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Cultural meanings of marks

While Olympic sponsors may be breathing a sigh of relief, it is precisely as the Beijing Olympic Games are coming to a close that the chance to turn them into the beginning of a new phase of intellectual property enforcement in China may be at its peak. China has not only created new physical structures to host the Olympics, it has also created new legal infrastructures to protect the Olympic symbols. These infrastructures, together with an unprecedented mobilization of enforcement resources to protect Olympic symbols, represent a marked advance in IP enforcement standards.

These advances can only become a permanent gold medal reality for all IP owners, however, if owners implement aggressive new marketing and enforcement techniques that place the enforcement of their rights within the cultural imperatives established in connection with the Olympic symbols. Brand meanings must be reconfigured and enforcement demands must be recalibrated to take advantage of the heightened opportunity for enforcing IP rights in China. Only by crafting such a culturally rational approach can IP owners convert the advances in protection for Olympic symbols into lasting benefits.

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In the critical period leading up to the Beijing Olympics, IP enforcement moved front and center as a domestic concern for the Chinese government. This changed status was a direct result of China's successful candidature as a host country for the Summer 2008 Olympics. China moved quickly to meet its obligations under the host agreement with the International Olympic Committee (IOC) to protect Olympic symbols. Both the Beijing municipality and the Chinese government enacted special laws to protect Olympic intellectual property, including not only the traditional five-ring symbols, but also the mascots, anthem and slogans of the Olympiad.

Both the Protection of Olympic Intellectual Property Provisions by the Beijing municipality (Beijing Declaration) and the Regulations on the Protection of Olympic Symbols (Special Regulations) prohibited unauthorized commercial uses of the protected marks. See www.beijing12312.com/newsshow.asp?id=A200712191653506083091 and http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=2168&col_no=119&dir=200603. These unauthorized uses included not only use "for business purposes" but also use "in advertisements, commercial exhibitions, commercial performance and other commercial activities." Special Regulations, Article 4. False advertising was also prohibited under Article 5(6) of the regulations, which prohibited "[a]ny other activities [that] may make the third parties believe that there are sponsorship or other support relationships between the users and the right owners of the Olympic Symbols."

The Special Regulations in particular represented a significant advance in IP protection by broadening the potential administrative avenues for relief and providing a more rationale basis for determining fines and penalties. Copyright tribunals became actively engaged in Olympic symbol protection, particularly in the unauthorized use of Olympic sponsorship slogans. Reported cases involve a wide array of Chinese businesses using references to the Olympics on packaging, napkins and other service items, including a Chinese fireworks manufacturer who used the phrase "Wishing Success to the Beijing Olympics" on his product. All of them were found to be infringing Olympic copyrights.

Most significantly, penalties and damages awards for violations of trademark rights under the Special Regulations were premised on the *actual* value of the trademarked use to the IP owner, instead of the pirate price. Under the present trademark system, as interpreted by the Supreme People's Court, "Value of the products produced by infringing on intellectual property shall be computed according to the prices at which such products are actually sold." This focus on the actual sales price included the market price charged by counterfeiters. The effect was to lower penalties to the point where they become merely a (relatively low) cost of doing business. By contrast, the Special Regulations specifically allowed fines to be tied to the license fees for the use of the Olympic symbol.

Under Article 13 of the Special Regulations, if "the loss of the infringed, or the gain of the infringer" cannot be determined, "the amount of the compensation shall be referred to the fee [for] licensed use of the Olympic Symbols." Since counterfeiters are notoriously poor record keepers, in most cases, losses and gains are easily determined. Hence, the default damages measure of the license fee applies. This focus on a tangible valuation, based, not on pirate values, but instead on the value to the trademark owner, was a major step forward in the regulations, given the relatively high license fees charged for use of the Olympic symbols.

Even with Special Regulations protecting Olympic symbols, counterfeiters started early. Their efforts were not limited to traditional counterfeiting activities in the hard goods arena, but included illegal activities on the Internet, including launching shadow sites purporting to offer tickets, travel

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and other Olympic-sponsored goods and services. In response, the Chinese government mobilized an impressive array of enforcement measures to combat Olympic piracy, including increased training programs for enforcement personnel and the establishment of a "rapid city Olympic IP protection linkage mechanism" to provide fast action on potential infringements. These enforcement efforts were not limited to Beijing, but included planned enforcement sweeps in other major cities in China, including Qingdao, Tianjin and Shanghai.

The government also mounted a public relations and education campaign that directly involved the public in protecting the Olympic symbols. Articles appeared stressing the harm that counterfeit products can cause. In one case, involving the seizure of 12,800 partially finished Fuwa (the five mascots of the Beijing Olympics), a local official was quoted in the *Beijing Daily Messenger* as warning people against the health hazard posed by the products, which were sometimes filled with industrial waste that could threaten people's health. Consumers were drafted into the front lines of the enforcement effort. A hot line was set up in Beijing and rewards were offered for truthful information regarding infringing activity. Corporations were urged to take pledges to avoid infringing the Olympic symbols, and were threatened with possible public criticism in the press if they violated them.

