

# BRAZIL'S OLYMPIC TRIALS: AN OVERVIEW OF THE INTELLECTUAL PROPERTY CHALLENGES POSED BY THE 2016 RIO DE JANEIRO GAMES

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“Today Brazil is uniquely placed to meet needs and to work together for a brighter future – yes Brazil is ready, Rio is ready, ready to host the Games of celebration and transformation.”<sup>1</sup>

## I. INTRODUCTION

For the first time since their inception, a South American country will be hosting the Olympic Games in the summer of 2016.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> Those requirements include the candidate’s ability to protect and enforce any intellectual property rights related to the Olympic Games.<sup>5</sup>

The Olympic Games are probably the largest international sporting event in the world. The 2008 Beijing Olympics brought together over 10,500 athletes from 204 countries around the world.<sup>6</sup> Even larger were the corporate sponsorships and viewer following of the games: some estimates point out that the Beijing Games had approximately 4.4 billion viewers worldwide,<sup>7</sup> and over \$5 billion in advertisement and corporate sponsorships.<sup>8</sup> Because of its magnitude, even the IOC recognizes the Olympic Games as “one of the most effective international marketing platforms in the world, reaching billions of people in over 200 countries and territories throughout the world.”<sup>9</sup> As such,

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1. Carlos Nuzman, President of the 2016 Rio Bid Comm. Address to the International Olympic Committee (Oct. 2, 2009) (supporting Rio de Janeiro’s bid to host the 2016 Olympic Games) available at FRANCE 24, <http://www.france24.com/en/20091002-olympic-games-president-lula-brazil-bid-rio-2016-candidate-international-olympic-committee> (last visited Mar. 16, 2011).

2. *Rio to stage 2016 Olympic Games*, BBC SPORT, [http://news.bbc.co.uk/sport2/hi/olympic\\_games/8282518.stm](http://news.bbc.co.uk/sport2/hi/olympic_games/8282518.stm) (last visited Mar. 16, 2011).

3. *Id.*

4. Int’l Olympic Comm., Olympic Charter, rule 34, bylaw to rule 34 (2007) available at [http://multimedia.olympic.org/pdf/en\\_report\\_122.pdf](http://multimedia.olympic.org/pdf/en_report_122.pdf) [hereinafter Olympic Charter].

5. *Id.*, art. 34.3.

6. THE OFFICIAL WEBSITE OF THE BEIJING 2008 OLYMPIC GAMES, <http://en.beijing2008.cn/sports/> (last visited Feb. 20, 2011).

7. NIELSEN CONSULTING, WHO WHERE THE REAL WINNERS OF THE BEIJING OLYMPICS? 1 (Sept. 2008), available at [http://cn.en.nielsen.com/site/documents/Olympic\\_en.pdf](http://cn.en.nielsen.com/site/documents/Olympic_en.pdf).

8. *US\$1 Billion in Marketing Sponsorship Could Fail to Deliver Results at the Beijing Olympics*, BUSINESSWIRE (June 2, 2008), [http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news\\_view&newsId=20080602006143&newsLang=en](http://www.businesswire.com/portal/site/home/permalink/?ndmViewId=news_view&newsId=20080602006143&newsLang=en).

9. INT’L OLYMPIC COMM., SPONSORSHIPS, available at <http://www.olympic.org/en/content/The-IOC/Sponsoring/Sponsorship/> (last visited Feb. 20, 2011).

the Olympic Games provide a forum for official sponsors to reap the benefits of increased brand recognition and affiliation with the event's goodwill.<sup>10</sup>

The Olympic Games are also the perfect setting for companies to test and showcase their new technological breakthroughs which help improve athlete's performance and enable them to break world records.<sup>11</sup> Millions of dollars are invested in developing and protecting the latest technologies and training methods that will give athletes the slightest edge over competitors—where a fraction of a second is the difference between winning and losing.<sup>12</sup> Needless to say, considering these numbers, some of Brazil's greatest challenges are not on the field, but rather in providing effective measures to protect Olympic-related intellectual property.

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.

## II. BACKGROUND

This section addresses the origin of the modern Olympic Games and the role of the International Olympic Committee in their organization. Next it provides detailed information on the different types of Olympic-related intellectual property and the legal challenges they face. Finally, this section discusses Brazil's legal framework for intellectual property protection and explores its deficiencies.

### A. *The Olympic Games and the International Olympic Committee*

Originally, the ancient Olympic Games were a series of competitions held between representatives of several city-states from Ancient Greece, which

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10. Vered Yakovee, *Legal Aspects of Big Sports Events Management, Part II: Sponsorships*, 25 ENT. & SPORTS LAW 1, 24 (2007).

11. See Keith Naughton, *Speedo: Making a Splash*, NEWSWEEK, June 30, 2008, <http://www.newsweek.com/id/142410> (noting how swimmers using the Speedo LZR have set a "stunning" 38 records).

12. See Ernest Beck, *Speedo: Innovation in the Aqua Lab*, BLOOMBERG BUSINESSWEEK (Apr. 14, 2008), [http://www.businessweek.com/innovate/content/apr2008/id20080414\\_823222.htm](http://www.businessweek.com/innovate/content/apr2008/id20080414_823222.htm) (noting how swimwear companies like Speedo have spent millions of dollars developing the "LZR" swimsuit for the Beijing 2008 Olympic Games). See also Steve van Dulken, *The LZR Racer swimsuit by Speedo*, THE PATENT SEARCH BLOG (June 20, 2008), <http://britishlibrary.typepad.co.uk/patentsblog/2008/06/the-lzr-racer-s.html> (noting how the new Speedo RZR swimsuit gives athletes a 2% performance improvement, which in competitive swimming is a significant advantage).

featured mainly athletic but also combat and chariot-racing events.<sup>13</sup> Although their origin is unclear, these Olympic Games reached their zenith in the 6th and 5th centuries BC, but then gradually declined in importance as the Romans gained power and influence in Greece.<sup>14</sup>

### 1. *The Origin of the Modern Olympic Games and Symbols*

Although the ancient Greeks were responsible for the original Olympic Games,<sup>15</sup> the Baron Pierre de Coubertain conceived the modern version in 1894.<sup>16</sup> Coubertain's main purpose behind reintroducing the Games was to set a platform in which the world's youth could peacefully compete every four years.<sup>17</sup> In this sense, Coubertain saw the games as an opportunity for athletes to make "international contacts," and to represent their countries with dignity.<sup>18</sup> So, in 1894, Coubertain organized the International Athletic Convention of Paris that adopted the modern Olympic Games.<sup>19</sup> The first modern Olympic Games were celebrated shortly thereafter, in Athens in 1896.<sup>20</sup>

### 2. *The International Olympic Committee*

The International Olympic Committee (IOC) is an international non-governmental, non-for-profit organization<sup>21</sup> that serves as the supreme authority of the Olympic Movement.<sup>22</sup> It was originally established, in 1894, at the International Athletic Convention of Paris that created the modern Olympic Games.<sup>23</sup> Seated in Lausanne, Switzerland,<sup>24</sup> it is composed of 115 members that are elected by the IOC itself as independent individuals,<sup>25</sup> active athletes or persons with executive or leadership function within an International Federation or National Olympic Committee.<sup>26</sup>

Among its many functions, the IOC is in charge of ensuring the regular

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13. *Ancient Olympic Games*, WIKIPEDIA (last visited Mar. 16, 2011), [http://en.wikipedia.org/wiki/Ancient\\_Olympic\\_Games](http://en.wikipedia.org/wiki/Ancient_Olympic_Games).

