infringement is still widespread, especially in smaller towns where factories are centralized, enabling the mass production of counterfeit goods.

The central government has made a number of notable errors in enforcing trademark rights. First, trademark legislation is disorganized and too vague. Article 213 of the Chinese criminal code imposes a criminal sentence of three years in prison if the counterfeiting crime is “of a serious nature.”⁷⁰ A counterfeiter receives three to seven years in prison for “cases of a more severe nature.”⁷¹ Article 214 imposes up to three years in prison for “relatively large sales” of counterfeit trademark goods and three to seven years for “huge” sales.⁷² Neither provision defines how the seriousness or the size of the case is to be determined.⁷³ The ambiguity of these statutes reduces accountability for authorities. Local authorities claim infringement cases are not “relatively large sales” and therefore not subject to strict punishment, or any punishment at all.⁷⁴

⁶⁸ *Id.* at 156, citing Andrew Mertha & Robert Pahre, *Patently Misleading: Partial Implementation and Bargaining Leverage in Sino-American Negotiations on Intellectual Property Rights*, 59 INT’L ORG, 695, 697 (2005) (highlighting the inconsistent enforcement of international treaties throughout China).

⁶⁹ Local enforcement of trademark laws is governed by Administrators of Industry and Commerce. See *infra* notes __ to __ and accompanying text.

⁷⁰ Criminal Code of the People’s Republic of China, Article 213 (1997). See also Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, ¶ 7.396 et seq. WT/DS362/R (Jan. 26, 2009) (citing Articles 213-220 as improperly vague, permissive, and in violation of TRIPS requirements for trademark legislation).

⁷¹ Criminal Code of the People’s Republic of China, Art. 214 (1997).

⁷² *Id.* Arts. 213-14.

⁷³ See Greene, *supra* note 43 at 392 (describing the how vague criminal laws contribute to the lack of enforcement of those laws).

⁷⁴ *Id.*

The ambiguity of the statute means that they are not failing to enforce it, but rather may just be applying its standards more leniently and are thus, never subject to sanctions for failing to perform their enforcement duties. Ambiguous standards in statutory language give authorities an easy way out when they bow to local pressures in failing to enforce trademark laws.

Furthermore, the Chinese legislature has not revised or narrowly tailored its laws, typically adding new requirements without giving adequate attention to the details of implementation leading to excessive and confusing trademark laws. As scholar William Alford observed, “the problem of Chinese intellectual property laws is not the existence of too few laws, but too many.”⁷⁵ Without clear laws and straightforward expectations for respecting intellectual property rights, a great deal of infringing activity goes unpunished by local administrators.

In addition, there is a lack of coordination between local administrators and criminal authorities and a general lack of training and allocation of resources for effective deterrence of counterfeiters. Local Administrations for Industry and Commerce (AICs) are responsible for the enforcement of China’s trademark law in the market in China’s 23 provinces.⁷⁶ These administrators lack clear standards of initiating criminal investigations and often bow to local economic interests that receive support from piracy and counterfeiting revenue.⁷⁷ Complaints from the United States regarding ineffective deterrence against copyright piracy, administered (under the same agencies that enforce anti-counterfeiting laws), prompted the International Intellectual Property Alliance to concur that “[government agencies] are too sporadic and the administrative fines are simply too low to deter piracy.”⁷⁸

⁷⁵ William P. Alford, *How Theory Does—and Does Not—Matter: American Approaches to Intellectual Property Law in East Asia*, 13 UCLA PAC. BASIN L.J. 8, 21 (1994).

⁷⁶ See KHOON, *supra* note 22 at 56 (describing the structure and responsibilities of AICs).

⁷⁷ See Greene, *supra* note 43 at 380-82 (discussing AICs’ role in the protection of trademarks and the common problem of bowing to local interests).

⁷⁸ International Intellectual Property Alliance, International Intellectual Property Alliance 2000 Special 301 Report People's Republic of China 27 (2000) at 31.

Finally, when trademark infringement disputes reach the judicial system, fines imposed on trademark infringers are too low, and fail to provide effective deterrence.⁷⁹ Fines for trademark infringement are valued by the price of the infringing products on the counterfeit market instead of the value of the original brands being copied.⁸⁰ The penalty, therefore, presupposes a market for counterfeit products and fails to take into account the damage the existence of that market does to the trademarks. Because the value of counterfeit products is lower than the value of the original and these values are constantly in flux, fines are often too small to outweigh the profits of engaging in the counterfeiting business.⁸¹

Although Beijing has passed legislation to bring China in compliance with TRIPS, enforcement of this legislation is inadequate.⁸² Unclear expectations and insufficient resources dedicated to local administrators and inadequate deterrence have made counterfeiting a profitable enterprise for many Chinese in light of China's extraordinary economic growth.⁸³

3. The Chinese viewed the 2008 Beijing Olympic Games as a showcase for their economic achievements after a century of economic and cultural isolation; the cultural significance of the event facilitated improved trademark protection due to some cultural respect for Olympic symbols and the government's willingness to put greater resources into Olympic trademark protection.

