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Brazil's Olympic Trials: An Overview of the Intellectual Property Challenges Posed by the 2016 Rio De Janeiro Games

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For the first time since their inception, a South American country will be hosting the Olympic Games in the summer of 2016.² In early October of 2009, the International Olympic Committee (IOC) voted Rio de Janeiro, Brazil, to host the Games over a fierce competition with other candidate cities such as Chicago, Madrid and Tokyo.³ Hosting the Olympic Games requires more than a great sports tradition, for the IOC will only choose the candidate that best satisfies the legal and infrastructure requirements of the Olympic Charter.⁴ Those requirements include the candidate's ability to protect and enforce any intellectual property rights related to the Olympic Games.⁵

... This Note examines Brazil's intellectual property policies along with its legal framework to determine if Brazil is indeed ready to host the 2016 Olympic Games. Part II provides background information on the origin of the Olympic Games, the International Olympic Committee, and the intellectual property that is created on their occasion, as well as their legal and policy challenges. Next, Brazil's legal framework for intellectual property protection and its deficiencies are explored. **Part III analyzes Brazil's controversial policies regarding intellectual property and how the domestic deficiencies may impact the Olympic Games. Part IV recommends a revision of Brazil's policies and ways to address the domestic deficiencies.** Part V is the conclusion.

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2. Sports Patents

Olympic athletes—both ancient and modern—have used any means at their disposal to improve the speeds at which they can run, the distances they can throw and the heights they can jump.⁴³ Because of this, international sports competitions—and competitors—have become increasingly dependent on technological advances, which have helped athletes improve their times and have increased the competitiveness and the difficulty of winning and setting new records. On the one hand, modern technologies such as anti-gravity treadmills,⁴⁴ hydrodynamic-friction-reducing swimsuits,⁴⁵ and sports methods—like a new tennis grip or a sports training technique—are designed to help athletes to become swifter and stronger.⁴⁶ On the other hand, the organizers of the Olympics now rely heavily on a myriad of sensors such as high-speed cameras which capture 8,000 frames per second and underwater cameras⁴⁷ to keep an accurate record of athletes' performances.⁴⁸ The excitement of the Olympic Games is possible not only because of the technological breakthroughs mentioned above, but because of the legal protection these breakthroughs receive under patent law.

... 4. Patent Infringement

In a broad sense, patent infringement occurs whenever an unauthorized party uses, sells or manufactures an invention without a license or waiver from the patent holder.⁶¹ In sports, patents have a variety of applications, ranging from performance enhancing training methods, signature “moves” —e.g. an infallible tennis serve or golf putting stroke—to state-of-the-art gadgets.⁶² Sport patents provide both individuals and corporate sponsors with enormous monetary benefits, for instance, by increasing their market share through the exclusion of competitive products.⁶³ Equally, individual athletes who hold patents over training methods or signature moves have an interest in excluding others from the advantages of their protected property.⁶⁴ It is arguably in the best interest of the host country to ensure an effective patent protection system—in order to provide the best Olympic Games experience.

D. Brazil’s Legal Framework for Intellectual Property Protection.

Brazil’s framework for protection of intellectual property is comprised by the Federal Constitution,⁶⁵ the Industrial Property Law (IPL),⁶⁶ and an extensive body of regulations. In terms of international law, Brazil has incorporated into its legislation the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement and has been a member of the Patent Cooperation Treaty since 1978.⁶⁷ Moreover, just one day before the IOC officially chose Rio de Janeiro to host the 2016 Olympic Games the Brazilian Federal Government enacted the Olympic Act,⁶⁸ which also contains specific intellectual property provisions relevant to the Games.⁶⁹ These laws will provide the general outline of rights, obligations, procedures and remedies regarding patents, copyrights and trademarks in Brazil for the upcoming Rio de Janeiro Games in 2016.

... b. Patents

According to Brazilian legislation, inventions may be protected through both patents of invention and utility models.⁸⁴ Patents and utility models are protected, in principle, for twenty and fifteen years respectively counting from the filing date.⁸⁵ Brazil has, however, enacted certain mechanisms like compulsory licensing of patents—consistent with TRIPS—and patent infringement exemptions—not so consistent with TRIPS—that may limit a patent owner’s rights from unauthorized use.⁸⁶

Compulsory licensing is a mechanism by which the government forces the holder of a patent or copyright to grant use to the state or others.⁸⁷ In Brazil, a third party can request a compulsory license *inter alia* whenever: (i) The owners exercise their patent rights in an abusive way; (ii) The owners engage in abuse of economic power—determined by administrative or judicial decision; or (iii) Commercialization is insufficient for domestic market needs.⁸⁸ However, the requested compulsory license will not be granted if the owner proves *inter alia*: (a) Serious and effective preparation for domestic exploitation has been carried out; (b) Non-use of the patent is justified for legitimate reasons; or (c) The lack of exploitation is due to legal obstacles.⁸⁹ Noteworthy is that key terms like “exercise in an abusive way” or “abuse of economic power” are somewhat vague, leaving room for convenient interpretations that lead to unjustified compulsory licensing.

Patent infringement exemptions in Brazilian legislation constitute an exception to the exclusive rights of the patent holder. These exemptions allow an unauthorized party to use the patented invention *inter alia* for (i) private, non-commercial use that does not result in detriment to the owner’s economic interest; and (ii) experimental purposes related to technological research.⁹⁰ The language used for these exemptions suffers from the same vagueness issue as the abovementioned compulsory licensing provisions.

... III. ANALYSIS AND DISCUSSION

This section begins with a critical analysis of Brazil's controversial policies towards intellectual property rights and how it could impact the 2016 Rio Games.

... *A. Brazil's Policy Regarding Intellectual Property*

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1. Impact of Brazil's Posture on the Olympic Games

The Brazilian government has assumed a leadership position in the international arena by promoting a new and controversial global framework that calls for the current high technology, knowledge, and information digital era to become "universally accessible" and essentially free of charge to developing countries.¹⁰⁴ Most conveniently, Brazil has self-designated as a developing country that should be favored in this new order.¹⁰⁵ It is argued that this stance towards intellectual property rights is heavily influenced by socialist/leftist ideals.¹⁰⁶

104. Lawrence A. Kogan, *Brazil's IP Opportunism Threatens U.S. Private Property Rights*, 38 U. MIAMI INTER-AM. L. REV. 1, 7 (2006).

105. *Id.*

106. *See id.* at 7–8 (arguing that among Brazil's supporters of this effort to change the current IP framework we find socialist governments, neo-marxist politicians, NGOs, anti-private property and anti-free market activists).

(p.203)

... **Brazil could argue that through the knowledge and technology that developed countries use to train their athletes, they obtain unfair advantages that should be leveled out by giving out for free said technology to developing countries. Just as pharmaceutical companies are the only ones reaping "unfair" benefits from their protected property, developed countries reap an unfair amount of medals in the Olympic Games. Because of these disparities, Brazil—and other developing countries—have little or no incentive to protect or enforce any kind of sports-related intellectual property rights. However, this posture is likely to backfire since it may discourage domestic and foreign sport patent owners to conduct any kind research, development, and commercialization for the Rio Games.¹¹⁵**

115. *See Kogan, supra* note 105, at 28 (noting how the Brazilian Government's stance regarding intellectual property rights discourages research, development and commercialization of inventions).

(p.204)