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# Great Olympics, New China: Intellectual Property Enforcement Steps Up to the Mark

## I. INTRODUCTION

Investors with valuable technology, bold enough to enter China's markets, find themselves in a love-hate relationship with the land that is "both the problem and the opportunity."<sup>1</sup> On one hand, China's accession to the World Trade Organization (WTO)<sup>2</sup> promised unsurpassed access to China's markets. On the other hand, China's reputation for being an intellectual property black hole is not undeserved.<sup>3</sup> Investors waited eagerly as China acceded to the WTO and the attached Agreement on Trade Related Aspects of Intellectual Property ("TRIPS Agreement")<sup>4</sup> with the hope that China would soon become fertile ground for profitable technology investment. Unfortunately, although accession-motivated changes in intellectual property law brought China on par with the global powers in legislation, enforcement trails far behind.

Two opposing sides of the debate emerged amidst the desire to enter China's markets. One side of this debate, under pressure by domestic industry lobbyist groups and repeated throughout the

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1. Anthony O'Reilly, *The Real Threat to World Trade Comes from China; We Have to Recognize That China is Both the Problem and the Opportunity of the Future*, INDEPENDENT (LONDON), Sept. 24, 2003, at 17.

2. China acceded to the WTO on December 12, 2001. Accession of the People's Republic of China, Decision of 10 November 2001, No. WT/L/432, available at [http://www.wto.org/english/thewto\\_e/acc\\_e/completeacc\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm) (Nov. 23, 2001) [hereinafter Accession of the People's Republic of China].

3. See, e.g., Peter Marsh, *Fear of High-Tech Piracy Makes Some Microchip Companies Cool About China—Potential Investors Can be Wary but Others Detect Growing Awareness There of the Need for Law*, FIN. TIMES, July 15, 2004, available at 2004 WL 85138132.

4. Agreement on Trade Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

United States' China policy, calls for trade sanctions and threats.<sup>5</sup> The other side, primarily urged by international law scholars, would rather encourage China to open its markets in ways other than erecting a wall that disrupts trade flows and perpetuates protectionism.<sup>6</sup> These approaches underlined the debate leading up to China's accession, and the latter won out briefly<sup>7</sup> when China acceded to the WTO in December 2001. WTO members rationalized that enforcement would inevitably follow treaty-forced intellectual property legislation because China needed to enter and maintain membership in the WTO. When enforcement did not follow fast enough, however, the United States reverted back to protectionist rhetoric and thereby undermined the possibility of forming an effective intellectual property regime.<sup>8</sup>

Enter the XXIX Olympiad. The 2008 Olympics is uniquely positioned to change China's intellectual property rights (IPR) enforcement framework. Not only is China's international reputation on the world's cultural stage at stake in hosting the Olympics, but preparation for the XXIX Olympiad will also bring irreversible technology transfer into China. Chinese citizens will, for the first time, comprehend what intellectual property infringement means on a national scale through China's protection of the Olympic trademarks. Unlike the imposition of wholesale foreign laws, the Olympics provide the flexibility, guidance, and training necessary for Chinese citizens to understand how

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5. China has been continually criticized for its lack of enforcement and weak penalties, but the United States leads the pack as China's harshest critic. *See, e.g.*, Press Release, Bureau of Int'l Info. Programs, U.S. Dep't of State, Grassley Urges China to Comply with Its Trade Obligations (Oct. 7, 2003), at <http://usinfo.state.gov/xarchives>.

6. China's accession to the WTO illustrates this debate. Early opponents to granting Most Favored Nation (MFN) status to China leveraged human rights violations, but even on this point, scholars agree that China should not be isolated. *See Hearings on China Most-Favored-Nation (MFN) Trade Status: Human Rights Consequence, Before the Subcomm. on Int'l Operations and Human Rights Comm. on Int'l Relations, U.S.H.R. 104th Sess. (1996)* (testimony of Prof. James V. Feinerman, Geo. U. L. Ctr.), at [http://www.house.gov/international\\_relations/104th/hrctes3.htm](http://www.house.gov/international_relations/104th/hrctes3.htm) [hereinafter *Hearings*]; *see also A Land of Opportunity and Threat*, N.Z. HERALD, Sept. 25, 2003, available at 2003 WL 67391789.

7. In the 1990s, the United States reluctantly changed its China policy to one of cooperation and partnership. *See, e.g., Hearings, supra* note 6.

8. Murray Hiebert & David Murphy, *The One-Two Punch: China is Coming Under Fire in the United States on Two Fronts; Politicians and Others Accuse Beijing of Stealing U.S. Jobs; but Growing Anger at the Slow Pace of Trade Reforms May Prove the Bigger Issue*, FAR E. ECON. REV., Oct. 2, 2003, available at 2003 WL-FEER 59147233.

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intellectual property protection can benefit not only foreign IPR holders, but also domestic businesses.

The Olympics will complete what Li Changxu, head of the China United Intellectual Property Investigation Center, referred to as the needed “electricity and water pipes” in the larger metaphor of building a house that is the Chinese intellectual property regime.<sup>9</sup> Part of this construction is the legal reform movement to alleviate the Chinese Communist Party’s (“the Party”) vast discretionary powers in favor of a due process oriented rule of law.<sup>10</sup> The non-politics based Olympic movement, along with internal legal reforms toward a rule of law, will cement the necessary foundation for intellectual property enforcement.

This comment argues that the 2008 Olympics is in a unique position to set the framework for legal adherence to the rights of foreign intellectual property owners. Legal reforms toward a rule of law can fortify this eight-year preparatory period into permanence for intellectual property enforcement, but progress would be hampered by the United States’ revived threats of unilateral protectionist sanctions. Part II briefly describes the transforming role of Party discretion in the post-Mao era and the emerging role of the “rule of law” necessary for an intellectual property regime to take root. Part III provides a brief background of the International Olympic Committee’s (IOC) intellectual property protection through the Host City Contract. Part IV contrasts China’s reactive approach in dealing with the United States’ external, political pressures to its proactive approach in adapting the internal, nonpolitical standards of the IOC. This section uses four factors expounded by Professor Peter K. Yu as a framework in analyzing the reasons for the United States’ failure and the IOC’s success.<sup>11</sup> Part V argues that the Olympics’ support of the infant domestic intellectual property industry, coupled with a transitioning legal system, will permanently change the foreign intellectual property investment environment. Foreign pressure and concern should be channeled into providing legal expertise

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9. Marcus W. Brauchli & Joseph Kahn, *Intellectual Property: China Moves Against Piracy as U.S. Trade Battle Looms*, ASIAN WALL ST. J., Jan. 6, 1995, at 1.

10. See Chris X. Lin, *A Quiet Revolution: An Overview of China’s Judicial Reform*, 4 ASIAN-PAC. L. & POL’Y J. 256, 294 (2003), available at [http://www.hawaii.edu/aplpj/table\\_of\\_contents/June2003artindex.html](http://www.hawaii.edu/aplpj/table_of_contents/June2003artindex.html).

11. Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT’L L.J. 1, 6-7 (2001).

and education in China, rather than using protectionist sanctions that have historically proved futile. This comment concludes that effective intellectual property enforcement may be achieved through maintaining the Olympic momentum and fostering intellectual property education in the rule of law, rather than reverting to economic sanctions and threats of trade wars.

## II. PARTY DISCRETION AND LEGAL REFORM TOWARD A RULE OF LAW

Foreign pressure failed to improve China's intellectual property protection in part because the foreign powers failed to understand China's social and legal structure. Despite attempts to increase regularity and predictability in legal rulings, China remains "more a system of discretion supplemented by law than a system of law supplemented by discretion."<sup>12</sup>

Party politics drive not only the administrative bureaucracy, but also the judicial system. Officials wield discretionary power over all laws in China, regardless of a law's textual meaning or legislative intent.<sup>13</sup> The traditional "rule *by* law" notion reflects the Party-driven ideology that the Party creates laws to regulate society and is not subject to its own laws.<sup>14</sup> Far from the American construction of separation of powers, the judiciary is subject to Party control, first through the Party's power to reopen an underlying proceeding post-judgment, and second in the Party's control over judicial appointments and salaries.<sup>15</sup> Until legal reforms began to overhaul the existing institutional framework,

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12. Margaret Y.K. Woo, *Law and Discretion in the Contemporary Chinese Courts*, 8 PAC. RIM L. & POL'Y J. 581, 615 (1999).

13. See STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 140-42 (1999).

14. Lin, *supra* note 10, at 264.

15. Currently, the judiciary enjoys less direct interference, although the Party will still interject in important cases. In 2002, the 16th Chinese Communist Party (CCP) Congress began to openly instill procedural reform and the elevation of the Constitution above the Party in its new amendment to the Charter of the CCP. Lin, *supra* note 10, at 268. Many Party leaders still believe that the law's purpose is to shape citizen behavior according to Party policy, and not to subject the Party to the law itself. *Id.* at 263. See also ZHONGHUA RENMIN GONGHEGUO XIANFA [Constitution], pmbl., (P.R.C.), translated in THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1979-1982, at 4 (1987).

the Chinese judicial system rested at the mercy of the Party politic.<sup>16</sup>

Even when the problem of Party discretion became apparent, external foreign pressure for China to move toward a stronger “rule of law” still failed to account for the historically rooted Confucian moral code, which strives for social harmony and personal relationships over state coercion and impersonal imposition of abstract rules.<sup>17</sup> This is the foundation and justification for Mao’s discretion-dominated system, in which substantive justice and equality is prized over procedural rules.<sup>18</sup> Informal mediation, which preserved the local social fabric within villages, provinces, and other various localities, was preferred over formal litigation.<sup>19</sup> Thus, inconsistent judicial results stem not only the fact that judicial discretion is driven by Party policy rather than public policy, but also from the individualized administration of justice. Internally, bureaucratic decentralization, coupled with the Party’s urge to micromanage, has resulted in conflicts between local practices and official national legislation.<sup>20</sup>

The values underlying intellectual property rights conflicted with the Confucian ideal, which stressed imitation and exact copying as the ultimate form of flattery and respect.<sup>21</sup> The concept of intellectual property rights requires acceptance of an individual’s property right as against all others,<sup>22</sup> including the

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16. See LUBMAN, *supra* note 13, at 214. Despite constitutional provisions creating an independent judiciary, the long absence of the rule of law in China has intertwined the judiciary with the Communist Party. See Lin, *supra* note 10, at 260-61.