14. *Id.*

15. Robert B. Barney, *Prologue: The Ancient Games*, in *ENCYCLOPEDIA OF THE MODERN OLYMPIC MOVEMENT*, xxiii (John E. Findling & Kimberly D. Pelle eds., Greenwood Press 2004).

16. Joachim K. Rühl, *Olympic Games Before Coubertain*, in *ENCYCLOPEDIA OF THE MODERN OLYMPIC MOVEMENT* 3, *supra* note 16, at 3.

17. Karl Lennartz & Stephen Wassong, *Athens 1896*, in *ENCYCLOPEDIA OF THE MODERN OLYMPIC MOVEMENT* 17, *supra* note 16, at 19.

18. *Id.*

19. *Id.* at 19–21.

20. *Id.* at 22.

21. Olympic Charter, *supra* note 5, rule 15, para. 1.

22. *Id.* rule 1, para. 1.

23. David J. Ettinger, *The Legal Status of the International Olympic Committee*, 4 *PACE Y.B. INT'L L.* 97, 98 (1992).

24. Olympic Charter, *supra* note 5, rule 15, para. 2.

25. Ettinger, *supra* note 24, at 100. Members of the IOC are not delegates from their country of citizenship to the IOC, but are delegates of the IOC to their respective countries. *Id.*

26. INT'L OLYMPIC COMM., *FACTSHEET IOC MEMBERS* (Feb. 2008), *available at* [http://multimedia.olympic.org/pdf/en\\_report\\_955.pdf](http://multimedia.olympic.org/pdf/en_report_955.pdf).

celebration of the Olympic Games.<sup>27</sup> The Games are celebrated every two years, alternating between the Summer and Winter Olympic Games,<sup>28</sup> and it is up to the IOC to select which city will host the Games in a given year.<sup>29</sup> The IOC will evaluate the applications from candidate cities in a bidding process and determine both their eligibility and desirability to host the Games.<sup>30</sup> As part of the bidding process, the Olympic Charter requires the national government of the applicant city to submit to the IOC a legally binding instrument, by which the national government will take all measures required to comply with the Olympic Charter.<sup>31</sup> Among these requirements, the host city/country must take measures to ensure that the IOC's rights over the Olympic property, such as the Olympic symbol, flag, and motto, are protected and enforced.<sup>32</sup>

### B. *Olympic Games Related Intellectual Property*

The Olympic Games are a memorable experience not only because of the medals won or the records broken by athletes, but also because of the different manifestations of its related intellectual property. On one hand, the Olympic Flag, the official mascot, the Games motto, and the official emblem, which are an integral part of the public's experience of the Games, are all subject to intellectual property protection under either Copyrights or Trademarks.<sup>33</sup> On the other hand, the technology used by athletes to train or the state-of-the-art instruments used for precise timekeeping are subject to protection under Patent law.<sup>34</sup> This section describes in more detail the Olympic related elements subject to intellectual property protection.

#### 1. *Copyrights and Trademarks*

The Olympic Flag, arguably one of the most widely known symbols,<sup>35</sup> was designed by Coubertin around 1914 and was first introduced in the 1920 Antwerp Olympics.<sup>36</sup> Coubertin explained the meaning of the flag in the following terms:

The Olympic flag . . . has a white background, with five interlaced rings in the centre: blue, yellow, black, green and red . . . . This design is symbolic; it represents the five continents of the world, united by

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27. Olympic Charter, *supra* note 5, rule 2, para. 3.

28. *Id.* rule 33, para. 1 ("The Games of the Olympiad are celebrated during the first year of an Olympiad, and the Olympic Winter Games during its third year").

29. *Id.* rules 33, 34.

30. *Id.* bylaw to rule 34.2.

31. *Id.* art. 34.3.

32. *See id.* rule 7 (expressing that the rights to various Olympic symbols belong exclusively to the IOC).

33. *Id.*

34. *See, e.g.,* Derek Bambauer, *Legal Responses to the Challenges of Sports Patents*, 18 HARV. J.L. & TECH. 401, 401-03 (2005) (explaining how sports training methods and techniques have become an area of interest to patent law).

35. Anne M. Wall, *The Game Behind the Games*, 12 MARQ. SPORTS L. REV. 557, 581 (2002).

36. THE OLYMPIC SYMBOLS, THE OLYMPIC MUSEUM 3 (2007) available at [http://multimedia.olympic.org/pdf/en\\_report\\_1303.pdf](http://multimedia.olympic.org/pdf/en_report_1303.pdf).

Olympism, while the six colours are those that appear on all the national flags of the world at the present time.<sup>37</sup>

In addition, “[t]he Olympic symbol, flag, motto, anthem, [and] identifications”—such as Olympics, Olympiads or Olympic Games—form what the Olympic Charter denominates as the “Olympic Properties.”<sup>38</sup> The IOC holds title to these Olympic properties and may license and exploit them for any profit making or commercial purposes.<sup>39</sup> Typically the IOC will license the use of the Olympic properties to corporate sponsors and to the National Olympic Committee (NOC), whenever the Games are celebrated.<sup>40</sup> Licensing of the Olympic properties is, along with the broadcasting rights, one of the IOC’s main sources of income.<sup>41</sup> Therefore, the IOC has a great interest in ensuring the host country is able to effectively enforce any rights derived from the Olympic symbols.

Furthermore, at the local level, other Olympic symbols are created and subject to intellectual property protection. The NOC will hold title to any domestic official symbols, such as the official emblem of the Games (*e.g.* the Rio de Janeiro 2016 logo), the medal designs, the torch, anthem and the official games mascot.<sup>42</sup> It is up to the NOC to license these symbols locally and to seek the best possible legal protection against infringement.

## 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.<sup>43</sup> 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,<sup>44</sup> hydrodynamic-friction-reducing swimsuits,<sup>45</sup> and sports methods—like a new tennis grip or a sports training technique—are designed to help athletes to become swifter and stronger.<sup>46</sup> On the other hand, the organizers of the Olympics now rely heavily on a myriad of sensors such as

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37. *Id.* (citation omitted).

38. Olympic Charter, *supra* note 5, rule 7.

39. *Id.*

40. *Id.*; OLYMPIC MARKETING FACT FILE, INT’L OLYMPIC COMM. 9–10 (2008), available at [http://multimedia.olympic.org/pdf/en\\_report\\_344.pdf](http://multimedia.olympic.org/pdf/en_report_344.pdf) [hereinafter IOC MARKETING].

41. IOC MARKETING, *supra* note 41, at 11–12, 26.

42. *Id.* at 9–11.

43. Steve Haake, *Physics, Technology and the Olympics*, PHYSICS WORLD (Sept. 1, 2000), <http://physicsworld.com/cws/article/print/486>.

44. See G-TRAINER LONDON UK, <http://g-traineruk.blogspot.com/> (last visited Mar. 5, 2011) (noting the benefits of weightless treadmill training for Olympic athletes and other professional sports because the G-trainer reduces a person’s apparent bodyweight by sealing the lower body in a pressurized bubble as she runs, lessening the impact on the knees, thus allowing for greater speeds and resistance).

45. *10 Technology Stunts at the 2008 Olympic Games*, TECHCULT (Sept. 9, 2008), <http://www.techcult.com/olympic-technology>.

46. Bambauer, *supra* note 35, at 403; Haake, *supra* note 44.

high-speed cameras which capture 8,000 frames per second and underwater cameras<sup>47</sup> to keep an accurate record of athletes' performances.<sup>48</sup> 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.