3.1 Due to China's prolonged isolation, the Chinese considered the Olympics to be more not only an athletic event, but also a sign of China's initiation into the world community.

⁷⁹ Jennifer L. Donauti, *Can China Protect the Olympics or Should the Olympics be Protected from China?*, 15 J. INTELL. PROP. L. 203, 217-18 (discuss how the current method of calculating penalties has led to very low fines, providing insufficient deterrence from counterfeiting).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See, e.g. Request for Consultations by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1 (Apr. 16, 2007) (claiming China has failed to make effective enforcement procedures available to intellectual property rights holders).

⁸³ See generally Greene, *supra* note 43 at 380-82 (discussing local administrators' disorganized and poorly administered enforcement programs).

China's sociopolitical history of the second half of the twentieth century is intricately related to the growth of China's economy, their emergence into the international market, and the development of both their position in the world community and the trademark laws that have emerged therein.⁸⁴ Communist rule, the disastrous socioeconomic reforms of the 1950s including the Great Leap Forward and the Cultural Revolution, and Mao's policies of cultural isolation left the Chinese economy in disarray.⁸⁵ Before the 1980s, the Chinese people had little to no interaction with international products or trademarks.⁸⁶

After the death of the first generation of communist leaders including Mao Zedong in 1976 and Zhou Enlai, the government initiated a series of political and economic reforms under Deng Xiaoping.⁸⁷ These instrumental reforms began a period of massive economic growth in China and opened the door for greater diplomatic relations between China and the West. International trade grew, and the Chinese saw an influx of foreign branded goods. Between 1971, China's first opening to international trade, and 1978, bilateral trade between the U.S. and China alone totaled \$2.4 billion. China began trading with the United States and European nations, and the Chinese economy, in turn, grew exponentially. Since 1988, the Chinese economy has grown at a rate of approximately 10% annually, greater than any other country worldwide.⁸⁸

⁸⁴ See KHOON *supra* note 22 at 4-12.

⁸⁵ Glenn R. Butters, *Norms and Property in the Middle Kingdom*, 15 W.I. INTL L. J. 281, 285 (describing Mao's isolationist policies as economically devastating).

⁸⁶ See generally Janeice Marshall, *Current Developments in the People's Republic of China: Has China Changed?* 1 TRANSNATL. LAW. 505, 508-09 (1988) (discussing Mao's isolationist policies and their effects on the Chinese people and the Chinese economy).

⁸⁷ Hamideh Ramjerdi & Anthony d'Amato, *The Intellectual Property Rights Laws of the People's Republic of China* 21 N.C. J. OF INTL COMM. REG. 169, 174-75 (discussing the transition from Mao Zedong's isolationist policy to Deng Xiaoping's reforms and their effects on China's economic growth).

⁸⁸ Early reports for 2009 indicate China's growth slowed to 9% in 2008 in response to the current global financial crisis, down from 13.7% in 2007. Although this growth rate is a decline for China from its extraordinary growth rate of recent decades, it is still dominating growth rates of many other countries who are facing shrinking economies. Jiabao Report *supra* note 44. See also Michael Bristow, *China's Economic Growth Slows*, BBC NEWS

The growth of the Chinese economy and the opening to international trade has had profound implications for the development of the Chinese psyche, their sense of place within the world community, and their interaction with foreign goods and trademarks. The Chinese had traditionally been cut off from both international influence and foreign competition. Under Deng Xiaoping, their borders opened to a steady influx of technology, entertainment, and innovation from the outside world as Deng implemented the Four Modernizations—among them Industry and Science & Technology—encouraging the Chinese people to utilize the incoming foreign assets to advance China’s modernization efforts.⁸⁹ In only a few years, China has gone from a country of heavily restricted foreign influence economically and culturally to a society cautious but eager to engage in the world economy and culture. The 2008 Olympics, in many ways, were the pinnacle of China’s emergence into the world arena and a spectacular showcase for their rapid development.

3.2 The Olympics unified the country, showcasing the country’s economic growth, diverse achievements, and their ability to meet world expectations of intellectual property rights when put in the world’s spotlight.

It is difficult to fully articulate the importance of the Beijing Olympics to China’s sense of place within the world community in the 21st Century. Only thirty years after opening its borders to international trade, China had grasped the opportunity to host the most talked about,

Jan. 22, 2009 available at <http://news.bbc.co.uk/2/hi/business/7843947.stm> (discussing China’s astounding growth rate).