While such efforts did not eradicate counterfeit activities, there is evidence that they had a positive impact. Reports indicate that counterfeit Olympic merchandise was not readily available, at least around major Olympic venues. The mobilization both of enforcement officials and the public was a tremendous advance for IP enforcement. Unfortunately, such mobilization may not be readily available to protect other brands.

There is strong evidence that the Chinese public does not see the Olympic symbols as commercial source designators. To the contrary, according to Li Yan Jun, director of the Beijing Olympic Organizing Committee, they have been actively promoted as "important cultural carriers of the Olympic movement, a symbol of the Olympic spirit." See "Protection of the Olympic symbol: China is resolute, www.china-fun.net/2008/preparation/200709261/1510291.shtml. The *Manual for Beijing Olympic Volunteers* stresses the role of the Olympics as a "social movement based upon sports and guided by certain philosophical thoughts, i.e., Olympism." Even the Beijing municipal provisions in Article 5 cited the "principles of safeguarding the dignity of the Olympic Games" as the basis for protection.

To place any brand within the cultural aura of Olympic symbology requires that implicit messages with regard to lifestyle choices; socially beneficial activities, such as protecting the environment; and other cultural activities that resonate with Chinese socialist goals be actively promoted. The manual for volunteers provides helpful hints in how to make a mark culturally relevant, including using references to socially relevant activities and Confucian precepts to support the social benefits connected with a particular brand.

This focus on the social meanings of marks must form part of the backdrop of enforcement efforts in China. Requests for protection should be couched in terms aligned with socialist goals, including the need to protect the public from the physical or social harm that counterfeit goods pose. It is no accident that published reports regarding the production of counterfeit stuffed fuwa included warnings about the unhealthy nature of the materials used to create toys. Owners must consider harm to their marks in terms that go beyond lost profits and creatively, but honestly, describe such harm in terms of public health and safety. Enforcement officials already trained to protect the cul-

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tural meaning of Olympic symbols will find the transition of efforts to other brands easier if such protection needs are couched in terms that do not rely on the simplistic "because the law says so."

In addition to creating cultural meanings for their brands in China, trademark owners must engage the public in actively protecting the public from the health and safety harms arising from counterfeit goods. Such public involvement should go beyond advertising the harms caused by illegal goods (a necessary adjunct to any successful enforcement program). Well-established brands should consider establishing hotlines and other methods for encouraging the public to alert trademark owners about the sale or distribution of illegal goods. The utility of such programs, however, requires a commitment to pursue both criminal and civil actions against such identified infringers. If enforcement officials decline to act on verified tips, IP owners must be ready to do so using the full panoply of administrative and court avenues available under local law.

To the extent they have not already done so, trademark owners should consider mimicking the distributive measures taken to protect Olympic-branded goods. Licensed Olympic goods contained holographs, and were available for sale only in Olympic stores. Luxury brands might follow similar techniques. They are not an absolute panacea, since, of course, holographs can also be counterfeited. However, narrowly circumscribed distributive channels must be combined with aggressive enforcement against goods sold outside of authorized channels.

Finally, if IP owners are to take full advantage of the heightened attention to IP enforcement, they must be as proactive with regard to the enforcement infrastructure as the IOC was. Now is the time to push for change in China's trademark laws and regulations to consolidate the experiences under the Special Regulations and Beijing Declaration for all trademark owners. This requires inclusion of the issue as part of the continuing bilateral negotiations arising both from ongoing World Trade Organization (WTO) proceedings as well as China's continuing placement on the Priority Watch List under the recently issued 2008 Special 301 Report. It requires a concerted effort to alter the judicial interpretation by the Supreme People's Court of the test for trademark valuation. Trademark owners need to file a sufficient number of civil cases in China so that the issue comes before the court. With both the diplomatic and court systems involved, and reliance on the clear recognition that counterfeit values are inappropriate measures of harm from the Special Regulations, the chances for securing the necessary interpretive change will be enhanced.

Trademark and copyright owners must remain actively involved in the current WTO proceedings involving the challenge to China's threshold valuations for criminal prosecutions. This will require trademark owners to abandon their traditional reluctance to band together to combat global piracy. Instead, they must provide the statistical and experiential information that will enable the U.S. government to provide persuasive arguments to both their Chinese counterparts and the dispute settlement body to remove present valuation stumbling blocks to effective enforcement of IP rights.

To make the advances in enforcement protection for Olympic symbols an effective platform for permanent enhancements to IP protection in general in China, IP owners must take a proactive approach that will assure that the benefits of the Olympics last far beyond the 2008 Summer Games. The time is ripe for change. With the enactment by the State Council in June of a National IP Strategy that contained the long-term goal of developing China into "a nation with an internationally top level of creating, using, protecting and managing IPRs by 2020," China has signaled that its commitment to increased IP rights enforcement is intended to last beyond the closing ceremonies on Aug. 24. It is up to intellectual property owners to take advantage of this potential by following a

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rational approach to protection and enforcement that helps convert the advances in protection for Olympic symbols into lasting benefits.

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