### C. Challenges for Olympic Games Related Intellectual Property

#### I. Ambush Marketing Practices

Ambush marketing is a deceitful advertising strategy that involves confusing consumers regarding a company's status as an official sponsor of an event.<sup>49</sup> Corporate firms pay the organizers of sports events like the Olympic Games great amounts of money to sponsor the event, and to let customers know of their contribution and endorsement in the success of the event, of the participating athletes and the overall experience.<sup>50</sup> However, non-sponsors sometimes take a "free ride" and benefit from association to the event's goodwill without bearing the costs.<sup>51</sup> As a result, consumers are deliberately confused and deceived by the "free riders" as to their status as an official sponsor.<sup>52</sup> Additionally, ambush-marketing practices would arguably create a disincentive for corporate sponsors to invest in the Olympic Games.

Ambush marketing practices take many forms, among which we can find (i) companies buying commercial advertising time surrounding the Olympics in order to create an association with the Games, (ii) companies using Olympic event tickets in giveaways or other corporate events, and (iii) through the use of advertising near the Olympic events.<sup>53</sup> Although not completely illegal,<sup>54</sup> the consequences of ambush marketing in consumers are of great concern to the Olympic organization because of its impact on their sponsorship programs.<sup>55</sup>

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47. TECHCULT, *supra* note 46.

48. See Meredith May, *Keeping a Closer Eye on Athletes; New Devices Help Track Winners, Losers at Games*, S. F. CHRON., Aug. 23, 2004, [http://articles.sfgate.com/2004-08-23/business/17441652\\_1\\_marathon-runners-touch-pads-speed](http://articles.sfgate.com/2004-08-23/business/17441652_1_marathon-runners-touch-pads-speed) (commenting on the precision of timing equipment used in the Athens 2004 Olympics where the Swiss team had to be disqualified because a swimmer jumped off the pad one hundredth of a second before a teammate touched the wall, and noting that extremely precise sensors can help competition judges determine results when it is impossible for the human eye).

49. Anita M. Moorman, *Consumer Attitudes of Deception and the Legality of Ambush Marketing Practices*, 15 J. LEGAL ASPECTS SPORT 183, 184 (2005).

50. *Id.* at 183.

51. *Id.*

52. See *id.* at 184 (describing how ambush marketing has the ability to confuse consumers regarding sponsorship status).

53. Jennifer L. Donatuti, Note, *Can China Protect the Olympics, or Should the Olympics be Protected From China?*, 15 J. INTEL. PROP. L. 203, 209 (2007).

54. See Moorman, *supra* note 50, at 183 (discussing the legality of ambush marketing).

55. See generally INT'L OLYMPIC COMM., *MARKETING REPORT—BEIJING 2008* 38 (2008), available at [http://www.olympic.org/Documents/Reports/EN/en\\_report\\_1428.pdf](http://www.olympic.org/Documents/Reports/EN/en_report_1428.pdf) (recognizing that the partnership/sponsorship program provide the services and resources that make the Olympic Games possible).

## 2. *Trademark Infringement*

Trademark infringement can be defined as “any . . . [unauthorized] reproduction, counterfeit, copy or colorable imitation of a registered mark in connection with the sale . . . distribution or advertising of . . . goods or services . . . which is likely to cause confusion, or to cause mistake, or to deceive . . . .”<sup>56</sup> Olympic trademark infringement would come from the unauthorized use of the Olympic symbols. As explained previously, the Olympic symbols are exclusive property of the IOC, and only through the licensing programs, and in exchange for royalties, may be used by third parties.<sup>57</sup>

## 3. *Counterfeiting*

Counterfeiting occurs when an unlicensed party creates products, such as clothing or memorabilia, with the Olympic symbols “or a confusingly similar mark.”<sup>58</sup> Given the IOC’s zealousness in protecting the Olympic symbols, the sale of counterfeited goods bearing the Olympic symbols jeopardizes the relationship between the IOC and the NOC.<sup>59</sup> Revenues from the sales of licensed products are considerable: the 2008 Beijing Olympics totaled over \$ 100 million in royalties due to sales of about 8,000 different officially licensed products.<sup>60</sup>

## 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.<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup> Equally, individual athletes who hold

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56. The Lanham Trademark Act, 15 U.S.C. § 1114 (2006).

57. See *Beijing 2008 Marketing Plan Overview*, BEIJING ORG. COMM. FOR THE GAMES OF THE XXIX OLYMPIAD, <http://en.beijing2008.cn/bocog/sponsors/n214077622.shtml> (last visited Mar. 5, 2011) (explaining the Olympic Games License Agreement).

58. Donatuti, *supra* note 54, at 210.

59. *Id.* at 208–09 (discussing how the NOC creates their own marketing programs).

60. MARKETING REPORT—BEIJING 2008, *supra* note 56, at 343.

61. See *Patent Infringement*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Patent\\_infringement](http://en.wikipedia.org/wiki/Patent_infringement) (last visited Mar. 5, 2011) (describing the elements of patent infringement). See also F. Scott Kieff, Robert G. Kramer & Robert M. Kundstadt, Symposium Review, *It’s Your Turn, But It’s My Move: Intellectual Property Protection for Sports “Moves”*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 765, 768–69 (2009) (explaining the rights of a patent holder in preventing others “from making, using, offering for sale, or selling the patented invention for the entire term of the patent”).

62. See Kieff, *supra* note 62, at 765–66 (explaining that even though the issue of patents for signature sports moves is controversial, it is theoretically possible); TECHCULT, *supra* note 46 (listing new sports technologies used in the Olympics).

63. Anne M. Wall, *Sports Marketing and the Law: Protecting Proprietary Interests in Sports*



patents over training methods or signature moves have an interest in excluding others from the advantages of their protected property.<sup>64</sup> 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,<sup>65</sup> the Industrial Property Law (IPL),<sup>66</sup> 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.<sup>67</sup> 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,<sup>68</sup> which also contains specific intellectual property provisions relevant to the Games.<sup>69</sup> 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.

##### *1. The Federal Constitution*

The Brazilian legal system is based on the Civil Legal tradition, characterized by rigid written laws.<sup>70</sup> As such, the Federal Constitution is the supreme law of the land in Brazil and sets the foundations and limits on which the country's legal system is built.<sup>71</sup> In this sense, the Federal Constitution expressly guarantees the rights of all persons to property, including intellectual property rights.<sup>72</sup> According to the Federal Constitution, the law will ensure authors of industrial inventions a temporary privilege for their use, as well as

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*Entertainment Events*, 7 MARQ. SPORTS L.J. 77, 142 (1996). See also Patrick Bedford, *Omega Watches the Official Olympic Timekeeper*, BUZZLE, <http://www.buzzle.com/articles/omega-watches-the-official-olympic-timekeeper.html> (last visited Mar. 1, 2011) (noting how Omega has been an official Olympic timekeeper several occasions, but other competitors such as Longines, Tag Heuer, Seiko and Swatch have also had that privilege).

64. See Kieff, *supra* note 62, at 765–66 (explaining that a patented sports move gives an athlete bargaining power).

65. CONSTITUIÇÃO FEDERAL, [C.F.] [CONSTITUTION] art. 5 (Braz.).

66. Lei No. 9.279, de 14 de Maio de 1996, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 15.05.1996. (Braz.) [hereinafter *Industrial Property Law*].

67. Adriana Rizzotto, *Overview of the Latest Developments on Patent Prosecution in Brazil, with Focus on Biotechnology, Business Methods and Computer-Implemented Inventions*, 2 (Mar. 2009) available at <http://www.ipo.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=21973> [hereinafter Rizzotto].

68. Lei No. 12.035, de 1 de Outubro de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 1.10.2009. (Braz.) [hereinafter *Olympic Act*].

69. *Brazil Passes its Olympic Act*, IP TANGO (Oct. 8, 2009), <http://iptango.blogspot.com/2009/10/brazil-passes-its-olympic-act.html> (last visited Mar. 1, 2011).