17. Yu, *supra* note 11, at 16-21. See also Liwei Wang, *The Chinese Traditions Inimical to the Patent Law*, 14 NW. J. INT’L L. & BUS. 15, 15-17 (1993).

18. See Yu, *supra* note 11, at 21-22.

19. *Id.* at 20. This underlying social order also explains the increasing popularity of arbitration for dealing with commercial disputes involving Chinese companies, but arbitral awards must still be enforced by a court. See, e.g., China Int’l Econ. & Trade Arbitration Comm’n (CIETAC) website ¶ 4, at [http://www.cietac.org.cn/english/introduction/intro\\_2.htm](http://www.cietac.org.cn/english/introduction/intro_2.htm) (last visited Jul. 25, 2005) (“[I]t is . . . true that a small number of local People’s Court[s] have improperly refused enforcement of the arbitral awards.”).

20. See generally LUBMAN, *supra* note 13, at 198-99.

21. Yu, *supra* note 11, at 18-20.

22. The concept of intellectual property rights, as a right of an individual holder for the purpose of financial gain, ran counter to Communist ideology. TAN LOKE KHOON & CLIFFORD BORG-MARKS, TRADE MARK LAW IN THE PEOPLE’S REPUBLIC OF CHINA 210 (1998) [hereinafter KHOON & BORG-MARKS]. Intellectual property in China did not exist as the term is now understood prior to 1984. For a definition of “intellectual property” in the context of Chinese history, see MICHAEL D. PENDLETON, INTELLECTUAL PROPERTY LAW IN THE PEOPLE’S REPUBLIC OF CHINA 1-3 (1986). See

state.<sup>23</sup> In contrast, under Confucian teachings, emulation was prized over originality; memorization and duplication of traditional works marked the well-learned citizen.<sup>24</sup> Under Communist ideology, Chinese citizens were to enjoy works produced.<sup>25</sup> Thus, the absence of social value placed on proprietary rights precluded Chinese society from seeing the benefits of intellectual property protection.

While trademark and patent legislation did exist in the early 1980s,<sup>26</sup> such laws did not establish private property rights.<sup>27</sup> Instead, they were tools of Party control in product differentiation and quality as *against* the intellectual property holder rather than for the protection of trademark or patent owners.<sup>28</sup> The 1982 Trademark Law, for example, did not protect service marks and business names.<sup>29</sup> Business and service names were unprotected until unfair competition legislation passed in 1993.<sup>30</sup> Internal changes and legal reforms did not begin to take stride until a new

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*also* ZHENG CHENGSI, INTELLECTUAL PROPERTY ENFORCEMENT IN CHINA: LEADING CASES AND COMMENTARY 3-9 (1997) (commenting on the first intellectual property court decision *Jiang Sishen v. Qiao Xuezhong*, reported only in a local newspaper).

23. See PENDLETON, *supra* note 22, at 1; PETER FENG, INTELLECTUAL PROPERTY IN CHINA 4 (2d ed. 2003).

24. Yu, *supra* note 11, at 17-18.

25. KHOON & BORG-MARKS, *supra* note 22, at 210.

26. See WORLD INTELLECTUAL PROP. ORG., COUNTRY PROFILE: CHINA 135, available at <http://www.wipo.int/about-ip/en/ipworldwide/pdf/cn.pdf> (last visited Jul. 25, 2005).

27. FENG, *supra* note 23, at 191, 293-94.

28. *Id.* at 293. Intellectual property legislation can be traced back to the Tang Dynasty (618-906 A.D.). These imperial decrees, however, were as much a tool for monarchical control as the 1980s legislation was for Party control and censorship. Yu, *supra* note 11, at 4 (edicts were "mainly instituted to control the dissemination of ideas"); see also Perry Keller, *Privilege and Punishment: Press Governance in China*, 21 CARDOZO ARTS & ENT. L.J. 87, 89-90 (2003) ("Party Principle" subjects all media to the principles and directives of the Chinese Communist Party).

29. PENDLETON, *supra* note 22, at 11. See also Yu, *supra* note 11, at 9-10 (despite passage of 1982 Trademark Law, American businesses are impatient with lack of improvement in intellectual property protection in China).

30. ZHONGHUA RENMIN GONGHEGUO SHANGBIAOFA [Trademark Law of P.R.C.], Fagui Huiban, translated in 2 CHINA L. FOREIGN BUS. 11, art. 3 (1982) [hereinafter Trademark Law 1982]; ZHONGHUA RENMIN GONGHEGUO SHANGBIAOFA [Law of the People's Republic of China Against Unfair Competition], Fagui Huiban, translated in THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1993, at 195 (1993) [hereinafter Unfair Competition Law of P.R.C.]. See PENDLETON, *supra* note 22, at 10. Currently, three institutions comprise the intellectual property enforcement infrastructure in China: the State Intellectual Property Office (SIPO), the State Administration for Industry and Commerce (SAIC), and the National Copyright Administration of China (NCAC).

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generation of western-educated Chinese returned to China in the post-Mao era.<sup>31</sup>

Premier Wen Jiabao's new generation of Chinese leaders marked significant change in Party ideology towards a market economy and an openness toward western ideas.<sup>32</sup> Within the past decade, Chinese legal reform rhetoric shifted from the traditional "rule by law" ideology towards the modern "rule of law" concept.<sup>33</sup> The most important change in this shift was the idea that the government ought to be bound within the limits of its laws. Instead of vesting the Party with the ultimate interpretative and legislative power as a tool for maintaining Party power, reform emphasized a more independent judiciary.<sup>34</sup> Because courts lack power of judicial review, however, they remained subservient to the Party's ultimate power of legislation and interpretation.<sup>35</sup> This, along with the entrenchment of the Maoist tradition of informal dispute resolution free from procedural restraints, has slowed efforts to increase transparency in the rule of law.

While courts are handling more IPR cases and new intellectual property courts have been created, the apparent progress is deceptive. First, court judgments are generally hard to

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31. Many children of prominent Party leaders and the business elite are educated in Western nations. *See, e.g.,* Kathy Chen & Susan V. Lawrence, *China's Premier Takes on U.S.*, ASIAN WALL ST. J., Nov. 28, 2003, at A1, available at 2003 WL-WSJA 65018560.

32. Premier Wen's philosophy recognizes the need to participate in the market economy. *See id.*

33. For a discussion on the recent development in "fazhi" (rule of law) versus the rule by law interpretation and the old arbitrary "renzhi" (rule by man) system, see Lin, *supra* note 10. *See also* LUBMAN, *supra* note 13, at 174-80, 306-19.

34. *But see* Woo, *supra* note 12, at 592. A series of procedural laws passed since 1978, e.g., the Administrative Litigation Law of 1989, provide a glimpse of a fledging independent judiciary granting citizens the power to challenge public agency actions in court. The procedural laws in force are the Criminal Procedure Law of 1979, amended in 1996; Civil Procedure Law of 1991; and Administrative Litigation Law of 1989. *Id.* at 593. A recent example of increased usage of the courts is a suit by a domestic patent holder against the SIPO for negligently deleting contact information from a patent application. ROUSE & CO. INT'L, *The SIPO Ordered to Pay Compensation by Way of an Administrative Fine, to a Patentee for Behavior Deemed to be a Misuse of Internal Guidelines*, CHINA IP EXPRESS, No. 190, Dec. 5, 2003, available at [http://www.iprights.com/publications/chinaipexpress/ciex\\_191.asp#2](http://www.iprights.com/publications/chinaipexpress/ciex_191.asp#2) (last visited Jul. 25, 2005).

35. *See* Lin, *supra* note 10, at 271 (quoting Professor Qiao Xinsheng, who argues that despite no *Marbury v. Madison* type of judicial review, the judiciary should at least be able to apply and enforce the constitution against the state).

enforce due to protectionist discretion in local enforcement.<sup>36</sup> Judicial judgments are not bound by *stare decisis* because the traditional goal is to provide substantive justice in accordance with Party policy and not uniformity in application.<sup>37</sup> Second, the administrative law scheme, which runs parallel to the judicial system, is currently more attractive to right-holders because it has the power to both decide and administer punishment.<sup>38</sup> Nonetheless, the administrative bodies' broad discretionary power makes prosecution and enforcement uncertain, while high thresholds on the criminal elements of infringement and on evidentiary matters make court victories unlikely.<sup>39</sup>

Furthermore, because the most recent decrees and regulations supersede all previous laws in conflict,<sup>40</sup> Chinese law lacks comprehensive codes rooted in developed jurisprudence. Rather, conflicting decrees and regulations often exist across local-national lines.<sup>41</sup> In this incomplete state of reform, China's traditional basis of the judiciary as an arm of the Party posed the dilemma that even if a right-holder prevailed in court, enforcement was another hurdle virtually independent of the

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36. For a discussion of enforcement difficulties in general, see Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System*, 25 B.C. INT'L & COMP. L. REV. 90-92 (2002).

37. Only the agency that promulgated the legislation, and in certain instances the State Council or the National People's Congress (NPC), may interpret that legislation. LUBMAN, *supra* note 13, at 205. Competition and corruption between local and national levels make uniform enforcement even more elusive. *Id.*

38. The Administrative Punishment Law (APL) is one body that has attempted to achieve transparency by requiring hearings before certain punishments can be carried out. See LUBMAN, *supra* note 13, at 212; see generally PETER HOWARD CORNE, FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM (1999). For criticism on the use of the administrative law scheme, see FENG, *supra* note 23, at 16-17 (observing that the "dual track" system has arguably "undermine[d] judicial independence").

