The 2008 Olympic Games in Beijing and China’s Enforcement of Intellectual Property Rights

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1. Introduction

Since the late 1970’s, the People’s Republic of China (“PRC”) has embarked on an unprecedented reform process that is changing its very social and economic foundations. The opening up of its market and society and its insertion into the international community is gradually but steadily taking place. Two single events in this long process stick out, and may serve to illustrate the progress made so far: China’s accession to the World Trade Organization (“WTO”) on 11 December 2001, and Beijing winning the bid to host the Olympic Summer Games in 2008.

In the last couple of months, both these landmark events were the object of celebration: The unveiling of the five official Olympic mascots (fu wa) in an elaborate, nationally televised gala on 11 November 2005 in Beijing to mark the 1000-day-countdown until the 2008 Olympic Games was closely followed by the 4th anniversary of the PRC’s accession to the WTO one month later.

Therefore, it is good moment to take stock and to inquire in what way these two events are related. In particular, this article aims to answer the question of whether, and how, the holding of the 2008 Olympic Games influences the implementation in China of an important part of WTO law—the protection of Intellectual Property Rights (“IPRs”).

2. Intellectual Property Rights under the WTO and in Chinese Legislation

China’s pledge to adopt and implement legislation protecting IPRs in line with international standards played an important part in the negotiation of its accession to the WTO. Once China became a full WTO member, its was required to ensure that its legislations is consistent with the Agreement related to Trade-Related Aspects of Intellectual Property (“TRIPS”), one of the WTO agreements.¹

TRIPS prescribes minimum national standards of IPR laws and adequate enforcement standards. TRIPS is also subject to the WTO’s binding dispute settlement process.

Before its accession to the WTO, China had already enacted legislation in the field of IPRs. The extensive Trademark Law and the Patent Law were adopted in the 1980s. The adoption of the Copyright Law followed in 1990.

In order to fully comply with the TRIPS Agreement, substantial amendments were made to the existing Patent Law, Trademark Law and Copyright Law in 2001, and implementing regulations of those laws were issued. Subsequent to WTO accession, the Chinese government reorganized its previously issued laws and implementing measures and adopted new measures, in compliance with WTO law – for example, by making amendments to the Criminal Law.²

While on the “books” Chinese IPR laws seem largely satisfactory, a look at the actual implementation of China’s IPR laws is less encouraging. In essence, IPR enforcement is deemed inadequate in China.³ Enforcement standards are said to fall short of TRIPS’ minimum requirements for “effectiveness” and “deterrence”.⁴

3. Regulations on the Protection of Olympic Symbols

The Regulations on the Protection of Olympic Symbols (the “Regulations”)⁵, adopted in 2002, and the recently issued Proclamation of the Beijing Organizing Committee

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⁴ Article 41(1) TRIPS.

⁵ Promulgated by Decree No. 345 of the State Council on 4 February 2002, and effective from 1 April 2002.
regarding the newly introduced Olympic mascots were essentially formulated for the purpose of safeguarding the rights and interests of the right holders of Olympic symbols.

The scope of the Regulations is far-reaching. The unauthorized commercial use of Olympic Symbols is forbidden. The definition of “commercial use” is broad, including many Olympic-related expressions such as symbols, flags, slogans, anthems, and “other symbols related to the 29th Olympic Games as provided for by the Olympic Charter and the Contract of the Host City of the 29th Olympic Games.”

The exclusive right holders are the International Olympic Committee (“IOC”), the Chinese Olympic Committee (“COC”) and the Beijing Organizing Committee of the 2008 Olympic Games (“BOCOG”), as well as authorized licensees.

Although the general IPR legislation such as the Trademark Law or Copyright Law already offer an acceptable level of protection of the distinctive Olympic symbols, with the issuance of the Regulations the Chinese authorities sought to ensure that all uses of Olympic elements are properly monitored in respect of the strict requirements regarding IPR protection under the Olympic Charter and the Host City Contract.

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7 In similar way, Australia had adopted specific laws to protect the IPRs related to the 2000 Sydney Olympic Games: the Olympic Insignia Protection Act 1987 and the Sydney 2000 Games (Indicia & Images) Protection Act 1996.

8 See Articles 2 and 5 of the Regulations on the Protection of Olympic Symbols.

9 See Article 2(6) of the Regulations on the Protection of Olympic Symbols.

10 See Article 3 of the Regulations on the Protection of Olympic Symbols.

11 See Article 8 of the Regulations on the Protection of Olympic Symbols.

12 See Article 14 of the Regulations on the Protection of Olympic Symbols.


14 The Beijing Host City Contract for the 2008 Olympic Games was entered between the IOC and the BOCOG. Furthermore, the Beijing Municipality imposes further obligations to protect and enforce Olympic Games-related IPRs.
If the general IPR legislation already protects the rights of right holders of goods related to Olympic symbols, then the question is whether the 15 articles of the *Regulations on the Protection of Olympic Symbols* add anything to the protection available under general laws. Or could it be that, to the contrary, they merely stress the Olympic symbols' importance, without adding any content to the IPR protection available under the traditional legislation such as the *Trademark Law* or *Copyright Law*?