70. *The Brazilian Legal System*, ORG. AM. STATES, [http://www.oas.org/Juridico/MLA/en/bra/en\\_bra-int-des-ordrjur.html](http://www.oas.org/Juridico/MLA/en/bra/en_bra-int-des-ordrjur.html) (last visited Mar. 5, 2011).

71. *Id.*

72. CONSTITUIÇÃO FEDERAL [C.F.] art. 5 (Braz.).

protection of industrial creations, trademarks, and distinctive signs, viewing the social interest and the technological and economic development of the country.<sup>73</sup> Consequently, intellectual property rights are constitutionally recognized—and limited—in Brazil, and it is essentially up to the Industrial Property Law to regulate rights and obligations in the subject.<sup>74</sup>

## 2. *The Industrial Property Law*

The Industrial Property Law (IPL) was enacted in May 1996 and is the main law governing intellectual property rights in Brazil.<sup>75</sup> According to the IPL, protection over intellectual property rights is an essential part of the Government's social interest and technological development.<sup>76</sup> To this effect, the IPL provides for trademark registration and measures to suppress unfair competition.<sup>77</sup> In general terms, trademarks under the IPL are valid for a ten-year period after registration that can be renewed indefinitely.<sup>78</sup> Under Brazilian law, any visually perceptible distinctive sign not included in any legal prohibition is registrable as a trademark.<sup>79</sup> However, certain “widely known trademarks”—like the Olympic symbols—under the Paris Convention for the Protection of Industrial Property are protected regardless of registration in Brazil.<sup>80</sup>

### a. Trademarks

Trademark rights in Brazil are granted on a first to file basis, that is, on registration before the Brazilian Patents and Trademark Office rather than use of the trademark.<sup>81</sup> Registration confers the trademark holder exclusive rights over the mark throughout the whole Brazilian territory.<sup>82</sup> Furthermore, once registered before the BPTO, the trademark holder is entitled to seek legal remedies in case of infringement of the protected mark.<sup>83</sup> Under Brazilian law, trademark infringement may constitute both a tort and a criminal offense.

### b. Patents

According to Brazilian legislation, inventions may be protected through both patents of invention and utility models.<sup>84</sup> Patents and utility models are protected, in principle, for twenty and fifteen years respectively counting from

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73. *Id.*, art. 5 XXIX.

74. *Industrial Property Law*, *supra* note 67, art. 1.

75. *Id.* art. 1–2.

76. *Id.* art. 2.

77. *Id.*

78. *Id.* art. 133.

79. *Id.* art. 124.

80. *Id.* art. 126.

81. *Id.*, art. 129.

82. *Id.*

83. *Id.*

84. *Industrial Property Law*, *supra* note 67, arts. 8, 9.

the filing date.<sup>85</sup> 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.<sup>86</sup>

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.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> The language used for these exemptions suffers from the same vagueness issue as the abovementioned compulsory licensing provisions.

### c. Remedies for Infringement of Intellectual Property Rights

In broad terms, infringement of Intellectual Property rights in Brazil carries both civil and criminal liability. On one hand, civil liability for infringement of IP rights allows titleholders to seek cessation of the infringement under threat of daily fines, the destruction of all products and materials related to the infringement, and the payment of attorney's fees and judicial costs.<sup>91</sup> On the other hand, criminal liability may entail imprisonment between three months and a year if the alleged infringer is found guilty of IP infringement.<sup>92</sup>

## 3. *The Olympic Act*

On the day before the IOC voted Rio de Janeiro to host the 2016 Olympic

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85. *Id.*, art. 40.

86. Rizzotto, *supra* note 68, at 6–7.

87. *Compulsory License*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Compulsory\\_licensing](http://en.wikipedia.org/wiki/Compulsory_licensing) (last visited Feb. 09. 2010); BLACK'S LAW DICTIONARY 1003 (9th ed. 2009).

88. Rizzotto, *supra* note 68, at 6.

89. *Id.*

90. *Industrial Property Law*, *supra* note 67, art. 43.

91. *Id.*, arts. 201, 202.

92. *Id.*, arts. 183, 187, 189.

Games, Brazil enacted Law No. 12.035 regulating the logistic and operational issues of organizing the event.<sup>93</sup> This enactment sought to assure the IOC of the Brazilian Federal Government's commitment to make the necessary infrastructure and logistic investments to make the Games a reality.<sup>94</sup> The Olympic Act contains several dispositions that specifically address some of the challenges to Olympic related intellectual property described *supra*.<sup>95</sup> However, the Olympic Act does not expressly provide for special protection for sports or Olympic related patents, nor does it prescribe sanctions against Olympic trademark and copyright infringement. Thus, the Industrial Property Law will deal with any related issues.

### 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. Next, the analysis turns to the impact of the legal framework's deficiencies based on hypothetical scenarios involving athletes like Usain Bolt, Roger Federer, Michael Phelps, and corporations like Speedo and AlterG. After that, the analysis focuses on the Brazilian government's initiatives to fight copyright and trademark infringement. Finally, the analysis turns to the issue of ambush marketing prevention.

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

Brazil has had a steady economic emergence on the international arena.<sup>96</sup> According to some forecasts, Brazil is to become the world's fifth largest economy, overtaking Britain and France by the year 2014.<sup>97</sup> Among the reasons to support this claim, forecasters say that unlike other BRIC economies,<sup>98</sup> Brazil "treats foreign investors with respect."<sup>99</sup> However, these affirmations fall short when the controversial posture of the Brazilian government towards intellectual property rights is considered.

Brazil has been labeled "a prominent member of the axis of IP evil"<sup>100</sup> because of its "flagrant disregard" for intellectual property rights.<sup>101</sup> This

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93. *Lula presents the Rio 2016 Act to IOC President*, RIO 2016 (Oct. 1, 2009), <http://www.rio2016.org/en/Noticias/Noticia.aspx?idConteudo=1042>.

94. *Id.*

95. A similar law was enacted in China on occasion of the Beijing 2008 Olympic Games in conjunction with state and municipal regulations. Fraser Mendel & Chao Yijun, *Protecting Olympic Intellectual Property*, 17 CHINA L. PRAC. 33, 33 (2003); Stacey Wang, Comment, *Great Olympics, New China: Intellectual Property Enforcement Steps Up to Mark*, 27 LOY. L.A. INT'L. & COMP. L. REV. 291, 301-02 (2005).

96. *Brazil Takes off*, ECONOMIST, Nov. 14, 2009, at 15.

97. *Id.*

98. *See id.* (referring to the BRIC acronym given by a Goldman-Sachs 2003 study on the up and coming economies in the world. The acronym BRIC stands for Brazil, Russia, India and China.).

99. *Id.*

100. *The Two Faces of Intellectual Property in Brazil*, KNOWLEDGE@WHARTON (Mar. 1, 2006), <http://knowledge.wharton.upenn.edu/article.cfm?articleid=1339> (quoting Kenneth Adelman, former United States ambassador to the United Nations).