⁸⁹ See Anne M. Wall, *Intellectual Property Protection in China: Enforcing Trademark Rights*, 17 MARQUETTE SPORTS L. REV. 341, 350 (discussing how Deng sought out foreign investment for the modernization of China in technology, industry, agriculture, and self-defense).

beloved event in the world. Preparations for the event were furious and overwhelming, as the Chinese government strived to meet and exceed world expectations in all respects.⁹⁰

The Olympic Committee showcased every element of the country's public services, and especially highly visible projects in Beijing. The government spent billions of dollars improving the Beijing bus and subway system.⁹¹ China's most famous architects turned Beijing into a playground of architectural innovation with amazingly modern stadiums, skyscrapers, and condominiums.⁹² The government initiated widespread public education campaigns to change Chinese behaviors to align with international habits,⁹³ and closed factories to improve air quality.⁹⁴ Pressure on Chinese athletes was intense, as the Chinese government made it clear they expected their athletes to risk injury to win for the glory of China.⁹⁵ The final cost of the Games totaled over \$42 billion, more than any Olympics in history⁹⁶ and the Chinese team earned more gold medals than any other country.⁹⁷

⁹⁰ See Schell *supra* note 12 (describing China's drive to impress the world at the 2008 Beijing Olympics through massive public works projects).

⁹¹ See Mark Landler, *Olympics, the Cost: Environmental and Transportation Improvement Projects Could Send Price Soaring*, THE NEW YORK TIMES (July 14, 2001) available at <http://query.nytimes.com/gst/fullpage.html?res=9406E6D8123BF937A25754C0A9679C8B63&fta=y&scp=2&sq=Beijing%20Olympics%20public%20works&st=cse> (describing the projects immediately planned by the government for the hosting of the Olympics). Notably, this article reveals how the government's initial estimate of the cost of the games, \$20 billion, was only half the price the Chinese ultimately paid to host the 2008 Olympics.

⁹² See, e.g., Nicolai Ouroussoff, *Architecture Review: Olympic Stadium with a Design to Remember*, THE NEW YORK TIMES (Aug. 5, 2008) available at <http://www.nytimes.com/2008/08/05/sports/olympics/05nest.html?scp=2&sq=architecture%20beijing%20olympics&st=cse> (discussing the extraordinary artistry that went into the creation of Olympic venues, such as the Bird's Nest and Water Cube).

⁹³ *IR 2008: Packaging China for the Olympics*, 123 CHINA RIGHTS FORUM (2007) available at http://hrichina.org/public/PDFs/CRF.1.2007/CRF-2007-1_IR2008.pdf (describing public education campaigns including reeducating taxi drivers through geography and English lessons, fines against spitting in public, and one day a month dedicated to teaching the public how to stand in line properly).

⁹⁴ Jim Yardley, *Cities Near Beijing Close Factories to Improve Air for Olympics*, THE NEW YORK TIMES July 7, 2008 available at <http://www.nytimes.com/2008/07/07/sports/olympics/07china.html?scp=1&sq=factories%20Beijing&st=cse>.

⁹⁵ Howard W. French, *China Pressures Injured Athletes in Quest for Gold*, THE NEW YORK TIMES, June 20, 2008 available at <http://www.nytimes.com/2008/06/20/world/asia/20olympics.html?scp=4&sq=pressure%20Chinese%20athletes&st=cse>

⁹⁶ Hilary Howard, *Comings and Goings: Olympics Bolster China's Great Leap in Tourism*, THE NEW YORK TIMES (Sept. 21, 2008) available at

The Olympic Games were considered by the International Olympic Committee an “indisputable success.”⁹⁸ Coordinating thousands of Olympic volunteers, security personnel, athletes, and fans virtually seamlessly, the Chinese Olympic Committee conducted a “flawless execution of the games.”⁹⁹ Furthermore, many of the projects developed for the Olympics will have continued benefits for China directly and indirectly through its trading partners, as China utilizes the event to gain international acceptance and appease many of its critics.¹⁰⁰ As the IOC remarked at the close of the Olympiad, “[The Games] brought many tangible and intangible benefits to China, especially in terms of public infrastructure improvements. While some of the positive benefits were immediately apparent, others will emerge with time.”¹⁰¹

One notable improvement that grew out of the Olympics was new legislation protecting Olympic trademark rights and new trademark enforcement mechanisms under the mandates of the IOC.¹⁰² Examining China’s complex history regarding trademark law, we have seen how traditional Chinese ethics, historical favoritism towards domestic interests, and socialist ideology have impeded the effective protection of trademark rights prior to the 2008 Olympic Games. The legislation and enforcement mechanisms established for the protection of Olympic marks

<http://www.nytimes.com/2008/09/21/travel/21CHINA.html?scp=3&sq=Beijing%20Olympics%20%2443%20billion&st=cse> (discussing the heavy investment made by the Chinese government for the Olympics and its continued benefits for increased tourism).

⁹⁷ The Official Website of the 2008 Olympic Games: Overall Medal Standings

<http://results.beijing2008.cn/WRM/ENG/INF/GL/95A/GL0000000.shtml> (last visited Mar. 18, 2009).