39. Article 127 of the criminal law had a maximum three years imprisonment, later extended to seven years in certain cases. Criminal Law of P.R.C., pt. I, ch. 1, art. 219, Fagui Huibian (amended Mar. 14, 1997), available at <http://www.qis.net/~chinalaw/prclaw10.htm>. Serious IPR infringement was criminalized by the 1997 revision of the PRC Criminal Code; however, the death penalties imposed in certain cases were more a function of Party control than an effort to increase intellectual property protection. See *Counterfeit Spirit Manufacturer Receives Death Penalty*, CHINA L. & PRAC., Apr. 29, 1993, at 20 (court imposed death sentence on distillery manager who severely disrupted socialist economic order with counterfeit version of Maotai spirits); Paul B. Birden, Jr., *Trademark Protection in China: Trends and Directions*, 18 LOY. L.A. INT'L & COMP. L. J. 431, 475-76 (1996).

40. Agency promulgations replace previous inconsistent decrees. FENG, *supra* note 23, at 13.

41. *Id.* at 12-13.

court's judgment.<sup>42</sup> In the absence of a consistent rule of law in the intellectual property context, all that really matters is whether intellectual property protection is part of the Party's agenda. Until IPR becomes part of the Party agenda, actual enforcement is lost amidst the sea of discretionary bodies at the provincial, local, and national levels, and across the administrative and judiciary sectors. Thus, China's Party-centralized but unstable legal framework was diametrically opposed to the concept of the lasting IPR<sup>43</sup> and current reform efforts continue to struggle against these traditional forces.<sup>44</sup> While China's membership in international treaties and its numerous internal intellectual property regulations give the appearance of a strong intellectual property state,<sup>45</sup> China's deficiency in enforcement is rooted in discretion.

### III. INTERNATIONAL PROTECTION OF THE OLYMPIC MARK

Before analyzing how the 2008 Olympics is positioned to create a viable intellectual property infrastructure in China, a brief

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42. Since the 1980s, China has developed an adversarial trial court system, but this has proved insufficient without real reforms at the institutional level. Lin, *supra* note 10, at 257.

43. FENG, *supra* note 23, at 4-16.

44. *Id.* at 6.

45. China is now party to the following major international intellectual property treaties and organizations: Convention Establishing the World Intellectual Property Organization, July 14, 1967, 828 U.N.T.S. 3 (acceded on June 3, 1980) [hereinafter WIPO Convention]; Berne Convention for the Protection of Literary and Artistic Works, as amended by Paris Additional Act and Declaration (1896), Berlin Convention (1908), Berne Additional Protocol (1914), Rome Convention (1928), Brussels Convention (1948), Stockholm Convention (1967), the Paris Convention (1971), Sept. 9, 1886, 828 U.N.T.S. 221 (acceded on Oct. 15, 1992) [hereinafter Berne Convention]; Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 828 U.N.T.S. 305 (acceded on Mar. 19, 1985) [hereinafter Paris Convention]; Madrid Agreement Concerning the International Registration of Marks, *opened for signature* Apr. 14, 1891, 828 U.N.T.S. 389 (acceded on Oct. 4, 1989), and Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, adopted June 28, 1989, 9 INDUS. PROP. LAWS & TREATIES, at Multilateral Treaties—Text 3-007 (World Intellectual Prop. Org. No. 609(E), July/Aug. 1989) (acceded in Sept. 1995) [hereinafter Madrid Protocol]; Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, 866 U.N.T.S. 178 (acceded on Apr. 30, 1993) [hereinafter Geneva Phonograms]; Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, June 15, 1957, 550 U.N.T.S. 45 (acceded on Aug. 9, 1994) [hereinafter Nice Agreement]; Universal Copyright Convention, Sept. 6, 1952, revised July 24, 1971, 6 U.S.T. 2731 (acceded on Oct. 15, 1992) [hereinafter UCC].

discussion of how the Olympics movement generally affects intellectual property protection is necessary.

Intellectual property protection is central to the multi-billion dollar Olympics enterprise. For example, the Sydney 2000 summer games single-handedly garnered over three billion dollars.<sup>46</sup> Much of this revenue was earned through licensing the IOC's exclusive marks: the Olympic symbol, motto, flag, emblems, anthem, flame, and torch.<sup>47</sup> The IOC Charter grants broad and exclusive rights to the IOC, including "all rights and data relating [to the Olympic Games] without limitation."<sup>48</sup> The revenue raised by the protected marks helps toward funding the Olympic Games and globally promotes the sports movement.<sup>49</sup>

Given the large revenue at stake, enforcement of the IOC's IPR is a primary concern.<sup>50</sup> As an international organization, the IOC's intellectual property standards are its own, separate and apart from the nation that happens to host the games in any given year. Under the Olympic Charter, "[t]he IOC may take all appropriate steps to obtain the legal protection . . . [both on] a

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46. This figure includes pre-Olympic promotional revenue and residual tourist revenue of the Sydney Organizing Committee and the IOC between 1997 and 2004. See SYDNEY MARKETING REVIEW, THE IMPACT OF THE OLYMPIC GAMES 95 (2001) [hereinafter SYDNEY MARKETING REVIEW].

47. The IOC is the main governing body over all Olympic activities. INT'L OLYMPIC COMM., OLYMPIC CHARTER 8, available at [http://multimedia.olympic.org/pdf/en\\_report\\_122.pdf](http://multimedia.olympic.org/pdf/en_report_122.pdf) (Sept. 1, 2004) [hereinafter OLYMPIC CHARTER]. The Olympic symbol consists of the five interlocking rings in blue, yellow, black, green, and red, representing the union of the five continents; the Olympic flag is a borderless white flag with the Olympic symbol in the center; the Olympic motto is "Citius. Altius. Fortius"; the Olympic emblems are any designs integrating the Olympic symbol with another "distinctive element"; and the Olympic anthem is the score approved in Tokyo in 1958. *Id.* at 15-16. See Laura Misener, *Safeguarding the Olympic Insignia: Protecting the Commercial Integrity of the Canadian Olympic Association*, 13 J. LEGAL ASPECTS SPORT 79 (2002) (discussing efforts made by Canadian Olympic Association to protect Olympic marks and indicia within Canada).

48. OLYMPIC CHARTER, *supra* note 47, at 15. The broad language of the Charter grants the IOC all rights to the Games' "organisation [*sic*], exploitation, broadcasting, recording, representation, reproduction, access and dissemination in any form and by any means or mechanism whatsoever, whether now existing or developed in the future." *Id.*

49. OLYMPIC CHARTER, *supra* note 47, at 11-12, 37.

50. "Use of the Olympic Symbol" is the first category listed in the Candidature file for important legal issues the candidate city must address, and three of the seven legal issues highlighted relate to intellectual property. See INT'L OLYMPICS COMM., MANUAL FOR CANDIDATE CITIES FOR THE GAMES OF THE XXIX OLYMPIAD, Theme 2(a), (e), (f) (2002), available at [http://multimedia.olympic.org/pdf/en\\_report\\_297.pdf](http://multimedia.olympic.org/pdf/en_report_297.pdf) (last visited Jul. 25, 2005) [hereinafter MANUAL].

national and international basis, [of the Olympic marks].”<sup>51</sup> The Olympic Games’ prestige and the fiercely competitive bidding process place the IOC in the position to dictate necessary IPR protections from the host country. In this sense, the IOC achieves a standard of international protection for its own trademark through the Host City Contract (“Contract”).

Olympic mark infringement can only be controlled, however, and not eliminated, even in countries with the most sophisticated IPR framework.<sup>52</sup> The Contract is the primary means of ensuring Olympic mark protection throughout the pre- and post- Olympic period.<sup>53</sup> The IOC selects a host city for each Olympiad, and a National Olympics Committee (NOC) is established in the host country. The IOC Contract governs three parties: the IOC, the host city, and the host city’s NOC.<sup>54</sup> The Contract takes precedence over any conflicting action that the city or its NOC may take.<sup>55</sup>

The Contract grants limited use of Olympic mark rights to the NOC and requires additional approval from the IOC Executive Board for further use.<sup>56</sup> Throughout the agreement, the IOC maintains strict control over its intellectual property, enlisting the NOC and the host state to vigorously protect the Olympic marks.<sup>57</sup>

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51. OLYMPIC CHARTER, *supra* note 47, at 17. The IOC attempted to gain legal protection on an international level for the Olympic symbol through the Nairobi Treaty on the International Protection of the Olympic Symbol (“Nairobi Treaty”). Nairobi Treaty on the Protection of the Olympic Symbol, *adopted* Sept. 26, 1981, 1863 U.N.T.S. 367 (currently forty-one signatories). Without international enforcement mechanisms and major power signatories, however, this treaty merely reaffirms international recognition of the Olympic symbol as a well-known mark.

52. Perfect intellectual property enforcement was never the goal in China, or anywhere else. Even in the United States’ strong intellectual property enforcement environment, infringement is a continual problem. *See* Paula L. Green, *Counterfeiters Go for the Gold at the Olympics*, J. COMMERCE, July 22, 1996, at 1A (describing U.S. efforts to protect Olympic marks in the 1996 Atlanta Games). Because intellectual property is a social and cultural concept rooted in policy, no international norms exist except by agreement. Necessarily territorial in scope, what may be protected intellectual property in one country may not be eligible for protection in another, either by shrinking the scope of protected intellectual property, or by varying the definition of what constitutes intellectual property. There is no *jus cogens* norm like in the area of human rights. *Cf.* PENDLETON, *supra* note 22, at 1-3.

53. The Host City Contract obligates the IOC, NOC, and the host city from the moment the host city is selected. MANUAL, *supra* note 50, at Theme 2.

54. *See* MANUAL, *supra* note 50, at Introduction, Theme 2.

55. *See id.* at Theme 2(b).

56. OLYMPIC CHARTER, *supra* note 47, at 18.

57. *Id.* at 18-19.