101. *Id.*

reputation derives mainly from the tensions between the Brazilian Government and pharmaceutical companies that produce anti-retroviral medications.<sup>102</sup> For instance, in March of 2006 the Brazilian Government threatened to break the medication patents of pharmaceutical companies Merck, Abbott Laboratories, and Gilead if those companies refused to allow Brazil to produce generic equivalents to sell the product at a discounted price.<sup>103</sup>

### 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.<sup>104</sup> Most conveniently, Brazil has self-designated as a developing country that should be favored in this new order.<sup>105</sup> It is argued that this stance towards intellectual property rights is heavily influenced by socialist/leftist ideals.<sup>106</sup>

As part of this strategy, the Permanent Mission of Brazil to the World Trade Organization submitted a proposal to the World Intellectual Property Organization (WIPO) on January 15, 2010, relating to the limits and exceptions of patent rights.<sup>107</sup> The proposal calls into question the assumptions underlying the idea that a grant of strong rights to IP holders fosters innovation or attracts investments.<sup>108</sup> Furthermore, the document expresses Brazil's reservation that the current international legal framework for compulsory licenses is extremely complex and hinders the use of compulsory licenses for patents.<sup>109</sup> Because of the current legal framework, Brazil claims "[d]eveloped countries seem to be the only ones capable of reaping any advantage from the system."<sup>110</sup>

This controversial stance towards developed countries and intellectual property rights may be used on the road to the 2016 Olympic Games. For instance, a close look at the 2008 Beijing Olympics medals distribution shows that developed countries won a disproportionate amount of medals in comparison to developing countries.<sup>111</sup> Sports have a high budget priority in

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102. *Id.*

103. *Id.*

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).

107. *Brazil's Proposal at WIPO on Patent Limitations and Exceptions (SCP/14/7)*, KNOWLEDGE ECOLOGY INT'L (Jan. 25, 2010), <http://www.keionline.org/node/769>.

108. *Id.*

109. *Id.*

110. *See id.* (referring to the difficulties faced by Brazil in developing a licensed patent because the license grant was not explicit enough to allow prompt development of a retroviral treatment).

111. 2008 *Summer Olympics – Beijing, China, Total Medals by Nation*, SI.COM, <http://sportsillustrated.cnn.com/olympics/2008/medals/tracker/> (last visited March 1, 2011).

developed countries where huge investments and technological resources are devoted to train Olympic athletes, whereas developing countries cannot match their counterparts.<sup>112</sup> For example, Chinese athletes for the 2008 Beijing Olympics trained with state-of-the-art technologies, and according to some estimates, China spent some six million dollars training each of its medal-winning athletes.<sup>113</sup> In contrast, the lack of funding for sports in Brazil sometimes forces track athletes to train without shoes.<sup>114</sup> 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.<sup>115</sup>

### B. Hypothetical Situations

Despite an extensive body of international treaties that deal with intellectual property, there is no uniform protection for an individual whose invention may be used in foreign countries.<sup>116</sup> Intellectual property protection in a foreign country is usually dependent on local registration.<sup>117</sup> This implies that if a U.S. individual or corporation holds a U.S. patent, but wishes to have his invention protected in Brazil, he needs to file before the Brazilian Patents and Trademarks Office. For purposes of this discussion, the assumption is that all kinds of intellectual property, regardless of the owner’s nationality, are properly registered before the Brazilian Patents and Trademarks Office.

Imagine the following scenarios: (i) Usain Bolt, holder of the Olympic and World records for the 100 meters race<sup>118</sup> developed a training technique for which he holds a patent. Further suppose that his training technique consists of a unique combination of meditation, yoga stretches, weight lifting,

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112. *Underdevelopment of Sport in Developing Countries: International Platform on Sport Development*, SPORTANDDEV.ORG, [http://www.sportanddev.org/learnmore/sport\\_and\\_economic\\_development/underdevelopment\\_of\\_sport\\_in\\_developing\\_countries/](http://www.sportanddev.org/learnmore/sport_and_economic_development/underdevelopment_of_sport_in_developing_countries/) (last visited March 1, 2011); *Lessons in Strategy Execution in China: Beijing Olympics 2008*, ARTICLESBASE.COM (Dec. 2, 2008), <http://www.articlesbase.com/strategic-planning-articles/lessons-in-strategy-execution-from-china-beijing-olympics-2008-668190.html>.

113. *Lessons in Strategy Execution in China: Beijing Olympics 2008*, *supra* note 113.

114. Maiko Tanabe, *Brazil’s Olympic Enthusiasm Exposes Country’s Social Problems*, THE NEW BRUNSWICK BEACON, Nov. 1, 2010, <http://www.newbrunswickbeacon.ca/2009/11/brazils-olympic-excitement-exposes-countrys-social-problems/2475>.

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).

116. INTELLECTUAL PROPERTY PROTECTION, <http://www.cftech.com/BrainBank/INTERNATIONALAFFAIRS/IntellecProp Protec.html> (last visited March 8, 2010).

117. *Id.*

118. *Usain Bolt*, WIKIPEDIA [http://en.wikipedia.org/wiki/Usain\\_Bolt](http://en.wikipedia.org/wiki/Usain_Bolt) (last visited Mar. 1, 2011).

targeted sprints and a diet rich in protein and carbohydrates; and (ii) Roger Federer, one of the best tennis players of all time<sup>119</sup> developed a signature serve-forehand stroke combination for which he holds a patent as well. Federer's signature serve-forehand stroke move makes him unbeatable in the tennis court. Assume also that both Bolt and Federer come from developed countries. Finally, (iii) imagine that Speedo develops and patents on occasion of the 2016 games a new hydrodynamic suit that Michael Phelps will use for pool training.

### *C. Potential problems for Bolt, Federer and Speedo*

Brazil has a long lasting sporting tradition and government authorities, companies, and society at large are recognizing its importance in the lives of Brazilians.<sup>120</sup> Because of this, over the last years the Brazilian government has contributed to the enhancement of Brazilian Olympic athletes' performance by providing resources and infrastructure for sports research and training.<sup>121</sup> Most notably, since 1995 the Brazilian Olympic Committee has established, in cooperation with the Federal Government, the Olympic Center for Sports Research and the Olympic Training Center.<sup>122</sup> However, Brazil's current stance towards patent rights, along with some gaps in its domestic legal framework, may raise other types of more obscure contributions for its athletes.

#### *1. Compulsory Licensing*

##### *a. Abusive Exercise of Patent Rights*

The first of these obscure contributions may come in the form of compulsory licenses of sports-related patents. As previously discussed, compulsory licenses may be granted whenever patent rights are exercised in an "abusive manner." Considering Brazil's patent policies and lack of clear legal standards as to what constitutes "abusive exercise" of patent rights,<sup>123</sup> it is not far-fetched to imagine the Brazilian government's inclination to "bust" sport patents. On one hand, Brazil could argue that through exclusive use, sport patent owners like Bolt or Federer "abuse" their rights every time they run faster or serve a ball, thus gaining an unfair advantage over Brazilian athletes. Busting patents would then be justified in order to level the playing field

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119. See *Roger Federer*, WIKIPEDIA (last visited Mar. 1, 2011) [http://en.wikipedia.org/wiki/Roger\\_Federer](http://en.wikipedia.org/wiki/Roger_Federer) (noting how no other tennis player has won 16 Grand Slam Titles in his career).

120. Carlos Arthur Nuzman, *An Olympic Power in the 21<sup>st</sup> Century* (June 17, 2007), [http://www.brasilemb.org/index.php?Itemid=97&id=47&option=com\\_content&task=view](http://www.brasilemb.org/index.php?Itemid=97&id=47&option=com_content&task=view).