⁹⁸ International Olympic Committee Fact Sheet, Issued Nov. 2008. For a discussion of the implications of the IOC’s response to the Olympics, see Thomas, *supra* note 1.

⁹⁹ Thomas, *supra* note 1.

¹⁰⁰ See generally Jeffrey F. Levine, *A Golden Opportunity for Global Acceptance? How Hosting the Olympic Games Impacts a Nation’s Economy and Intellectual Property Rights with a Focus on the Right of Publicity*, 15 *SPORTS L. J.* 245 252-55 (discussing the global attention garnered by the Olympics and how other countries have used the event to showcase their economic improvements).

¹⁰¹ Thomas *supra* note 1.

¹⁰² See INTERNATIONAL OLYMPIC COMMITTEE, *OLYMPIC CHARTER*. July 7, 2007 available at http://multimedia.olympic.org/pdf/en_report_122.pdf (describing IOC requirements for the protection of Olympic marks and Olympic merchandising).

demonstrated China's ability to overcome many of its traditional cultural and administrative obstacles to trademark protection.¹⁰³

4. The government should utilize the national unity surrounding the Olympics to broaden awareness of intellectual property rights and expand Olympic trademark enforcement programs to all trademarks.

4.1 The Chinese people united behind the Olympic Movement and Olympic trademarked symbols.

The Olympics were viewed by many Chinese as a symbol of their cultural and economic achievements.¹⁰⁴ Nationalist sentiments and patriotism reverberated throughout the country, as China advanced projects in every public sector in preparation for this showcase event.¹⁰⁵ Not only were public leaders dedicated to seeing the event succeed from an international relations perspective, which they certainly did, but the Chinese people, overall, were eager for the world to turn its attention to the new China.¹⁰⁶

Because of what the Olympics represented for the Chinese and the national pride surrounding the event, the Chinese people felt a slightly greater apprehension towards profiting

¹⁰³ See Belinda Goldsmith, *Crackdown on Fake Olympic Merchandise is Working*, INT'L HERALD TRIB., Aug. 20, 2008 available at <http://www.iht.com/articles/2008/08/19/business/fakes.php>; See Maureen Fan, *China's Olympic Turnabout on Knockoffs*, THE WASHINGTON POST (June 13, 2008) available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/12/AR2008061204167.html> (discussing China's crackdown on Olympic counterfeit goods and their financial incentives from protecting Olympic trademarks).

¹⁰⁴ See Schell *supra* note 12 (discussing the importance of the Olympics for the Chinese).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

from Olympic symbols, a sentiment reinforced by heightened trademark enforcement.¹⁰⁷ Counterfeiting still took place, and traveling through China in the weeks prior to the Games, one came across knock-off Olympic gear somewhat frequently.¹⁰⁸ But fake Olympic merchandise was much less common than one would have anticipated, and it was almost completely inexistent in Beijing itself.¹⁰⁹ Even in markets dedicated to counterfeit designer goods, counterfeit Olympic merchandise was largely missing,¹¹⁰ attracting the attention of the media which had grown accustomed to markets dedicated entirely to counterfeit goods.¹¹¹

The limited amount of Olympic trademark infringement was a result of increased penalties and improved enforcement mechanisms, and the overall national support for the Olympics.¹¹² From the perspective of trademark law, the Olympic marks are the same as any trademark. To the Chinese, however, the symbols of the Beijing Olympics, especially the adorable Fuwa mascots embodying the five elements of Confucian philosophy and welcoming visitors to Beijing,¹¹³ were culturally distinct from a North Face jacket or a Louis Vuitton handbag.¹¹⁴ Foreign trademarked luxury goods reflect the economic success of foreign countries; the Olympic trademarks reflected the success of China.

¹⁰⁷ See Tang Yuankai, *Symbol of Protection*, BEIJING REVIEW, (Jan. 18, 2007) available at http://www.bjreview.com/quotes/txt/2007-01/16/content_54311.htm (discussing how business owners were committed to the success of the Olympic games).

¹⁰⁸ The author traveled throughout Shanghai, Guilin, Xi'an and Beijing from July 28-August 16. Products displaying counterfeit Olympic logos were conspicuously absent, even in markets dedicated to the sale of counterfeit goods.

¹⁰⁹ Goldsmith, *supra* note 103.

¹¹⁰ *Id.*

¹¹¹ McKenzie, *supra* note 4 (reporting that “fake Olympics merchandise is becoming increasingly scarce in Hong Kong [in 2007]” due to aggressive police action in counterfeit markets).

¹¹² Goldsmith, *supra* note 103.

¹¹³ The five Fuwa, literally “good luck dolls” are the mascots of the 2008 Beijing Olympics, widely adored by the Chinese people. Together they symbolize the five traditional Chinese elements: water, wood, fire, earth, and sky and their names—Bei Bei, Jing Jing, Huan Huan, Ying Ying, and Ni Ni—shorten to read “Welcome to Beijing.” The marks were advertised all over China in the years prior to the Olympic Games in conjunction with the Games. For the official description of the mascots from the Beijing Olympic Committee, see <http://en.beijing2008.cn/spirit/beijing2008/graphic/n214068254.shtml> (last visited Jan. 24, 2009).