While the NOC can create its own unique Olympic emblems for the hosted event, the Olympic Charter bylaws dictate strict spatial layout for the emblem, as well as other conditions that must be satisfied. One such condition is the requirement of legal protection within the NOC and in other countries specified by the IOC.<sup>58</sup> All contracts for the use of the Olympic marks by any Organizing Committee for the Olympic Games (OCOG) must be finalized by December 31st of the year in which the games are held.<sup>59</sup>

China has taken a multifaceted approach under the guidance of the IOC. The Beijing Host City Contract (“Beijing Contract”) requires protection of two main categories of Olympic marks: the IOC’s marks and the Beijing Organizing Committee of the Olympic Games’ (BOCOG) marks.<sup>60</sup> The BOCOG marks and symbols include the Chinese Olympic mark logo, mascot, names,<sup>61</sup> symbols, anthems, and their slogan: “New Beijing Great Olympics.”<sup>62</sup> To satisfy China’s obligations under the Beijing Contract, a series of Olympics-specific intellectual property decrees and regulations were passed, including the Protection of Olympic Intellectual Property Provisions by the Beijing Municipality,<sup>63</sup> the Regulations on the Protection of Olympic Insignia,<sup>64</sup> and the Measures for the Recordal and Administration of Olympic Insignia.<sup>65</sup> The purpose of these additional regulations is more than mere emphasis; failure to fulfill the Beijing Contract with respect to intellectual property enforcement means Beijing could lose certain subsidies that are contingent on enforcement results.<sup>66</sup>

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58. *Id.* at 18.

59. *Id.* at 19.

60. *See id.* at 18.

61. *E.g.*, “Beijing 2008,” “Olympiad,” and “Olympics.” Regulations on the Protection of Olympic Symbols, Decree 345, *entered into force* Apr. 1, 2002, at <http://en.beijing-2008.org/91/39/article211613991.shtml> (last visited Jul. 25, 2005) [hereinafter Decree 345].

62. Liu Li, *Olympic Symbols Receive Protection*, CHINA DAILY, Apr. 1, 2003, [http://www.chinadaily.com.cn/en/doc/2003-04/01/content\\_160212.htm](http://www.chinadaily.com.cn/en/doc/2003-04/01/content_160212.htm) [hereinafter *Olympic Symbols Receive Protection*].

63. Protection of Olympic Intellectual Property Provisions by the Beijing Municipality, *entered into force* Nov. 1, 2001. Wang Jun, *Olympic Emblem Is Safe and Sealed*, 46 BEIJING REV. 28 (2003).

64. Decree 345, *supra* note 61.

65. *See* Jun, *supra* note 63.

66. *See e.g.*, INT’L OLYMPIC COMM., REPORT OF THE IOC EVALUATION COMMISSION FOR THE GAMES OF THE XXIX OLYMPIAD IN 2008, 62-64, 69, 71 (Apr. 3, 2001) [hereinafter IOC EVALUATION REPORT] (allocating 118 million USD for sustainable development in Beijing; 400 million USD for healthcare facility improvements;

The Olympic Games' massive scale leaves no host city unchanged.<sup>67</sup> Given the IOC's dependence on intellectual property revenue, the IOC took a leap of faith in designating China as host city for the 2008 Olympics.<sup>68</sup> Considering China's accession to the WTO later that year on December 11, 2001,<sup>69</sup> the IOC took China's word that Olympic mark protection would be guaranteed.<sup>70</sup> China's greatest potential for change in the wake of the Olympic Games is in its IPR enforcement infrastructure.

#### IV. REACTION AND PROACTION: CHINA'S DIFFERING RESPONSES TO FOREIGN POLITICS AND THE IOC

If China sought entry into the WTO to become a major world economic player, why did it fail to proactively create an intellectual property regime conducive to its goals? The answer lies in a Chinese tradition antithetical to the concept of intellectual property and China's deep distrust of foreigners. China lacks the institutional framework necessary to successfully implement a regime of IPR enforcement. A fundamental disconnect, fueled by external foreign pressures perceived as exploitative by the Chinese, hindered China's path to creating an effective intellectual property regime.

Foreign pressure, particularly by the United States, wanted too much too soon. Failing to account for China's socialist underpinnings and the lack of intellectual property infrastructure, foreign pressure only increased China's distrust. Professor Peter Yu attributes the United States' failure to convert China into an intellectual property regime to four factors:

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50 million USD for a contingency fund, and also billions of dollars in non-BOCOG investments into the transportation infrastructure and environmental clean-up).

67. Sydney 2000, the largest summer games undertaking thus far, transformed Australia's world image and tourism industry. See SYDNEY MARKETING REVIEW, *supra* note 46, at 95.

68. The IOC has taken precautions against such a blind leap, strengthening international protection for the Beijing logo more than for any previous Olympic Games. See Michel Jen-Siu, *Long-Awaited Olympic Logo to be Revealed*, S. CHINA MORNING POST, Aug. 1, 2003, at 6. See also Tom O'Byrne, *China's Campaign Against Brand Piracy*, WORLD TODAY ARCHIVE, <http://www.abc.net.au/worldtoday/stories/s650903.htm> (last visited Jul. 25, 2005). Some have analogized China's intellectual property situation to that of South Korea's transformation during its Olympic bid for the 1988 Olympic Games, but this view is not widely held. See Steve Freiss, *The Trouble with Olympic Trinkets*, USA TODAY, Dec. 12, 2001, at 6B.

69. See Accession of the People's Republic of China, *supra* note 2, at 1, 11.

70. See IOC EVALUATION REPORT, *supra* note 66, at 64.

- (1) The United States' failure to consider the relevance of its imposed regime,
- (2) The United States' inability to convince China of the domestic benefits of IPR,
- (3) The United States' failure to reach out to domestic IPR owners, and
- (4) The United States' failure to provide training and education on intellectual property basics.<sup>71</sup>

These factors set up a framework for analyzing this reactive and proactive dichotomy. In contrast to the failures of foreign efforts, the IOC's involvement in China's preparation for the Olympics satisfies each of these factors, further supporting the prospect that China will develop foundational intellectual property structures through Olympics-motivated changes.

Now that the United States is again stirring threatening rhetoric against China, these factors reveal that such an approach promises to be as fruitless as it has been in the past. During China-U.S. bilateral negotiations in 1979, 1992, 1995, 1996, and 1999, China reacted to U.S. demands just enough and just in time to ward off trade sanctions.<sup>72</sup>

The Olympics, in contrast, is spurring China to become internally proactive in the post-Olympic bid years toward Olympic mark protection. Conspicuously absent in pre-Olympic bid China was state motivation to enforce IPR. When China sought to host the Olympics, it understood the primary importance of the IOC's intellectual property enforcement expectations.<sup>73</sup> Pressure to meet

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71. Yu, *supra* note 11, at 6-7.

72. Agreement on Trade Relations Between the United States of America and the People's Republic of China, July 7, 1979, U.S.-P.R.C., 1202 U.N.T.S. 179 [hereinafter 1979 Agreement]; Memorandum of Understanding Between China and the United States on the Protection of Intellectual Property, Jan. 17, 1992, P.R.C.-U.S., 34 I.L.M. 677 [hereinafter 1992 MOU]; Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, P.R.C.-U.S., 34 I.L.M. 881 [hereinafter 1995 Agreement]. Kim Newby, *The Effectiveness of Special 301 in Creating Long Term Copyright Protection for U.S. Companies Overseas*, 21 SYRACUSE J. INT'L L. & COM. 29, 42-44 (1995).

73. See INT'L OLYMPICS COMM., QUESTIONNAIRE FOR CITIES APPLYING TO BECOME CANDIDATE CITIES TO HOST THE GAMES OF THE XXIX OLYMPIAD IN 2008 (Feb. 24, 2000), at [http://multimedia.olympic.org/pdf/en\\_report\\_288.pdf](http://multimedia.olympic.org/pdf/en_report_288.pdf) [hereinafter QUESTIONNAIRE].

the IOC's enforcement standards is non-politics based<sup>74</sup> and the IOC's exacting standards are supervised at each step to guide the host city in satisfying the enforcement requirements.<sup>75</sup>

#### A. Four Factor Analysis

The first factor--the relevance of a foreign imposed regime--encompasses two aspects. The Party simply did not see the need to protect foreign intellectual property because (1) of its distrust of foreigners, and (2) it needed to acquire foreign technological know-how.<sup>76</sup> By ignoring China's lack of domestic intellectual property enforcement regime, the United States failed in its attempt to have China enforce foreign intellectual property rights. China was not convinced of the reasons behind IPR enforcement. Instead of educating China on how intellectual property could benefit domestic IPR holders, the United States blindly expected that the wholesale importation of international intellectual property treaties would bring effective enforcement for foreign IP holders.

U.S.-China bilateral negotiations in the latter half of the 20th century repeatedly illustrate the United States' failure to convince China of the relevance of the U.S. imposed regime. China wanted to accede to the WTO, and each round of negotiations showed China's resolve to remove U.S.-set barriers to the path of accession.<sup>77</sup> The United States' arsenal in its China policy consisted

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74. The Olympic Charter explicitly disassociates its mission at all levels from global politics. National Olympic Committees "must preserve their autonomy and resist all pressures of any kind, including those of a political, religious or economic pressures which may prevent them from complying with the Olympic Charter." OLYMPIC CHARTER, *supra* note 47, at 40. Moreover, "[g]overnments or other public authorities shall not designate any members of an NOC." *Id.* at 42.

75. *See id.* at 63.

76. China's main interest was to shed foreign advantage, and tried to leverage legal reforms against the western powers. WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 13, 29 (1995).