121. See generally *id.* (discussing Brazil's contributions to their athletes performance).

122. *Id.*

123. See Denis Allan Daniel, *Brazil: Key Trends for Intellectual Property in Brazil Through 2001-2002*, <http://www.mondaq.com/article.asp?articleid=14048&print=1> (Nov. 2, 2001) (noting that the Industrial Property Law is being interpreted in a manner that facilitates "patent busting" by means of compulsory licensing).

between athletes.<sup>124</sup> This “leveling of the playfield” would mean for Bolt or Federer that non-licensed Brazilian athletes in the Rio Games could legally use their training techniques and signature moves. Though seemingly a fair argument, other means to level the playing field exist to limit Federer or Bolt from the exclusive use of their patents without reverting to compulsory licensing. For instance, properly drafted rules for the 2016 Rio Games could prevent Federer and Bolt from exclusive use of their patents.<sup>125</sup> Alternatively, assuming that anti-trust violations are not an issue, the IOC or the NOC could mandate or condition Bolt’s and Federer’s participation in the Games to a license grant on reasonable terms to all participating athletes if they wish to use the patents themselves.<sup>126</sup>

#### b. Insufficient Commercialization

Corporate sponsors like Speedo or AlterG<sup>127</sup> that develop state-of-the-art sports technology for the Olympics could also have their inventions subject to compulsory licensing. Indeed, compulsory licenses for Speedo’s hydrodynamic suits or AlterG’s anti-gravity treadmill could be granted if, the Brazilian government finds that the commercialization of those products is insufficient for domestic market needs.<sup>128</sup> Just as the IPL does not set a clear legal standard for “patent abuse,” it similarly does not set a clear standard for “sufficient commercialization.”<sup>129</sup> The problem can arise, when corporate sponsors have partnership agreements with individual athletes, where an exclusive use relationship is established.<sup>130</sup> For example, assume that Michael Phelps has a partnership agreement with Speedo<sup>131</sup> that includes an exclusivity clause between them whereby Phelps would be the only athlete able to use Speedo’s suits in the Olympics. If Michael Phelps was the only athlete entitled to use Speedo suits, then arguably there would be absolutely no commercialization of them in Brazil. Of course such exclusivity would provide Phelps with a tremendous—and arguably unfair—advantage over

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124. See generally Patricia J. Zettler, *Is it Cheating to use Cheetahs?: The Implications of Technologically Innovative Prostheses for Sports Values and Rules*, 27 B.U. INT’L L.J. 367 (2009); *Level Playing Field*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Level\\_playing\\_field](http://en.wikipedia.org/wiki/Level_playing_field) (last visited Mar. 1, 2011).

125. Kieff, *supra* note 63, at 774–76.

126. *Id.*

127. See *Anti-Gravity Treadmill for Conditioning, Training and Rehabilitation*, ALTERG (last visited Mar. 1, 2011), <http://alter-g.com> (describing AlterG, the company that owns and distributes the anti-gravity treadmills mentioned above).

128. See Rizzotto, *supra* note 68, at 6–7 (describing how Brazil has enacted certain mechanisms like compulsory licensing of patents and patent infringement exemptions that may limit a patent owner’s rights from unauthorized use).

129. See generally *Industrial Property Law*, *supra* note 67 (failing to set clear legal standards for the terms patent abuse and sufficient commercialization).

130. See generally Jaime Heins & Brian R. Socolow, *Properly Drafted Right of First Refusal Helps Sponsors Keep Athletes*, STREET & SMITH’S SPORTS BUS. J., <http://groupynetwork.com/tools/legal/properly-drafted-right-of-first-refusal-helps-sponsors-keep-athletes/> (last visited Mar. 1, 2011) (discussing the right of first refusal included in many endorsement contracts and how it can be a powerful tool for sponsors).

131. *Speedo Extends Partnership With Michael Phelps Through 2013*, PENTLAND, <http://www.pentland.com/news/speedo@-extends-partnership-michael-phelps-through-2013> (last visited Mar. 1, 2011).



Brazilian athletes and could give the Brazilian government an excuse to grant a compulsory license.

Another possible scenario for compulsory licensing based on insufficient commercialization arises, when a technology is so expensive that few people can afford it. This issue is at the core of the abovementioned tensions between Brazil and pharmaceutical companies that produce HIV medications.<sup>132</sup> In principle, compulsory licensing mechanisms under TRIPS are meant to give countries the flexibility to produce generic versions of products—without the patent holder's permission—under certain pressing circumstances, such as national emergencies.<sup>133</sup> The problem with this flexibility is that any nation can declare a state of national emergency under questionable reasons and grant compulsory licenses of a given product.<sup>134</sup> For example, the AlterG anti-gravity treadmills used by Olympic athletes in developed countries have a staggering price tag of \$75,000 apiece.<sup>135</sup> Developing countries like Brazil—where athletes sometimes train shoe-less—could hardly afford paying such prices so their athletes' training can match that of developed countries' athletes. Under these hardship circumstances, and considering Brazil's policy of free and universal access to technology, it is possible that the Brazilian government declares a state of national emergency—or something along those lines—on occasion of the Rio Games and issues compulsory licenses for all kinds of sports training technology without incurring major costs.

## 2. *Patent Infringement Exemption Problems*

The second obscure contribution depends on how Brazilian courts will interpret the patent infringement exemptions of the IPL. As described *supra*, infringement exemptions are a mechanism through which unauthorized third parties can use patents in a private, non-commercial way as long as they do not harm the owner's economic interests. This exemption can prove particularly troublesome for courts in the case of patents over training techniques or sports moves like those in the Bolt or Federer scenarios. Imagine that Usain Bolt walks into a gym in the Olympic Village to train before the final 100 meter race. Next to Bolt is his Brazilian counterpart stretching and lifting weights in a sequence that is strikingly familiar to him. Alternatively, imagine that Federer loses the Olympic tennis finals to the Brazilian champion who also used a very familiar serve-forehand stroke combination. In these scenarios, determining the scope of the exemption has delicate implications for both the patent holder and the alleged infringer since patent infringement in Brazil carries both civil and criminal liability.<sup>136</sup>

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132. Toni Johnson, *Generic Drugs: The Other War*, COUNCIL ON FOREIGN REL. (Dec. 16, 2009), [http://www.cfr.org/publication/18055/generic\\_drugs.html](http://www.cfr.org/publication/18055/generic_drugs.html).

133. *Industrial Property Law*, *supra* note 67, art. 71; Johnson, *supra* note 133.

134. See Johnson, *supra* note 133 (quoting a 2007 research guide from Do Hyung Kim stating that any country could declare a state of national emergency to issue compulsory licenses).

135. Peter Sagal, *Into Thin Air, How a Decidedly Earthbound Runner Learned to Fly*, RUNNER'S WORLD (Feb. 13, 2008), <http://www.runnersworld.com/article/0,7120,s6-240-322-12476-0,00.html>.

136. *Industrial Property Law*, *supra* note 67, arts. 44, 183. See also CHRISTOPHER GARRISON, UNITED

On one hand, courts could adopt a narrow view of the economic detriment requirement and call for the patent holder to show a tangible and direct harm against his economic interests. In this case, if Bolt or Federer usually charge a license fee to third parties in order to use their techniques, then the unauthorized use by Brazilian athletes would arguably constitute a direct economic harm. However, if Bolt or Federer do not usually charge a licensing fee or lose a sponsor or marketing deal after an Olympic defeat, then the answer is unclear.

On the other hand, courts could adopt a broad view of the economic harm requirement, where any kind of detriment would suffice for a non-exempt infringement. In such case, if Bolt or Federer lost a sponsor or a marketing deal or could prove any kind of economic harm—even a remote one—from the unauthorized use of their patents, then the infringer would be subject to civil and criminal liability. The problem with this overbroad interpretation scenario is that courts risk imposing severe punishments—damages and imprisonment—for a wide array of conduct that otherwise would be perfectly harmless for patent-holders. Finally, such a broad interpretation would require that criminal prosecutors, judges, police officers, and defense attorneys be present at all times at Olympic venues looking out for potential patent-infringing athletes/criminals.