### 3.1. Do the new Regulations enhance IPR protection?

The *Regulations* do not establish an enlargement of IPR protection in general. In many respects, the *Regulations* virtually copied the text of other IPR legislation. As such, the text of Article 10 of the *Regulations* is virtually identically with Article 53 of the *Trademark Law*. Nonetheless, the fine imposed by the State Administration of Industry and Commerce (“SAIC”) or its counterpart at the local level in case of illegally obtaining income through the infringement of IPRs of Olympic symbols is up to five times the amount of the illegally obtained income. This amount is higher than the fine provided for in Article 52 of the *Implementing Regulations of the Trademark Law* or Article 58 of the *Patent Law*. Both articles empower the competent administrative agency to impose a fine only of up to three times the illegally obtained income.¹⁵

Regarding the enforcement of IPR laws, Chinese law follows a dual system. On the one hand, there are judges specializing in IPR at the Intermediate Court and the Higher People’s Courts for civil actions and courts competent for hearing criminal cases. On the other hand, a number of agencies have jurisdiction in the field of IPR enforcement, such as the SAIC for cases of unfair competition and for trademark infringements or the State Intellectual Property Office (“SIPO”) for patent infringements.

Article 6 of the *Regulations* asserts that the SAIC is responsible for the protection of Olympic symbols throughout the country, while its equivalent at or above the country level has the task to guarantee effective protection within the respective administrative area. This distribution of competence does not introduce a new aspect to general IPR protection in China. Frequently, authorities at different levels are responsible for IPR policy enforcement.

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¹⁵ The penalties for crimes of IPR infringement provided for by the *Criminal Law*, adopted in compliance with the requirements of Article 61 of the TRIPS Agreement, apply equally to Olympic symbols as well as to other goods.
formulation and implementation. More importantly, the SAIC and its local counterparts also supervise the implementation of the *Trademark Law*\textsuperscript{16}, for example.

Similarly, Article 11 of the *Regulations* explicitly describes the powers of the SAIC (or its local equivalent) in dealing with acts infringing the exclusive rights of Olympic symbols. Again, those rights do not exceed existing statutory IPR protection. Agencies empowerments are identically with Articles 54 and 55 of the *Trademark Law*.\textsuperscript{17}

A further aspect of the *Regulations* is its specific focus on the customs law aspect of IPR protection regarding the Olympic symbols. Article 12 of the *Regulations* does not introduce new rights but simply refers to the existing *Customs Law* and the *Regulations on the Customs Protection of Intellectual Property Rights*. Nonetheless, the reference itself is noteworthy since no similar reference to the *Customs Law* is contained in the general IPR legislation. This circumstance contributes to the impression of a profound regulation of all aspects related to IPRs of Olympic symbols.

To conclude, the *Regulations* aimed at the protection of the Olympic symbols do not go beyond the existing legislation in the field of IPR.

**3.2. Better enforcement of the Regulations**

Although, as stated above, the *Regulations* do not go much beyond the existing IPR laws, in practice the protection of the Olympic symbols may substantially differ from the level of protection for IPRs in general.

In practice, the impact of the general provisions of IPR protection tends to be very low. The actual protection level hardly reaches full compliance with the TRIPS agreement.\textsuperscript{18}

The *Regulations on the Protection of Olympic Symbols*, by contrast, seem to overcome the difficulties in IPR enforcement. Less than 1000 days before the Olympic Games take

\textsuperscript{16} See Articles 2 and 54 of the *Trademark Law*.

\textsuperscript{17} See Article 54 of the *Trademark Law*.

\textsuperscript{18} According to the annual report of the International Intellectual Property Alliance, piracy levels in China were still around 90% in all sectors in 2005. See 2005 Special 301 Report, supra note 3, page 183.
place, counterfeit products bearing the official Olympic logo are virtually inexistent in the Chinese markets.

The reasons for the substantial differences in IPR enforcement are not entirely clear\(^\text{19}\), but several factors may play a role:

First, the *Regulations* may be perceived as a comprehensive text, containing all aspects of IPRs concerning goods with Olympic symbols. Thus, the *Regulations*’ effect may be to highlight the importance of IPR protection with respect to Olympic symbols in particular. Not only is the *Regulations*’ language very specific. But also, the different protection 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.

A second reason why enforcement of IPR regulations regarding Olympic symbols appears to be relatively good may be that national pride is tied to those symbols and mascots (in particular the *fu wa*). Perhaps, the Chinese people believe that an infringement would harm the Chinese society and economy. In that regard, it would appear to be particularly important if this growing consciousness were present among officials of the local authorities -because the enforcement of IPR laws often depends on the cooperation of local officials.\(^\text{20}\)

Indeed, the insufficient consciousness of the negative effects of IPR infringements in the Chinese society may be an important cause of the weak IPR law enforcement. Historical and cultural factors play a strong role.\(^\text{21}\)

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\(^{19}\) For example, the annual report of the State Intellectual Property Office gives only vague explanations for the successful enforcement stating that “all the related departments put very stress on the Olympic IP protection and would strictly execute the regulation.” State Intellectual Property Office, “2008 Beijing Time IP Protection in China”, available at http://www.sipo.gov.cn/sipo_English/gfxx/iprspecial/t20050422_44864.htm (last visited on 14 February 2006).