77. China made its first modern trade concessions in economic policy during its bilateral negotiations with the United States beginning in 1979. *See* 1979 Agreement, *supra* note 72. At the forefront of WTO negotiations were lowering tariffs and eliminating non-tariff barriers. The 1979 Agreement, negotiated against the backdrop of the 1947 General Agreement on Tariffs and Trade, focused on "products," and ignored intellectual property. *See* Gary Clyde Hufbauer & Daniel H. Rosen, *American Access to China's Market: The Congressional Vote on PNTR*, INT'L ECON. POLICY BRIEFS, No. 00-3, Apr. 2000, available at <http://207.238.152.36/policybriefs/news00-3.htm>.

of threats of imposing Smoot-Hawley tariffs on Chinese imports,<sup>78</sup> Special Section 301 Proceedings,<sup>79</sup> and measures aimed at forcing China to lower its walls while at the same time raising the United States' own walls of protectionism. The Agreement on Trade Relations between the United States of America and the People's Republic of China in 1979 ("1979 Agreement") required reciprocal treatment of intellectual property rights between the two states. After a series of eleventh hour agreements,<sup>80</sup> most notably the 1995 Agreement, which required the most pre-accession internal legislative change, China achieved international standards for intellectual property legislative protection.<sup>81</sup> U.S. opposition to China's entry into the WTO reached a turning point with this 1995 Agreement. With the numerous IPR concessions required under the agreement, China had satisfied U.S. demands, at least for the time being.<sup>82</sup>

China's reactive stance to foreign threats held especially true in the area of intellectual property since, relative to the more pressing issue of market-entry barriers, intellectual property was not at the forefront of China's pre-accession agenda. For example, in the 1992 bilateral Memorandum of Understanding ("1992 MOU"), China's cautiously reacted to U.S. demands following the United States' act of naming China as a Priority Foreign Country under Special Section 301.<sup>83</sup> Under Article 3(3) of the 1992 MOU, China accepted the supremacy of these international treaties over its domestic laws, bringing them within the application of the People's Republic of China (PRC) Civil Code, article 142.<sup>84</sup> China,

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78. These tariffs, implemented during the Depression, can be as high as 50% ad valorem. *Id.*

79. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-148, § 1302(a), 102 Stat. 1176 (1988) (codified as amended at 19 U.S.C. §§ 2411-2420 (1994)). *See generally* Newby, *supra* note 72 (describing Section 301 Proceedings). Both the 1992 MOU and the 1995 MOU were in response to the United States' act of placing China on the Special 301 priority lists. *See* Patrick H. Hu, "Mickey Mouse" in China: Legal and Cultural Implications in Protecting U.S. Copyrights, 14 B.U. INT'L L. J. 81, 82 (1996).

80. *See* agreements listed, *supra* note 72.

81. For an account of U.S.-China bilateral negotiations leading up to China's accession, *see* Yu, *supra* note 11.

82. *See* Hu, *supra* note 79; *see also* Brauchli & Kahn, *supra* note 9 (quoting Li Changxu, head of the China United Intellectual property Investigation Center: "This is the way America does business. It puts on lots of pressure, acts very strong. . . [b]ut just before the deadline, they'll [*sic*] be concessions and a compromise").

83. *See* 1992 MOU, *supra* note 72.

84. *Id.*; General Principles of the Civil Code of P.R.C., art. 142, Apr. 21, 1986.

however, was not about to embrace an IPR regime that required it to revamp the foundational principles of its existing system. To counter this concession, China placed as many interim steps as possible between foreign intellectual property right holders and state protection.<sup>85</sup>

Furthermore, the imported international treaties had been created by developed countries and thus lacked relevance to China's foreign policy agenda. As a state-centralized and state-controlled economy, China historically guarded itself from foreign investment.<sup>86</sup> Until recently, the central state controlled nearly all economic modalities, from property to most industries.<sup>87</sup> Against this backdrop of state control and China's long-standing distrust of all things Western, it is unsurprising that China balked at foreign pressure to protect foreign intellectual property rights.<sup>88</sup> Given the Party's control over its citizens, any argument for affording individual rights to foreigners against the central state would be unavailing. International disapproval and the United States' economic threats, sanctions, and opposition to China's entry into the WTO could not have succeeded in convincing the Party of the importance of intellectual property protection for foreign investors.<sup>89</sup> These constant threats exacerbated China's distrust and perpetuated China's unwillingness to give in to U.S. demands.<sup>90</sup>

From the United States' perspective, the WTO's intellectual property agreement—TRIPS—which required China to expand and translate the treaties it had already acceded to under previous bilateral agreements with the United States into domestic law, was supposed to safeguard IP rights. Under TRIPS, the United States could resort to the WTO dispute settlement procedures, effectively legitimizing its previously unilateral economic sanctions under the WTO's reciprocity provisions. While China did overhaul its

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85. One example is requiring Chinese language filing by a Chinese agent. FENG, *supra* note 23.

86. China's perspective is common among developing nations and emerging markets. See ALFORD, *supra* note 76.

87. China was neither a common law nor a civil code country to the extent seen in European nations like France or Germany. The People's Republic of China did not establish a civil law framework until 1986. FENG, *supra* note 23, at 5.

88. See ALFORD, *supra* note 76, at 117-18; see also LUBMAN, *supra* note 13, at 313.

89. Yu, *supra* note 11, at 131.

90. *Id.* See Robert S. Greenberger et al., *China Warns Washington of Reprisals*, WALL ST. J., May 13, 1996, at A2.

domestic Trademark Law and Patent Law to comply with the TRIPS Agreement,<sup>91</sup> the United States continued to voice its intent to resort to WTO-sanctioned retaliation.

Furthermore, in the pre-accession period, the WTO members primarily focused on trade issues and bootstrapped intellectual property into negotiations as they placed external, politically-based pressure on China. Because the WTO encompasses a comprehensive range of trade issues, WTO members' emphasis on various other WTO obligations allowed China the opportunity to re-prioritize intellectual property enforcement off the to-do list.<sup>92</sup> The result is a grudgingly compliant state that did not understand the relevance of intellectual property protection to its agenda.<sup>93</sup> As the accession cloud cleared, China's deficiency in IPR enforcement became globally transparent.

Professor Yu's second and third factors—the United States' inability to convince China of the domestic benefits of protecting intellectual property rights, and failure to reach out to domestic intellectual property right owners—both point to a common failure. The domestic intellectual property industry is the foreign

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91. Both the Trademark Law and the Patent Law were revised in 2001. The 2001 Trademark Law went into effect on December 1, 2001, and the 2001 Patent Law revisions went into effect on July 1, 2001. FENG, *supra* note 23, at 299. Compare Trademark Law 1982, *supra* note 30, with ZHONGHUA RENMIN GONGHEGUO SHANGBIAOFA [Trademark Law of P.R.C.], Fagui Huiban, *translated in* 2 CHINA L. FOREIGN BUS. 11 (1993) and Trademark Law 2001, available at [http://www.trademarkpatent.com.cn/EN/default/laws/laws\\_list\\_trade.asp?epic\\_mode=ee](http://www.trademarkpatent.com.cn/EN/default/laws/laws_list_trade.asp?epic_mode=ee) (Dec. 1, 2001). For example, pursuant to the revised provisions of the Trademark Law of 2001, non-merchant individuals were allowed to register marks as private property and three-dimensional designs and color combinations were also accepted for the first time as marks. *Implementing Regulations for the Trademark Law of the People's Republic of China*, 5 CHINA L. UPDATE 10 (Sept. 2002) (outlining changes in the 2001 Trademark Law). A Working Conference on Intellectual Property Rights was established to study progress in IPR enforcement. See KHOON & BORG-MARKS, *supra* note 22, at 61.

92. One primary post-accession objective on the U.S. agenda, for example, is getting China to float its currency at market rates to the U.S. dollar instead of pegging it to the dollar at a fixed rate of exchange. See U.S. Dep't of State, *China Not Fulfilling All WTO Commitments, USTR Says*, Sept. 24, 2003, at <http://usinfo.state.gov/xarchives/> (transcript of statement by Deputy Assistant U.S. Trade Representative Charles W. Freeman III to the Congressional – Executive Comm. on China) [hereinafter Freeman statement].

93. Two years after China acceded to the WTO and more than fifteen years after China's bilateral negotiations with the United States began, domestic enforcement has not kept pace with China's promises in the multitude of signed decrees and regulations purporting to increase penalties for infringement. State Council's Development Research Center estimated the counterfeit problem at 160 billion to 200 billion RMB (19 billion to 24 billion USD) in 2001. See *id.* at 93.

right-holder's biggest ally, and the United States failed to emphasize China's two domestic beneficiaries: the Party, and the domestic individual right-holder. Foreign interest in China's intellectual property regime lay only in protecting foreign intellectual property investments, adding to China's distrust of foreign motives. Just as the United States failed to show the Party the potential benefit of intellectual property enforcement to China's interests, it also failed to reach out to the domestic holders of intellectual property.

Since China was not convinced of the benefit of institutionalizing IPR protection, China did not embrace treaty requirements and instead made empty promises. China limited the effects of its negotiated concessions to open its markets by strictly regulating foreign investment.<sup>94</sup> Some regulations were as draconian as the transfer of ownership to similar domestic enterprises after a certain time period.<sup>95</sup> The dwarfed social understanding of IPR paralleled the historical political distrust and rejection of foreign legal systems.<sup>96</sup> In either case, protecting intellectual property rights was an abstract concept that ran counter to China's goals.

The fourth factor—failure to provide training and education on intellectual property basics—has become one of the most prominent criticisms of the United States' past approaches. In the United States' defense, it would have been hard-pressed to gain the access necessary to implement such training. Even if foreign training and education had been demanded in trade negotiations, as it was to an extent in the 1995 Agreement, distrust of foreigners would have hampered the potential success of such programs. For example, private foreign investors could have, but did not attempt, a massive educational campaign. By virtue of being foreigners, this would have placed their business images at risk. Instead, foreign investors and businesses attempted to work around the existing

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94. Until recently, China's investment laws kept most industries under state control. Recent law has begun to allow wholly foreign-owned subsidiaries in China. *Nationwide Checks Set on Intellectual Property Rights*, CHINA DAILY, Apr. 27, 2002, at [http://china.9c9c.com/politics\\_and\\_religions/](http://china.9c9c.com/politics_and_religions/).