¹¹⁴ Doris Long, *Trademarks and the Beijing Olympics: Gold Medal Challenges*, 7 J. MARSHALL REV. INTELL. PROP. L. 433, 450.

The Olympics represented national progress and achievement for all Chinese people. The government utilized this national excitement surrounding the Games to inform the population how misappropriating Olympic trademarks and copyrights hurt the Olympic movement. The Chinese authorities recruited volunteers to collect evidence of cases of infringement, and many Chinese business owners signed a pledge to refrain from infringing Olympic trademarks as a promise to fulfill their “social responsibility.”¹¹⁵ Within the Confucian and socialist mentality of subjugating one’s interests for the good of Chinese society, infringing Olympic trademarks was, in a very real sense, considered an offense against the glory of the Chinese people.¹¹⁶

4.2 The Chinese government should utilize the national unity surrounding the Olympic movement to address the importance of trademark rights nationwide.

China may be able to utilize the excitement and national unity from the success of the Olympics to educate the public about trademark rights generally, though they are unlikely to see the same success as they achieved for Olympic marks. Foreign brands are seen as symbols of distant, foreign cultures and the luxuries they represent. Luxury brands from abroad, thus, do not carry the same cultural significance of the Olympic marks. The Chinese see counterfeiting luxury brands as an average, and profitable business enterprise with minimal, if any legal repercussions (a perspective reinforced by the lax penalties imposed upon them by Chinese authorities). However, education campaigns informing the public about the value to the Chinese people of establishing a workable intellectual property regime may be possible in light of

¹¹⁵ See Yuankai, *supra* note 107 (discussing how authorities are informing even goodwill infringers, such as those writing that they with the Olympic games succeed on their merchandise, that they are harming the Olympic movement through intellectual property infringement).

¹¹⁶ Crane *supra* note 9.

increased attention to intellectual property rights during the Olympics. “China needs to somehow bridge the cultural disconnect and prove to its domestic business community that global economic success is tied to effective IPR enforcement.”¹¹⁷ The Olympics may provide this catalyst for “bridg[ing] the cultural disconnect” between economic success and intellectual property rights. While the Olympics showcased China’s economic success, intellectual property rights will continue to foster it by encouraging and protecting greater foreign investment in the Chinese economy, a message the Chinese government can convey to its people.

Improved enforcement of trademark rights will not only benefit China’s position with international business. As China’s economy continues to develop, it is likely the country will see an increase in Chinese marks and franchised brands. China’s corporations will benefit directly by improved trademark protection, and consumers will benefit from greater assurances of product quality conveyed through strong, reliable trademarked brands nationwide.

4.3 China should apply the enforcement and liability mechanisms used for policing Olympic trademark rights to all trademarks.

When China was awarded the Olympics in 2001, they acted quickly in enacting legislation and enforcement mechanisms for the protection of Olympic trademarks. In November, 2001, the Beijing municipal government issued a decree on the Protection of Olympic Intellectual Property Provisions by the Beijing Municipality.¹¹⁸ The following month, the Beijing 2008 Olympic Games Organizing Committee (BOGOC) set up a legal affairs

¹¹⁷ Levine, *supra* note 100 at 264 (discussing how the disparities in cultural treatment of intellectual property have hampered effective intellectual property enforcement).

¹¹⁸ Beijing Municipality, Protection of Olympic Intellectual Property (Nov. 2001) *available at* <http://www.beijing12312.com/newsshow.asp?id=A200712191653506083091>.

department dedicated to protecting Olympic intellectual property rights,¹¹⁹ stating that intellectual property protection was their “indispensable responsibility.”¹²⁰ The national government also enacted the Regulations on the Protection of Olympic Insignia and the Measures for the Recordal and Administration of Olympic Insignia.¹²¹

Practitioners have noted that much of the text of Olympic trademark legislation is virtually identical to existing national trademark legislation.¹²² For example, Article 10 of the Olympic Regulations¹²³ is nearly identical with Article 53 of the Trademark law,¹²⁴ providing for the possibility of consultation to settle trademark disputes, and providing procedures to seek administrative or judicial relief for infringement matters.¹²⁵ Article 12 of the Olympic Regulations refers directly to preexisting Chinese legislation, stating, “[w]here import or export goods are suspected of infringing the exclusive rights of Olympic symbols, the Customs shall investigate into and deal with the case with reference to the powers and procedures laid down in ... the Regulations of the People's Republic of China.”¹²⁶ Likewise, although the Olympic Regulations establish a new administrative mechanism through the SAIC, the powers of this

¹¹⁹ See The Official Website of the Beijing Olympic Organizing Committee (Organization Chart), <http://en.beijing2008.cn/bocog/organization/n214071835.shtml#fl> (last visited Jan. 24, 2009) (describing the responsibilities of every sector of the BOCOG, including the legal affairs department).