\(^{20}\) Failure by the various *local* authorities to fully implement the IPR protection seems to be widespread. See U.S. Chamber of Commerce, *“China's WTO implementation and other issues of importance to American business in the U.S.-China commercial relationship*”, supra note 3, page 16.

\(^{21}\) The Chinese government has established programs for training judicial and administrative officials about IPR infringements. An EU-China IPR co-operation was established in October 2003. The European Commission has been financing an IPR technical co-operation program. A follow-up program, focusing on enforcement issues, is planned under the 2005-06 China National Indicative Program (NIP) for development co-operation. See European Commission Website, at http://europa.eu.int/comm/external_relations/china/intro/.
Third, and perhaps most importantly, the authorities established an elaborated distribution system for goods with Olympic symbols. The BOCOG and the COC, the right holders of the specific Beijing Olympic symbols and Chinese Olympic symbols respectively, supervise the entire production and distribution chain in order to eradicate potential weak points from the beginning of the production process.

Supervision of production and distribution is made through a careful selection of manufacturers\textsuperscript{22}, which are involved in IPR protection during the entire supply chain\textsuperscript{23}, through the strict regulation of the distribution of Olympic souvenirs at a limited number of official sales points\textsuperscript{24} and through elaborate security labeling and safety arrangements. These control mechanisms aim to suppress overproduction that could be used for the black market. Also, these mechanisms enable the right holders to maintain the design patterns confidential. By contrast, most foreign right holders have to share their knowledge underlying the IPRs with domestic joint ventures partners.

Furthermore, the public’s attention is brought to the authenticity of the Olympic items, with a media campaign and by other means.\textsuperscript{25} This is, of course, because the state -through the right holders BOCOG and COG- has a massive economic interest in the protection of the Olympic symbols.\textsuperscript{26}

Finally, it cannot be excluded that the higher fines – in comparison with existing general IPR laws – imposed by administrative agencies, as explained above, in the case of IPR infringement may have an increased deterring effect.

\textsuperscript{22} The selection of licensees, both for manufacturing and distribution, is above all based on criteria such as quality control management and anti-counterfeit measures. Beijing 2008 Olympic Marketing Plan, available at \url{http://en.beijing-2008.org/02/40/article211614002.shtml} (last visited on 14 February 2006).


\textsuperscript{24} All licensed products are to be sold in licensed merchandise stores that will feature consistent store images, whose operations are certificated by BOCOG. Proof of certification can be seen inside the stores. To foil counterfeit producers, each licensed product has attached an anti-counterfeit label with a toll-free telephone number. This has already proven to be a viable tactic against counterfeitors. The labels contain the addresses of licensed stores, varieties and prices of licensed products and are affixed with anti-counterfeit labels. Beijing This Month, "Beijing Olympics Calls On More Attention", 15 November 2005, available at \url{http://www.btmbeijing.com/contents/en/business/2005-11/specialreport/beijingolympics} (last visited on 14 February 2006).


3.3. Unequal treatment?

Since the enforcement of IPRs related to Olympic symbols appears to be much better than that for other goods, the question arises whether this difference entails unequal treatment.

International law and Chinese law prohibit unjustified discrimination. On the one hand, discrimination among Chinese IP right holders would run counter the equal treatment principle enshrined in China’s Constitution. On the other hand, unequal treatment of Chinese and foreign IP right holders would violate the national treatment principle under WTO law.

However, as was explained in this article, at present there does not seem to be “hard evidence” of a deliberate decision on the part of Chinese authorities to treat the BOCG and the COG differently from other IP right holders. The fact that the Chinese state itself has an interest in the economic success of the Olympic Games marketing does not directly amount to unlawful discrimination. The better IPR protection regarding the Olympic symbols is not necessarily the result of the authorities increased enforcement efforts. A reasonable explanation may be the higher public awareness and the strict control over the entire production and distribution chain by the right holders themselves.

4. Conclusions

The improvement brought by the *Regulations on the Protection of Olympic Symbols* to the protection of IPRs in China is noteworthy: Enforcement can actually work on a high level. This conclusion by itself is a promise for the future. The hope is that in future no specific laws must be adopted to ensure effective enforcement of all types of IPRs in China. Foreign investors will certainly use the example of enforcement of IPRs related to Olympic symbols to push for better protection of their rights.

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27 Article 33(2) of the *PRC Constitution*.

28 With regard to TRIPS in particular, see Article 3 TRIPS.

In parallel, China’s economic progress and its increasing degree on innovation are likely to turn Chinese companies into exporters of IPRs.

In China, the Olympic Games are often used by the Chinese government as a tool for economic and social reform. Fostering broader public acceptance of the necessity of effective protection of IPRs may be a small achievement in this reform process.

Therefore, it is hoped that raising the level of IP protection enforcement in one specific area will eventually lead to an overall satisfactory level of enforcement of all types of IPRs.