95. This was done as part of a movement to "catch up" to the West. See Freeman statement, *supra* note 92.

96. LUBMAN, *supra* note 13, at 2.

system rather than fight it, oftentimes writing it off as part of the cost of doing business in China.<sup>97</sup>

*B. The IOC Made Intellectual Property Protection Relevant to China, and Helped Jumpstart China's Infant Intellectual Property Industry*

In contrast to cornering China into a reactive position, the Olympics gives China the unique opportunity to prove itself on the world's cultural stage. In stark contrast to the pre-accession negotiations which did not conclude with specific and relevant intellectual property demands,<sup>98</sup> the IOC and the IOC Charter provide precise and specific protections while remaining flexible in application, since they must adapt to each host city's legal system.<sup>99</sup>

Preparation for Olympics 2008 has revealed fundamental change in Party attitude toward intellectual property enforcement from reactive to proactive. China sought to host the Olympics and understood the IOC's IPR protection expectations. Winning the 2008 Olympics bid has not only given China a chance to demonstrate its cultural prowess, but it has also made intellectual property enforcement relevant to the Party agenda. As the host country, China must be proactive toward Olympic mark protection

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97. A senior official of Sony Music's Shanghai subsidiary recognized that "people just don't have such awareness and responsibility" to pay royalties for use in karaoke clubs. Shanghai Daily, *Karaoke Bars Skip Royalties*, Jan. 8, 2004, available at 2004 WL 56676280.

98. In the past, the United States has rarely gone beyond vague demands in the area of intellectual property protection. See Jacques de Lisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179, 255 (1999). And to the extent that intellectual property demands were specific, they might have been inconsistent within the context of other demands and activities. See Steven Mufson, *Americans Battle, Bargain with Chinese; While Officials Threaten Trade Sanctions, Businessmen Seek Deals*, WASH. POST, Feb. 24, 1995, A17; see also Michael N. Schlesinger, *A Sleeping Giant Awakens: The Development of Intellectual Property Law in China*, 9 J. CHINESE L. 93, 94 (1995) (discussing how U.S. demands for improvements in copyright piracy prosecution and intellectual property damage awards minimized the significance of China's substantive compliance with TRIPS and strengthening judicial enforcement of intellectual property rights).

99. The United States has only recently begun to bring specific IP concerns to the table, including strategies and aid for improving China's intellectual property enforcement infrastructure. See, e.g., U.S. Dep't of State, *Important for U.S. that China Play by Rules of Trade, Official Says* (Sept. 25, 2003) (overview and transcript of testimony by Deputy Assistant Secretary of Commerce for Asia Pacific Policy Henry Levine to the Congressional-Executive Commission on China), at <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2003&m=September&x=20030925145556kains0.4719355&t=xarchives/xarchitem.html>. [hereinafter Levine's Testimony].

because its international reputation is at stake for its zealous promises made as an Olympics host candidate. China is both aware of the importance of Olympic mark protection to the IOC and wants to maximize its return on the 2008 Olympics investment.

After a near miss for the coveted spot of 2000 Olympics host,<sup>100</sup> Beijing was awarded the 2008 Host City Contract on July 13, 2001.<sup>101</sup> In making this prospect a reality, China pulled out all the stops when the Olympics team came to inspect Beijing, investing over \$20 million for the Olympic bid alone.<sup>102</sup> The Olympics Committee report on Beijing's readiness to host in 2008 appeared optimistic. A closer look reveals that the government shut down polluting factories, closed streets, and even spray-painted the grass green on the main streets.<sup>103</sup>

China's budget for the 2008 Olympics—\$23 billion—is more than seven times the budget of Sydney 2000.<sup>104</sup> This expenditure illustrates the massive undertaking of reconstructing China's infrastructure. While China is already at the forefront of the global electronics trade, by 2008 Beijing will become a high-technology society.<sup>105</sup>

Olympic marks will saturate China's licensing market over the next five years because of the excitement that surrounds the Olympic Games.<sup>106</sup> The Olympic licensing program is set to officially begin in 2004, and already forty-five Olympics-related trademarks have been registered.<sup>107</sup> Awareness of the licensing system is increasing as smaller local firms gear up to participate in the Olympic licensing market.<sup>108</sup> Exclusive Olympics broadcasting

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100. China lost to Sydney by two votes to host the 2000 Olympics. Charles L. Thornton, *International Politics & the Modern Olympic Movement: China 2000: Case Study*, at <http://www.dctkd.org/library/papers/olympics/site.cfm> (last updated July 6, 2004).

101. *Id.*

102. *Id.*

103. *Id.*

104. The Olympic organizing budget alone is \$1.6 billion. Evelyn Iritani, *Rings Around Beijing: China's \$23-Billion Plan for 2008 Games is the Olympic Gold for U.S. Companies*, L.A. TIMES, Feb. 21, 2002, at A1.

105. For example, plans are under way by the State Administration of Radio, Film and Television to outfit thirty-three major Chinese cities with digital television by 2005 in preparation for Olympics 2008. Xin Dinding, *Major Cities to Shut Off Analogue Television*, CHINA DAILY, Oct. 27, 2003, available at 2003 WL 57560467.

106. See Global News Wire, *Licensing Program to Kick Off Early Next Year*, BUS. DAILY UPDATE, Oct. 24, 2003, at § 24 [hereinafter *Licensing Program to Kick Off Early Next Year*].

107. *Id.*

108. *See id.*

will further expand the infrastructure for future licensing potential.<sup>109</sup>

The Olympics will bring to China an influx of the best technical capabilities, project management expertise, and environmental technology. China's preference for joint-ventures will ensure that the technology is transferred to outfit Chinese capability once the Olympics end.<sup>110</sup> By 2008, China will be fundamentally different from China in 2003.<sup>111</sup>

In the United States, where IPR protection is deemed one of the most extensive in the world, undertaking Olympics enforcement is still a difficult and expensive task.<sup>112</sup> Ironically, despite the criticism of China's discretionary enforcement, administrative discretionary enforcement works to the IOC's advantage. The 2008 Olympic emblem was launched on August 3, 2003.<sup>113</sup> By August 12, fines on unauthorized emblem use on 134 seized clothing items were already collected.<sup>114</sup> In April 2003, four months before Beijing's emblem launch, more than 130,000 unauthorized IOC Olympic symbols had already been confiscated.<sup>115</sup> China promises to "bring [IP] violators to justice."<sup>116</sup> This strong rhetoric goes against China's traditional view of nonexistent IPR, and more recently as something only for domestic IP holders. IP piracy has not been traditionally viewed as a crime punishable with prison time.<sup>117</sup>

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109. See *Agreements Signed for JV Company to Broadcast 2008*, Beijing 2008, at <http://en.beijing-2008.org/66/93/article211619366.shtml> (May 27, 2004). The Beijing Olympic Broadcasting Co., Ltd. was established as a subsidiary of the IOC. People's Daily Online, *Broadcasting Program of Beijing Olympics Kicked Off*, Oct. 28, 2004, at [http://english.people.com.cn/200410/28/eng20041028\\_161973.html](http://english.people.com.cn/200410/28/eng20041028_161973.html).

110. Iritani, *supra* note 104.

111. See Ken Hoover, *Led by a Hot China, Asian Funds Soar*, INVESTOR'S BUS. DAILY, Aug. 22, 2003, at A06.

112. Green, *supra* note 52 (The United States undertook a \$1 million campaign for Olympics enforcement during the Atlanta Games, the most comprehensive campaign in Olympic history).

113. See Liu Li, *Emblem Vital to Games Marketing*, CHINA DAILY, Aug. 4, 2003, available at 2003 WL 57559083.

114. People's Daily, *China Works to Protect Official Emblem of 2008 Olympics*, available at <http://english.peopledaily.com.cn> (last updated Aug. 14, 2003) [hereinafter *China Works to Protect Official Emblem*].

115. *Olympic Symbols Receive Protection*, *supra* note 62.

116. Jen-Siu, *supra* note 68.

117. See Glenn R. Butters, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081, 1108 (1996); see also Jen-Siu, *supra* note 68.

The Olympic Games, however, sends an honorable message and promotes a noble goal, something that everyone can respect, as well as distinguish the goals of IPR enforcement from the visions of greedy corporations normally associated with foreign IPR. In the remaining years leading up to 2008, China will see, and is indeed already seeing, a major crackdown on Olympic trademark infringement.

The non-political nature of the IOC's IPR protection standards is non-threatening to China, thus making the benefits even more apparent. The IOC, as an organization, is as non-partisan as Switzerland is in world politics.<sup>118</sup> Even the subject of human rights, a sensitive topic that led many WTO members to oppose China's accession, is expressly rejected by the IOC in its selection of a host city as being too politically charged.<sup>119</sup> China does not apply its suspicion normally reserved for Western politics toward the Olympics' benign objectives. Furthermore, China's successful participation in past Olympiads involves the Chinese masses in the process. China believes, as does the IOC, that hosting the Olympics is a game in which everybody wins.<sup>120</sup>

To domestic businesses and individuals, the Olympic marks bring concrete benefits. The Olympics present authorized domestic businesses with promotion and profit opportunities on an incredible scale, both domestically and internationally.<sup>121</sup> Souvenirs, shirts, and hats authorized by the BOCOG to celebrate the emblem launching sold out within a day.<sup>122</sup>

An example of the domestic businesses' increasing awareness and desire to reap benefits from intellectual property lies in the

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118. In fact, the IOC is domiciled there. OLYMPIC CHARTER, *supra* note 47.

119. See *IOC Inspectors Reiterate Their Position of "Sport, No Politics,"* Official Website of the BOCOG, at <http://210.75.208.159/eolympic/ztq/ioc/c/02243.htm> (on file with Loyola of Los Angeles International & Comparative Law Review).

120. In contrast, while the ideological basis of the WTO is the long-term "everybody wins" mantra in a world of economic free trade, short-term problems make the WTO game appear very much comprised of winners and losers. See, e.g., TRADE COMPLIANCE CTR., U.S. DEP'T OF COMM., CHINA TRADE 1995-2002 (2003) (noting that the trade deficit has been one area of worry ever since the United States became China's largest export market in 1999, with the post-accession deficit increasing dramatically to over \$43 billion in 2002, up \$15 billion from 2001 figures). Global politics, particularly current U.S. rhetoric and policy toward China, is reminiscent of the threats previously employed against China in pre-WTO times.