#### *D. Olympic Trademark and Copyright Infringement*

The market for counterfeited goods is another example of the deficiencies of the current intellectual property framework in Brazil. It is estimated that every year billions of dollars in counterfeited goods are sold in the Brazilian market.<sup>137</sup> Counterfeited cigarettes, medicines, clothing, toys, shoes, software, and even auto parts are available to buy in Brazil at any time.<sup>138</sup> In the 2008 Beijing Olympics, not only did Chinese authorities confiscate all kinds of counterfeit memorabilia like the abovementioned, they even arrested people, who were selling counterfeit tickets to Olympic venues and events.<sup>139</sup> Needless to say, this counterfeit industry causes millions of dollars in retail and tax losses in Brazil and causes foreign investors to be reluctant about investing in the country.<sup>140</sup> Brazil must effectively deal with these problems and prevent the sale of counterfeit Olympic memorabilia, if it wishes to preserve its image and reputation before the IOC and the international community.

As mentioned *supra*, the Olympic Act's reach over Olympic-related intellectual property infringement is limited to empowering Federal authorities

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NATIONS COUNCIL ON TRADE AND DEVELOPMENT, EXCEPTIONS TO PATENT RIGHTS IN DEVELOPING COUNTRIES xi-xii (Aug. 2006), available at [http://www.unctad.org/en/docs/iteipc200612\\_en.pdf](http://www.unctad.org/en/docs/iteipc200612_en.pdf).

137. See BRAZIL-U.S. BUS. COUNCIL, COUNTERFEITING AND PIRACY IN BRAZIL: THE ECONOMIC IMPACT 9, available at [http://www.brazilcouncil.org/usermedia/MediaLibrary/Counterfeiting\\_and\\_Piracy\\_in\\_Brazil.pdf](http://www.brazilcouncil.org/usermedia/MediaLibrary/Counterfeiting_and_Piracy_in_Brazil.pdf) (reporting that the Brazilian black market is estimated to be worth \$20 billion).

138. *Id.* at 1.

139. *China Gets Serious About Fake Olympic Merchandise*, N.Y. TIMES, Apr. 26, 2007, [http://www.nytimes.com/2007/04/26/business/worldbusiness/26iht-fakes.1.5448762.html?\\_r=1s](http://www.nytimes.com/2007/04/26/business/worldbusiness/26iht-fakes.1.5448762.html?_r=1s).

140. BRAZIL-U.S. BUS. COUNCIL, *supra* note 138, at 1.

to control and restrain (without specifying the means for it) third-party unlawful use of the symbols related to the 2016 Rio Games.<sup>141</sup> Consequently, any efforts to combat the spread of Olympic-related counterfeits will occur in accordance to the IPL and the Brazilian government's related policies.

In spite of the Brazilian government's controversial stance regarding intellectual property and the issues presented by the counterfeits market, Brazil has advanced in terms of intellectual property protection. Early in 2009, the WTO acknowledged that Brazil had made progress and stepped up its intellectual property protection framework.<sup>142</sup> According to a WTO official, Brazil made important changes in terms of intellectual property policies and legislation during a 2004–2007 review period.<sup>143</sup> The changes include a new “comprehensive and modern IP protection law” and compliance with all major aspects of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement.<sup>144</sup> For instance, the IPL's criminalization of trademark infringement has had a positive effect by encouraging trademark owners to litigate to protect and to claim monetary compensation for violations to their marks.<sup>145</sup> Under the current legal framework, trademark holders may file infringement suits before state courts—either where the infringer has its domicile or where the infringement is taking place—and seek redress.<sup>146</sup> Additionally, the sole requirement for filing a criminal case of this nature is the ability to prove the infringement.<sup>147</sup> This can be easily done through a preliminary search and seizure action against the alleged infringer, the results of which, are analyzed by an expert appointed by the court.<sup>148</sup> If the expert finds that infringement occurred, the trademark owner will have strong evidence to file along with a criminal and civil suit.<sup>149</sup> Consequently, Brazil's NOC and the IOC could rely on efficient judicial means to protect Olympic-related intellectual property symbols against unauthorized use.

Another step forward in copyrights and trademark property protection in Brazil is the establishment of the National Council to Combat Piracy and Crimes against Intellectual Property, a partnership between the government and the private sector.<sup>150</sup> In 2005, this Council published the National Anti-Piracy Plan, which included ninety-nine measures for the short, medium and long term, divided among law enforcement, educational, and economic

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141. *See supra* Part I.C.3.

142. Kaitlin Mara, *WTO Review Finds Brazil Progressing On Trade Policy, IP Rights Protection*, INTELLECTUAL PROP. WATCH (March 11, 2009, 4:13 PM), <http://www.ip-watch.org/weblog/2009/03/11/wto-review-finds-brazil-progressing-on-trade-policy-ip-rights-protection/>.

143. *Id.*

144. *Id.*

145. Danneman Siemsen Advogados, *Brazil: New Enforcement Tools in Brazil are Encouraging Trademark Owners to Litigate to Protect Their Rights and Claim Monetary Compensation for Infringement*, WORLD TRADEMARK REVIEW, June/July 2009, at 80, 80, available at <http://www.worldtrademarkreview.com/Issues/Article.ashx?g=3ec2700b-4bc1-4ef2-8cfe-ab2f218b8abe>.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. Mara, *supra* note 143.

actions.<sup>151</sup> Special attention is now given to the triple border region between Brazil, Argentina, and Paraguay, a big area for the trade of illegal merchandise.<sup>152</sup> These policies, legal and enforcement changes represent steps forward in ensuring protection to the Olympic symbols on the road to the 2016 Rio Games.

### E. Ambush Marketing

The Olympic Act empowers the Federal authorities, namely the Federal Revenue and Federal Police, to oversee, control and restrain third-party unlawful use of the symbols related with the “*Jogos Rio 2016*” (Rio Games 2016), thus providing a modest framework to prevent infringements and ambush marketing.<sup>153</sup> In this sense, the symbols protected under the Olympic Act include “the mottos, hymns, flags, emblems, marks, words (in any language), abbreviations, mascots and torches of the International Olympic Committee (IOC), Rio Games 2016 Organizing Committee and those related to the Rio 2016 Olympic and Paralympic Games.”<sup>154</sup> Moreover, to deal with ambush marketing, “[a]rticle 7 [of the Olympic Act expressly] prohibits the use of words or expressions so similar to the ‘symbols related to *Jogos Rio 2016*’ that are likely to create an undue association with any product or service, company, business relationship, or event with the Rio Games 2016 or the Olympic movement.”<sup>155</sup> It must be noted that the Olympic Act’s scope on ambush marketing is limited to mere prohibitions of certain practices, but does not prescribe sanctions for these violations. Consequently, the unfair competition provisions of the Industrial Property Law may be used to determine sanctions. However, the scope of the useful IPL’s unfair competition sanctions is limited to those cases where (i) a person or entity “uses [or imitates] another person’s advertising phrase or sign . . . in order to create confusion among the products or establishments;”<sup>156</sup> or (ii) “attributes to himself, for advertising purposes, a reward or distinction that he has not received.”<sup>157</sup> As a consequence, Brazil’s current legal framework is insufficient to deal with some of the more sophisticated ambush marketing practices. For instance, “sponsoring individual players at sporting events so that they are wearing the ambush marketer’s logo [or] sponsoring a news conference where team players are invited to speak” are ambush-marketing practices that create confusion in consumers,<sup>158</sup> but would go unpunished under Brazilian laws.

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151. *Brazil: Doing Enough to Fight Piracy?*, BRAZILIAN-AMERICAN CHAMBER OF COMMERCE, (Mar. 6, 2007), [http://www.brazilcham.com/default.asp?id=285&c031\\_ui=sa&c031\\_id=185](http://www.brazilcham.com/default.asp?id=285&c031_ui=sa&c031_id=185).