¹²⁰ See *Beijing Organizers Get Down to Legal Business* (Dec. 27, 2001) available at <http://english.cri.cn/144/2003-2-28/6@2797.htm> (highlighting statements made by the Olympic Committee regarding the creation of the legal affairs department).

¹²¹ See Wang, *supra* note 2 at 302 (characterizing the Olympics as a unique opportunity to set a precedent for China’s adherence to international intellectual property agreements).

¹²² Wenger & Vieli, Attorneys at Law. *The 2008 Olympic Games in Beijing and China’s Enforcement of Intellectual Property Rights*, 7 (Feb. 2006) available at http://www.wenfei.com/fileadmin/archives/wenger_vieli/pubs/Olympic_Games_and_China_s_Enforcement_-_Feb._2006_.pdf (noting the lack of differences in the text of many Olympic trademark provisions from general Chinese trademark law).

¹²³ Regulations on the Protection of Olympic Symbols art. 10, adopted by the State Council of the People’s Republic of China and effective Apr. 10, 2002.

¹²⁴ Trademark Law of the People’s Republic of China art. 53, adopted by the 24th Session of the Standing Committee of the Fifth National People’s Congress and effective Aug. 23, 1982. Amended Feb. 22, 1993 and Oct. 27, 2001.

¹²⁵ *Id.*; Olympic Regulations *supra* note 119.

¹²⁶ Regulations on the Protection of Olympic Symbols art. 12, adopted by the State Council of the People’s Republic of China and effective Apr. 10, 2002

body do not exceed the empowerments of existing agencies articulated in Articles 54 and 55 of the Trademark Law.¹²⁷

Although the text of much of the Olympic regulations articulating intellectual property rights parallels existing legislation, the Olympic regulations implement some important differences with respect to penalties and enforcement. First, penalties imposed for infringing upon Olympic trademarks under Article 13 of the Olympic regulations are calculated based on the Olympic item's official licensing fee instead of the price of the infringing product.¹²⁸ Fines can also be imposed even when no illegal income is seized.¹²⁹ Because the value of official Olympic merchandise is fixed, and is almost by definition greater than the price of its counterfeit, this penalty will be higher and will act as a greater deterrent to potential counterfeiters. Furthermore, imposing fines even when no illegal income is seized will limit the production of counterfeited goods initially, if infringers know they can be fined even before they have established a market for their products.

In addition to greater deterrence through increased fines, the Olympic Regulations overcome many of the legislative and administrative deficiencies that characterize existing

¹²⁷ Trademark Law of the People's Republic of China arts. 54—55, adopted by the 24th Session of the Standing Committee of the Fifth National People's Congress and effective Aug. 23, 1982. Amended Feb. 22, 1993 and Oct. 27, 2001. Article 14 of the Olympic Regulations state that "in addition to these Regulations, Olympic symbols are also protected according to provisions of other laws and administrative regulations such as . . . Trademark Law of the People's Republic of China." Regulations on the Protection of Olympic Symbols art. 14, adopted by the State Council of the People's Republic of China and effective Apr. 10, 2002. Thus, the empowerments of the Olympic regulations do not exceed the powers of existing agencies charged with enforcing general trademark laws; both AICs established for general trademark protection and Olympic agencies have legally overlapping authority. The Olympic agencies, however, enforced the protection of Olympic trademarks much more efficiently and effectively than general AICs, giving them the general appearance of having greater legal authority. In fact, their statutory authority was less than that of existing agencies, although they exercised it to much greater effect.

¹²⁸ "The amount of compensation for the loss caused by infringement of the exclusive rights of Olympic symbols shall be determined on the basis of the loss that the right holder [generally the International Olympic Committee or the Beijing Olympic Committee] has suffered from the infringement . . . the compensation shall be reasonably determined with reference to the licensing fees for using Olympic symbol." Regulations on the Protection of Olympic Symbols art. 13, adopted by the State Council of the People's Republic of China and effective Apr. 10, 2002.

¹²⁹ *Id.*; See Greene *supra* note 9 at 395-97 (describing the higher punishments enforced for the infringement of Olympic emblems).

trademark laws.¹³⁰ The Regulations charge the AICs with the explicit duty of enforcing Olympic intellectual property violations.¹³¹ Additionally, the BOCOG set up their own enforcement staff to supervise the market for cases of Olympic trademark infringement.¹³² Combining legislation with specific enforcement mechanisms was an effective way to overcome many of the administrative hurdles that characterize existing trademark law as, “the different mechanisms and enforcement means are merged together in a single, clear, and all-embracing legal framework (a sort of a ‘one-stop shop’ regarding the IPR protection of the Olympic symbols.)”¹³³ Although pre-existing AIC’s legally retained more power than the Olympic agencies,¹³⁴ Olympic agencies exercised their authority and enforced Olympic trademark rights much more vigorously than general AICs due to the clearer mandates and streamlined enforcement procedures of Olympic intellectual property laws and agencies.¹³⁵

The Chinese government should utilize the Olympic regulations and agency structure as a model for improving trademark protection overall by combining legislation and enforcement mechanisms to clarify expectations of administrators, as was accomplished by the BOCOG. The Chinese government will not be able to recreate the national pride surrounding Olympic symbols with respect to commercial trademarks. However, the Chinese government can begin to send stronger and clearer messages regarding its expectations of intellectual property rights by adopting the mechanisms embodied in the Olympic regulations.