121. Zhang Lu, *Beijingers Go Mad over Souvenirs*, CHINA DAILY, Aug. 5, 2003, available at 2003 WL 57559132.

122. See *id.*

exploitation of the BOCOG's failure to register the emblem as a design patent. The BOCOG registered the 2008 Olympic logo under the relevant trademark and copyright laws, but did not register the marks and emblems as design patents.<sup>123</sup> This apparently placed the BOCOG in the awkward position of having to pay royalties to individuals who had registered the emblems as design patents.<sup>124</sup> BOCOG officials, however, maintained that the BOCOG obtained prior rights to the emblem through trademark registration, and thus the individual registration was void.<sup>125</sup> This highly publicized situation shows a new, albeit incomplete, understanding of the registration requirement, which was not in place until recently.<sup>126</sup> Despite the pitfalls inherent in the learning process, domestic businesses, along with the Chinese government, understand the potential of having an enforceable intellectual property right.

While the investment influx over the past few decades has made large-scale businessmen and sophisticated international traders aware of the need for effective intellectual property protection, the majority of the Chinese population remains unaware of such a concept.<sup>127</sup> The stream of commerce, however, is not confined to major trading cities, and neither are Olympic mark counterfeiters.<sup>128</sup> With China's reputation at stake, having made lofty promises to the IOC, China has been making its crackdown effort highly public to show its commitment to the world. Such publicity has also produced the side effect of disseminating intellectual property rights understanding to its own citizens.

Finally, the controversial training and education factor is not so controversial where the Olympics are concerned. The IOC's

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123. See Legal Statement of the BOGOC & Post Office of the Beijing 2008 Olympic Games Bid Committee, Legal Statement, at <http://210.75.208.159/eolympic/ztq/legal-statement/statement.html> (Aug. 20, 2001) [hereinafter Legal Statement].

124. Rouse & Co. Int'l, *Requirement for the BOCOG to Pay Royalties for the Olympic 2008 Emblems, Which had been Filed by Other Patent Owners*, CHINA IP EXPRESS, No. 191, Dec. 3, 2003, available at <http://www.iprights.com/publications/chinaipexpress/ciex191.asp> [hereinafter *BOCOG to Pay Royalties*].

125. *Id.*

126. Michael D. Pendleton, *Chinese Intellectual Property—Some Global Implications for Legal Culture and National Sovereignty*, 15 EUR. INTELL. PROP. REV. 119 (1993) (only computer software requires copyright registration, which then only indicated proof of invention, not continual copyright protection).

127. Most Chinese citizens still speak only their native tongue, while most of those who can speak English are concentrated in the major trading cities.

128. See Freiss, *supra* note 68.

exacting standards are supervised at each step to ensure that the host city satisfies enforcement requirements. As required by the Olympic Charter, the IOC must approve all uses of the Olympic marks and the BOCOG emblems, including both commercial and noncommercial uses. This keeps all Olympic intellectual property uses within the IOC's close rein. As required by the Olympic Charter, the Host City Contract grants the IOC's licensees exclusive, but limited, use of the Olympic marks within the licensee's industry. The IOC's licensing contracts are linked to Beijing's Olympic funding and subsidy levels.<sup>129</sup> Thus, if unauthorized use infringes on a company holding an Olympic license, Beijing would feel the pinch.<sup>130</sup>

The BOCOG has set up a legal affairs department, "the first ever in the history of Chinese sports,"<sup>131</sup> to provide legal expertise for the industry, commerce, and customs authorities.<sup>132</sup> Under the guidance of the BOCOG's legal affairs committee, various administrative departments will jointly combat Olympic intellectual property infringement, including city check-ups by the joint efforts of the SIPO, the Industrial and Commercial Administration Bureau, the Copyright Bureau, and the Public Security Bureau.<sup>133</sup> For example, the legal affairs department advised SIPO to launch a mass propaganda campaign aimed at the public.<sup>134</sup> Bulletins and posters educating the public on intellectual property rights are displayed in the streets.<sup>135</sup>

Infringement under IOC's broad and exclusive rights includes potatoes laid out in the Olympic five-ring formation at a produce stand, because such a display is used to generate business.<sup>136</sup> Businesses that congratulate Beijing on the successful Olympics

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129. Cf. *Beijing Guards Olympic Logo*, Nov. 1, 2001, at China Internet Info. Ctr., <http://www.china.org.cn/english/2001/Nov/21434.htm>.

130. See *Beijing Moves to Assure Rights of IOC Patrons*, China Internet Info. Ctr., at <http://www.china.org.cn/english/2002/Jan/25220.htm> (Jan. 14, 2002).

131. *Id.*

132. *China Works to Protect Official Emblem*, *supra* note 114.

133. The Beijing Municipal Bureau of Intellectual Property has been designated to plan and coordinate the protection campaign. Associated Press, *Beijing Launches Decree to Fight Ambush Marketing*, PEOPLE'S DAILY ONLINE, Nov. 1, 2001, at [http://english.people.com.cn/english/200111/01/eng20011101\\_83679.html](http://english.people.com.cn/english/200111/01/eng20011101_83679.html). See also *Beijing Moves to Assure Rights of IOC Patrons*, *supra* note 130.

134. *China Pledges Increased Protection for Intellectual Property*, BEIJING TIMES, Apr. 27, 2002, available at [http://english.people.com.cn/200204/27/eng20020427\\_94854.shtml](http://english.people.com.cn/200204/27/eng20020427_94854.shtml)

135. *Id.*

136. See Freiss, *supra* note 68.

bid also constitute infringement.<sup>137</sup> The legal affairs department also has a hand in municipal regulations targeting Olympics patent protection that effectively patched holes in current patent rulings.<sup>138</sup>

Thus far, actual enforcement of Olympic IPR has been given high marks. The BOCOG conducts random “check-ups,” displays educational posters in the streets,<sup>139</sup> and has set up an infringement reporting site.<sup>140</sup> Through this website, the BOCOG joined a national grassroots effort in curbing Olympic mark infringement. Anyone logging on to the World Wide Web can access the Beijing Olympics website and fill out an online form to report the infringement electronically.<sup>141</sup> The SIPO remains the primary enforcement institution, making a patriotic appeal in expounding its mandate to its citizens not to infringe on Olympic marks and to prove themselves to the world. The IOC emphasized the need for Beijing to get the message out to “ordinary Chinese people who care about China’s first Olympics.”<sup>142</sup> Chinese citizens, raised on socialist principles, can embrace the Olympic movement goal of bringing athletic opportunities to all. This affinity for the Olympic movement, free from politics, sheds new light on what intellectual property can bring to a society. Chinese citizens were mobilized to understand what benefits can come from intellectual property protection.

#### V. STRENGTHENING DOMESTIC INTELLECTUAL PROPERTY INDUSTRY

A growing domestic IP industry is significant, not only from a general legal reform perspective, but also from the perspective of

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137. See Legal Statement, *supra* note 123; see also *Beijing Guards Olympic Logo*, *supra* note 129 (“declaring support or congratulations to Beijing in the media” also constitutes “unauthorized usages” of the Olympic marks). Under the Olympic Charter and the IOC’s host city requirements, competitors of IOC’s patrons—the official sponsors—cannot have any connection to Olympic-related intellectual property. *Id.*

138. Wang Yefei, vice-director of the Beijing Intellectual Property Office, expressed that new Olympic related regulations have “made up for...uncovered fields” in patent rights on public welfare ads and performances. See *More Efforts Taken to Keep Promise*, CHINA DAILY, Jan. 14, 2002, [http://www.chinadaily.com.cn/en/doc/2002-01/14/content\\_101812.htm](http://www.chinadaily.com.cn/en/doc/2002-01/14/content_101812.htm).

139. See *Nationwide Checks Set on Intellectual Property Rights*, *supra* note 94.

140. Infringement Reporting, Official Website of BOCOG, at <http://en.beijing-2008.org/93/39/article211613993.shtml> (n.d.).

141. *Id.*

142. *Nationwide Checks Set on Intellectual Property Rights*, *supra* note 94.

intellectual property rights. Strengthening the domestic IP industry is necessary for any changes brought about by Olympic fervor to become permanent.

Beginning with the trend of privatizing state-owned enterprises,<sup>143</sup> the ground became fertile for the growth of a domestic IP industry. The first university program in intellectual property education, implemented at Beijing University in 1993, spread to China's other major universities.<sup>144</sup> Intellectual property consumer associations and educational programs have formed. Cities have begun their own programs to encourage innovation.<sup>145</sup>

These initiatives, however, remain in their infancy. SIPO reported that of the eleven major universities, less than five percent of students choose to take intellectual property courses.<sup>146</sup> Furthermore, specialized intellectual property courts suffer from a lack of expertise and court competence. Competent authorities and legal experts on intellectual property law are not formally included in court proceedings, and thus are unable to render assistance.<sup>147</sup> Despite the visibility of these changes, foreign investors attempting to utilize these channels for redress have not had much success.

#### *A. Olympics and Legal Reform Toward the Rule of Law: Success in Addressing Infringement*

The Olympics infringement cases settle the controversy over China's capability to control infringement. China has been successful in utilizing the dual channels of the judiciary and the

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143. An "open-door" policy began in 1978 under Deng Xiaoping, former Secretary General of the Communist Party of the People's Republic of China, ending China's isolation. See *The Titan Stirs*, *ECONOMIST*, Nov. 28, 1992, available at 1992 WL 11282205.

144. Xie Liangjun, *New School Starts on Rights Track*, *CHINA DAILY*, Dec. 16, 1993, available at 1993 WL 10866676.

145. E.g., Rouse & Co. Int'l, *Shanghai Awarded 54 Patents*, *CHINA PATENT EXPRESS*, No. 42, Nov. 14, 2003, at [http://www.iprights.com/publications/chinapatentexpress/cpex\\_42.asp#1](http://www.iprights.com/publications/chinapatentexpress/cpex_42.asp#1) (Shanghai City Invention Patent Awards and Wuhan-China Optical Valley Intellectual Property Protection Forum); Rouse & Co. Int'l, *China Ministry of Information Industry Experts Warn: Digital Cameras May Encounter the Same Restrictions As DVD Technology*, *CHINA PATENT EXPRESS*, No. 42, Nov. 14, 2003, at [http://www.iprights.com/publications/chinapatentexpress/cpex\\_42.asp#1](http://www.iprights.com/publications/chinapatentexpress/cpex_42.asp#1).