152. *Id.*

153. *Olympic Act*, *supra* note 69, art. 6; Jorge Miguel Arruda da Veiga, *Brazil Passes its Olympic Act*, IP TANGO (Oct. 8, 2009) <http://iptango.blogspot.com/2009/10/brazil-passes-its-olympic-act.html>.

154. *Brazil Passes its Olympic Act*, *supra* note 154.

155. *Id.*

156. *Industrial Property Law*, *supra* note 67, art. 195.IV.

157. *Id.*, art. 195.VII.

158. Brian R. Socolow, *Ambush Marketing*, GROUP Y (Jan. 14, 2010), <http://groupynetwork.com/tools/legal/ambush-marketing/>.

## IV. RECOMMENDATIONS

First, Brazil needs to change its controversial stance against intellectual property and seriously commit to its protection, if it wishes to show to the world they are indeed ready to host the 2016 Olympic Games. This readiness starts with a coherent and well-oriented public policy regarding intellectual property protection and enforcement. Brazil can no longer afford to have simultaneous and opposite approaches to intellectual property rights. In other words, Brazil cannot on one hand lead a crusade against patent rights and on the other lead a crusade to enforce trademarks and copyrights. While it is true that intellectual property rights have limitations and must be protected considering the social and technological interest of the country, like the Brazilian Constitution mandates, that does not mean that a selective or capricious protection is appropriate. To the contrary, Brazilian policy makers must understand that intellectual property right—as a whole—play an important role in economic growth and development,<sup>159</sup> and, as such, their protection is in Brazil's best interest. Otherwise, the consequence is not surprisingly, that the Brazilian people will “consider[] intellectual property [as] something that is not worth protecting.”<sup>160</sup> Needless to say, the attitude of Brazilian people will have a significant impact upon Olympic-related intellectual property on the road to the 2016 Games.

Second, Brazilian courts must define some kind of legal standards for the uncertain provisions of the Industrial Property Law examined above. Indeed, courts must establish at least minimum parameters in regards to what constitutes “abusive exercise” of patent rights, “sufficient commercialization,” and what kind of economic interest triggers the patent exemptions of the IPL. Such parameters must strike a balance between Brazil's interests for social and technological development and the individual's property rights. Only in exceptional circumstances should courts allow one's interest to prevail over the other.

Third, Brazil must adopt an integral approach to effectively combat Olympic trademark and copyright infringements. Even though the current legal framework is for the most part sufficient, its application is in large part missing at almost every level including law enforcement, customs, education, and in the judiciary.<sup>161</sup> Regarding law enforcement, Brazil must step up its surveillance of counterfeit Olympic products until the Games are over. In this sense, increased inspections and frequent raids on black markets would help in reducing the volume of circulating Olympic-related counterfeit products. In terms of customs, Brazil should increase its controls at airports, borders and ports to prevent counterfeit goods from entering or leaving the country. Additionally, counterfeit products are arguably subject to market laws where

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159. See The Federalist Society for Law and Public Policy, *Intellectual Property: Does IP Harm or Help Developing Countries*, 2007 U. ILL. J.L. TECH. & POL'Y 65, 66–68 (2007) (discussing the value intellectual property systems can add to developing countries).

160. BRAZILIAN-AMERICAN CHAMBER OF COMMERCE, *supra* note 152.

161. *Id.*

the demand for these products can also be dealt with.<sup>162</sup> In order to reduce the demand for counterfeits, the people need to be educated that buying and selling counterfeit goods is something that cannot be tolerated. Brazilian people must be made aware that every time they purchase a counterfeit product, the economy loses money that would otherwise be invested schools, roads, police, etc.<sup>163</sup> Finally, Brazil must take measures to expedite the judicial resolution of intellectual property infringement suits. Because of the current backlog in Brazilian courts, trademark infringement actions at the first instance take approximately two years to reach a decision, and another two years if an appeal is filed.<sup>164</sup>

Fourth, Brazil must adopt measures that effectively deal with ambush marketing practices that are not criminalized by the IPL. Ambush marketing practices, during the Olympic Games, are increasingly sophisticated and Brazil's current legislation is unable to counter them. Brazil could implement measures like educational campaigns, mystery shoppers,<sup>165</sup> and restrictions on the commercial activities of participating athletes that have proved effective in previous Olympic Games.<sup>166</sup>

## V. CONCLUSION

On December 31<sup>st</sup>, 2010 as part of the New Year's Eve celebrations in Rio de Janeiro, the Brazilian Olympic Committee unveiled the official logo for the 2016 Olympic Games to a multitude of over one million that gathered in Copacabana beach.<sup>167</sup> A team of national and international members of the Rio 2016 Committee chose the final logo and over 140 agencies competed for the design over several months.<sup>168</sup> According to the head of the Organizing Committee the final pick conveyed Brazilians' passion for sports and celebration, just as the transformations the Games are bringing to Rio de Janeiro.<sup>169</sup> However, shortly after the unveiling, plagiarism accusations came forth as strong similarities were found between the new Rio 2016 logo and that of the Telluride Foundation based in Colorado.<sup>170</sup> Others pointed to similarities between the new logo with Henri Matisse's famous painting "The Dance."<sup>171</sup>

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162. See generally MOISÉS NAÍM, *ILLCIT: HOW SMUGGLERS, TRAFFICKERS AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY* 109–30, 239 (Anchor Books 2005) (explaining how counterfeiting networks operate and how illicit trafficking is an economic phenomenon and is subject to supply and demand laws).

163. BRAZILIAN-AMERICAN CHAMBER OF COMMERCE, *supra* note 152.

164. Danneman, *supra* note 146, at 60.

165. SHEILA KESSLER, *MEASURING AND MANAGING CUSTOMER SATISFACTION: GOING FOR THE GOLD* 165 (Quality Press 1996) (noting that mystery shoppers pose as customers of the target company and aim to test service quality).

166. Stephen McKelvey, *An Analysis of the Ongoing Global Efforts to Combat Ambush Marketing: Will Corporate Marketers "Take" the Gold in Greece?*, 14 J. LEGAL ASPECTS OF SPORT 191, 213 (2004).

167. , *Rio Unveils Logo for 2016 Games*, ABC NEWS, Dec. 31, 2010, <http://abcnews.go.com/Sports/wireStory?id=12518800>.

168. *Id.*

169. *Id.*

170. *Logo designers deny plagiarism*, ESPN (Jan. 2, 2011), <http://sports.espn.go.com/oly/news/story?id=5982192>.

171. Tales Azzoni, *Rio 2016 logo designers deny plagiarism*, YAHOO! NEWS (Jan. 2, 2011),

Though both the logo designers and the Rio 2016 Committee have adamantly denied plagiarism,<sup>172</sup> it nonetheless raises suspicion considering the current state of intellectual property protection in Brazil as discussed in this Note.

The 2016 Rio de Janeiro Olympic Games will provide Brazil with one of its greatest challenges in its recent history. Providing effective measures to protect Olympic-related intellectual property will challenge the Brazilian government to a profound revision of its policies and legal framework in the area. Chief among these revisions is Brazil's non-compliant policy towards patent rights. Additionally, Brazilian courts must fill the gaps of the Industrial Property Law balancing legitimate state interests and individual rights. Furthermore, in order to combat Olympic trademark infringements and ambush marketing, Brazil must adopt an integral approach that coordinates law enforcement, customs, education, and an efficient judiciary. Finally, before Brazil can claim that it is "ready to host the Games of celebration," it must initiate the above transformations itself.

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[http://news.yahoo.com/s/ap/20110102/ap\\_on\\_sp\\_oly\\_rio2016\\_logo\\_plagiarism](http://news.yahoo.com/s/ap/20110102/ap_on_sp_oly_rio2016_logo_plagiarism).

172. *Id.*