¹³⁰ See The Official Website of the Beijing Olympic Organizing Committee (Organization Chart), <http://en.beijing2008.cn/bocog/organization/n214071835.shtml#fl> (last visited Jan. 24, 2009) (describing the administrative mechanisms for enforcing the intellectual property rights of Olympic trademarks).

¹³¹ Green *supra* note 9 at 397.

¹³² *Id.*

¹³³ Wenger & Vieli, *supra* note 122 (articulating the differences between existing trademark legislation and laws passed for the protection of Olympic symbols).

¹³⁴ See note 131, *supra*, and accompanying text (describing the legal relationship between existing AICs and Olympic agencies).

¹³⁵ See McKenzie *supra* note 4 (discussing aggressive enforcement of Olympic trademark laws and the structure of enforcement).

First, China should revise the penalties for trademark infringement to align with those passed in the Olympic regulations; counterfeiters are not deterred by the low fines imposed upon them, and need a clearer business incentive to stop infringing foreign marks. Calculating fines based on the market for the trademarked product, as was done for Olympic merchandise, more appropriately compensates the market for the damage done to it by trademark infringement.¹³⁶ Notwithstanding the fact that many purchases of lower priced counterfeit products do not represent a lost sale of the trademarked product (many people may pay a lower price for a counterfeit good, but would be unwilling to pay the premium price for the trademarked good, even if the counterfeit were not available), counterfeit goods misappropriate the investment made in that brand name through advertising and consistent consumer quality without providing a return on that investment, namely a sale of the trademarked good.¹³⁷ Every counterfeit sale, thus, is stealing the investment of the trademark holder and the market that relies on the investments of those firms.¹³⁸ Counterfeiters should be required to recompensate the market for what it has stolen from it, not what they have lost by not being able to sell their goods on the black market.

Second, China should revamp its administrative mechanisms for the reporting of trademark offenses. AICs are not doing enough to enforce trademark rights on a local level,¹³⁹ and China is too massive and diverse to rely on enforcement from Beijing.¹⁴⁰ Providing clearer mandates to local administrators, as the Olympic regulations did, will improve the enforcement of national trademark laws. Legislation and administration of trademark protection needs to be clearer so that local officials are held accountable when they fail to report trademark

¹³⁶ See generally Landes & Posner *supra* note 54 at 268-70 (discussing how the failure to enforce trademark rights will destroy the information capital of the trademark in the marketplace).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See notes 76–78, *supra* and accompanying text (discussing the role of AICs).

¹⁴⁰ See Yu, *supra* note 64 at 181 (describing how China's size and diversity have impeded the enforcement of national laws).

infringement in favor of local interests.¹⁴¹ The Olympic legislation for the protection of trademarks succeeded in streamlining administration of reporting of infringement by involving administrators with clear expectations and establishing its own enforcement team through the BOCOG.¹⁴² While the Olympic legislation benefited from the national unity surrounding Olympic symbolism and local officials' greater willingness to confiscate counterfeit Olympic goods,¹⁴³ this enforcement mechanism may still be effective in improving the protection of commercial trademarks.

5. Conclusion

China must find a way to improve protection for commercial trademarks. China's growing economy will increasingly depend on its ability to improve trademark and other types of intellectual property protection in a number of ways.

Chinese companies will increasingly demand improved trademark protection, as the growing Chinese economy will foster improved communication through advertising of brand names. Franchising is growing rapidly in China¹⁴⁴ and the need to protect trademarks in this massive country has never been greater. In addition, the growing economy has created a large class of sophisticated consumers in China's cities who shop for high-end, brand-name goods, many of which are produced by Chinese corporations. Domestic firms investing millions in production and advertising, and consumers who demand high quality goods will rely on trademarks to correct the information asymmetry inherent in a modern consumer society.

¹⁴¹ See Greene, *supra* note 9 at 380-82 (discussing the problem of AICs bowing to local interests).

¹⁴² See BOCOG website *supra* note 122 (discussing the agencies dedicated to the enforcement of Olympic trademark rights).

¹⁴³ McKenzie, *supra* note 4 (noting that greater police action confiscating Olympic merchandise had a dramatic impact on decreasing Olympic counterfeiting).