146. *Chinese Government to Help Companies Deal with Intellectual Property Disputes*, *BBC MONITORING ASIA PAC.*, Jan. 26, 2004, available at 2004 WL 64203313.

147. See Gregory S. Kolton, Comment, *Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts*, 17 *U. PA. J. INT'L ECON. L.* 415, 441 (1996).

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administrative agencies to enforce judgments in a manner atypical of past trends. Instead of un-enforced judicial rulings and interruptions by Party officials, enforcement of the Olympic marks provides foreign investors with a safety net in this unfamiliar terrain. The grand scale of the Olympics' success and the transparency required by the IOC should alleviate investors' fears. The Olympics is a stepping stone towards addressing more complex intellectual property enforcement problems. Administrative discretion and evidentiary problems that plague other intellectual property enforcement are not present here. There is one unambiguous standard to which the government has promised to abide. Guided by the IOC and a legal affairs department, the Chinese government is not in control in the way that it is in control of other Party discretionary matters.

Domestic IPR holders are increasingly aware of the need to have a consistent rule of law applied in intellectual property cases. Despite China's traditional unwillingness under Confucian principles to engage in adversarial dispute resolution, the Olympics movement necessitates that this avenue be explored in the honorable name of sports. A desensitization effect from Olympics litigation, in addition to increased court usage initiated by foreign parties and the increasing voice for legal reform, will steer the preference for informal mediation towards more predictable judicial rulings.

Furthermore, China's global export industry subjects its domestic businesses to potential infringement suits abroad absent reliable channels for dealing with infringement in China. For example, Taiwan Semiconductor Manufacturing Corporation recently filed suit in California against Shanghai-based Semiconductor Manufacturing International Corporation.<sup>148</sup> The decision to take a Chinese defendant company to court in California demonstrates existing dissatisfaction with China's intellectual property enforcement mechanisms.

### *B. Progress for Foreign Trademark Owners*

Foreign companies that have taken the leap into the China market and risked intellectual property piracy from the beginning

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148. See Jason Dean, *Taiwan Semiconductor Sues Chinese Rival over Patents*, *ASIAN WALL ST. J.*, Dec. 23, 2003, at A3.

remain cautious in the face of the government's promises.<sup>149</sup> But foreign trademark owners are already seeing progress in multiple contexts outside the Olympics. One major change is in customs controls. For example, the Olympics-motivated tightened customs controls resulted in seized counterfeit Lancome perfume in November 2003.<sup>150</sup> China's border control of exports tainted with unauthorized Olympics symbols has been successful, not only in terms of confiscations, but also in terms of pushing China to balance foreign protection with domestic interests.<sup>151</sup> Unlike Sydney, where most counterfeit Olympic goods were found in import transit, China has to deal with customs seizures of goods made in China for export. For the first time, an export control framework for seizing infringing goods has been implemented.

China has taken center stage since its accession to the WTO, becoming the United States' fourth largest trading partner and second largest source of imports.<sup>152</sup> U.S. pressure on China is also increasing to fulfill WTO promises and increase transparency.<sup>153</sup> The drastically decreased tariffs made many countries, especially the United States, feel insecure in the newly competitive labor and

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149. Walt Disney President Robert Iger expressed the opinion that China made commitments but haven't delivered results. *Piracy in China Vexes US Media Industry*, XINHUA FIN. NETWORK, Jan. 12, 2004, available at 2004 WL 56741668.

150. Xiamen Customs seized counterfeit Lancome perfume for the first time. Rouse & Co. Int'l, *First Customs Seizure of Counterfeit LANCOME Perfume in China*, CHINA IP EXPRESS, No. 189, Nov. 24, 2003, at [http://www.iprights.com/publications/chinaipexpress/ciex\\_189.asp](http://www.iprights.com/publications/chinaipexpress/ciex_189.asp). In September 2003, U.S.-based Educational Testing Service (ETS) and the Graduate Management Admission Council (GMAC) received a \$1.2 million copyright and trademark infringement judgment against unauthorized use of these company's exams. See Rouse & Co Int'l, *New Oriental Ruled Infringement in Copyright and Trademark Lawsuit*, CHINA IP EXPRESS, No. 183, Sept. 23, 2003, at [http://www.iprights.com/publications/chinaipexpress/ciex\\_183.asp](http://www.iprights.com/publications/chinaipexpress/ciex_183.asp). One area that remains a problem for foreign investors is the music industry, but with the advent of the internet, music piracy is a global problem rampant even in the United States. See, e.g., Case, *Copyright Law - Ninth Circuit Holds that Computer File-Sharing Software Vendors are Not Liable for Users' Copyright Infringement*, 118 HARV. L. REV. 1761 (2005) (outlining the current legal obstacles to overcoming music piracy in the United States).

151. See *Olympic Symbols Receive Protection*, *supra* note 62.

152. U.S. Dep't of State, Bureau of Int'l Info. Programs, *China Not a Market Economy Yet, Commerce Official Says* (Oct. 1, 2003), at <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2003&m=October&x=20031001170108esrom0.1587946&t=xarchives/xarchitem.html> [hereinafter Aldonas' Statement] (transcript of Grant Aldonas' statement to House Panel).

153. See, e.g., U.S. Dep't of State, Bureau of Int'l Info. Programs, *Grassley Urges China to Comply with Its Trade Obligations* (Oct. 7, 2003), at <http://usinfo.state.gov> (transcript of press release from Senate Finance Committee).

business environment.<sup>154</sup> The current rhetoric of the Bush administration is one of criticism, wielding the WTO over China, and reminiscent of pre-accession negotiations that fostered China's distrust of Western countries.<sup>155</sup> Advocating for U.S. domestic industries threatened by the post-accession export of U.S. labor, U.S. representatives called upon China to "play by the rules" of the WTO.<sup>156</sup> Now that trade has been increasingly opened to Chinese markets, the problem has shifted from China's previous unwillingness to trade at all to the current problem of counterfeit U.S. goods, costing U.S. companies twenty to twenty-five billion dollars each year.<sup>157</sup> The United States' repeated declarations that it will not seek WTO sanctions for "noncompliance" suggests that China is noncompliant, angering Party leaders.<sup>158</sup> Instead of threatening unilateral trade sanctions directly, the United States now makes similar threats through the WTO.<sup>159</sup>

Instead of lobbying the U.S. government, foreign investors should divert their resources into providing legal expertise to Chinese governmental and non-governmental intellectual property associations, which can then place internal pressure on the Chinese government for competence in the courts. With increasing acceptance of legal reform and an increasing awareness of a need for intellectual property education, the aid will not be ill-received if the proper channels are used.

## VI. CONCLUSION

Hosting the Olympic Games in a nation historically lacking in private property rights brings to the forefront the problem of intellectual property adherence. In China's past, foreign pressure

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154. UNITED STATES TRADE REPRESENTATIVE, 2002 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 8 (2002) [hereinafter 2002 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE]; see, e.g., O'Reilly, *supra* note 1.

155. The United States attributes China's intellectual property enforcement deficiency to corruption, protectionism, and lack of coordination and training, and organized crime. See 2002 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, *supra* note 154 at 38; U.S. Dep't of State, Bureau of Int'l Info. Programs, *China Not Fulfilling All WTO Commitments, USTR Says* (Sept. 24, 2003), at <http://usinfo.state.gov> (transcript of statement by Deputy Assistant U.S. Trade Representative Charles W. Freeman III to the Congressional - Executive Commission on China).

156. See Levine's Testimony, *supra* note 99.

157. See *id.*

158. *Id.*

159. See Aldonas' Statement, *supra* note 152.

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to change China into a “rule of law” state overnight, while expecting enforcement of intellectual property rights through such a channel, had only served to generate more mistrust. China’s transition must be respected, while working with the effective channels within the state to further intellectual property protection through education and legal reform.

The prospect of hosting the 2008 Olympics has changed intellectual property’s rank on China’s priority list, at least with respect to the IOC’s protected marks. The unprecedented national scale of the 2008 Olympic effort will have the added effect of increasing social understanding of the intellectual property rights concept. In turn, this facilitates a spillover effect in the state’s efforts to increase intellectual property rights enforcement in other areas. Unlike past inconsistencies of administrative discretion in IPR enforcement, Olympic IPR enforcement has a wholly different dynamic, signaling that this could become a permanent trend.

Ironically, now that China’s borders are open to trade at an unprecedented level, the United States has resurrected a protectionist tone toward its relationship with China.<sup>160</sup> The main criticism is the rampant counterfeit products flowing from the subsidized manufacturing industry.<sup>161</sup> The United States, however, must not fall back into its threatening rhetoric and must practice what it preaches. Let this be a reminder that, in the world economy, competition is not a zero-sum game, but everyone loses in protectionism.<sup>162</sup>

The move towards “rule of law” not only fosters an infant domestic intellectual property regime, but also constructs the foundation upon which foreign intellectual property will be protected. The transformation from “rule by law” to “rule of law” will cement China’s revolution into a market economy. Within this market economy, intellectual property rights become valuable, spurring innovation, and increasing profits for both domestic and

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160. Congress has discussed the possible repeal of China’s Normal Trade Relations status and the imposition of tariffs on Chinese imports. See U.S. Dep’t of State, Bureau of Int’l Info. Programs, *Bush Opposes Repeal of NTR with China, Evans Says* (Nov. 10, 2003), at <http://usinfo.state.gov>.

161. Peggy Hu, *Commerce Secretary’s Remarks in Minnesota Nov. 6, available at* Bureau of Int’l Info. Programs, U.S. Dep’t of State, <http://usinfo.state.gov> (Nov. 10, 2003).

162. Rich Karlgaard, *China Syndrome; Digital Rules*, FORBES, Oct. 27, 2003, at 45. (“The urge to blame China must be avoided.”).

foreign right-holders. Finally, these changes are harbingers of the future investment climate in China, a post-Olympics intellectual property infrastructure that will become increasingly conducive to proprietary technology and brand investment.

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