¹⁴⁴ Wenjie Sun and Richard Wageman, *China's Developing Franchising Market*, CHINA LAW & PRACTICE (Mar. 2007), available at <http://www.chinalawandpractice.com/Article/1690316/Channel/9929/Chinas-Developing-Franchising-Market.html>.

Foreign firms will also grow intolerant of the revenue lost through the vast piracy and counterfeiting that takes place in China's borders. To many firms, lower production costs and a "market too large to ignore"¹⁴⁵ have created large profit margins. These firms accept piracy as a price of doing business in China, and see intellectual property protection as a means to "increase their already acceptable profit ratios."¹⁴⁶

The United States estimates that American industries lose approximately \$20-25 billion annually due to piracy and counterfeiting in China¹⁴⁷ and many foreign governments and private firms have grown intolerant of China's refusal to enforce intellectual property rights.¹⁴⁸ Indeed, having proven they are capable of protecting Olympic intellectual property rights, China has shown the world it is capable of enforcing intellectual property rights where it is in their immediate financial interest.¹⁴⁹ The Olympics put Beijing in the spotlight, magnifying any achievements in intellectual property enforcement. In addition, Beijing, as the host city, received 10-15% of sales of Olympic merchandise, with an estimated value to Beijing of over \$60 million.¹⁵⁰

Finally, since its accession to the WTO in 2001, China's international trade in other areas may depend on its ability to meet WTO regulations such as TRIPS. In 2007, the United States, joined by several other nations, filed a formal complaint with the WTO alleging China has failed

¹⁴⁵ Yu, *supra* note 42 at 5.

¹⁴⁶ *Id.*

¹⁴⁷ Congressional Executive Commission on China: Testimony of Deputy Assistant Secretary Henry A. Levine. Sept. 24, 2003 available at

http://cecc.gov/pages/hearings/092403/levine_henry.php?mode=print&PHPSESSID=2444d65d5c7dc745330f94fea3e25d10&PHPSESSID=2444d65d5c7dc745330f94fea3e25d10.

¹⁴⁸ The WTO complaint against China is evidence of this intolerance. Similarly, some American companies have chosen to litigate some of the most extreme cases of deliberate infringement, hoping to lead the way to make trademark infringement suits more commonplace as a means of protecting their trademarks. *See Starbucks supra* note 47 (discussing the large damages award and injunction won by Starbucks in an infringement suit against a Chinese coffee company).

¹⁴⁹ *See Fan, supra* note 103 (discussing China's political financial incentives to protect Olympic trademarks).

¹⁵⁰ *Id.*

to meet its TRIPS obligations.¹⁵¹ In light of growing international pressure from other WTO members, China must find a way to adhere to these international agreements lest other trading areas are negatively affected through WTO penalties. This WTO complaint has put China, a country already close watch for a variety of international issues including alleged human rights violations, intellectual property shortcomings, and staggering economic growth, under an even brighter spotlight in the international community.

The cultural differences between China and its western allies have emerged dramatically in trademark law in the past fifty years. Neither culture is better than the other, or more deserving of prosperity. Indeed, as recent events have revealed, the United States has ceded its economic dominance to China, which now owns the majority of American debt.¹⁵² As international economies become more intertwined, however, countries that have traditionally been isolated from foreign markets and brands—such as China—will face the most dramatic adjustment to the new world market, even as its growing prosperity makes it one of the most important parties to it. The importance of effective trademark protection in a growing international market cannot be overstated, as consumers and producers will rely on trademarks to protect their investments and assurances of product quality. China is no longer the isolated country it once was, and incorporating trademark law into a national philosophy at odds with intellectual property rights will be an ongoing challenge.

The 2008 Olympics provided an exceptional opportunity for China to showcase its national achievements to the world and emerge from centuries of isolation. With all eyes turned

¹⁵¹ Request for Consultations by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1 (Apr. 16, 2007) For an analysis of the implications of this complaint, see Harris *supra* note 16.

¹⁵² See Gady Epstein, *China's U.S. Debt Quandary*, FORBES (Mar. 19, 2009) available at <http://www.forbes.com/2009/03/19/china-debt-fed-business-beijing-dispatch.html> (discussing China's extensive involvement in the financing of American debt and some criticisms by the Chinese).

to Beijing, China put on a spectacular show. The Chinese government utilized the billowing Olympic support to highlight the harm caused by infringing Olympic trademarks. Despite the lack of a philosophical basis for intellectual property, the Chinese took a unique view towards Olympic marks and, through heightened and improved enforcement efforts, limited counterfeit operations. Of course, no commercial trademark will be able to duplicate the cultural symbolism of the Beijing Olympic marks and China is unlikely to see the same immediate success in limiting trademark counterfeiting in the wider marketplace. Although this cultural symbolism cannot be duplicated, it may be imitated through education highlighting the harm caused by deliberate trademark infringement and adopting the improved enforcement mechanisms of Olympic legislation for the protection of all commercial trademarks.