

Predatory Ambushing – “Advantage IP Inc. Official Sponsor of FICPI Games”

EXPERT 3 (China): When my Brazilian and Canadian colleagues are busy in providing their opinions, I quickly checked online to find out that FICPI registered two “FICPI+logo” trademarks in China, in class 41 and 45 respectively. If Advantage IP Inc. provides the same or similar services in classes 41 and 45 as FICPI’s Chinese TM registration, such an ambushing conduct may have committed trademark infringement and should be stopped depending on *the Chinese Trademark Law*. However, if the goods or services of this ambusher are different from what FICPI registered their trademarks on, it may be difficult for FICPI to rely on Trademark Law to stop such a predatory ambushing conduct unless FICPI mark can be recognized as well-known trademark. Nevertheless, dear FICPI executives and its official sponsors, please don’t get too disappointed with this conclusion; all roads lead to Rome! There are other solutions when this road cannot lead to the destination.

While there are no specific provisions in Chinese laws and regulations involving ambush marketing, the Chinese government takes measures against such ambushing conduct for such an important Game as FICPI Games with its *Regulations on the Administration of Special Symbols*. The precondition is that FICPI registers its symbols (such as the phrase of “FICPI Games” and the FICPI logo) with the Administration of Industry and Commerce in China in advance to be recognized as special symbols competent to be covered by this Regulations. In addition, for an event as important as FICPI Games, if it is held in China, the Chinese government will pass special *Regulations on the Protection of FICPI Symbols* just as what the Chinese government did for Beijing Olympic Games and Shanghai EXPO. It will prescribe that nobody is allowed to use FICPI symbols in any commercial activities without authorization. During Beijing Olympics and Shanghai EXPO, the Chinese authorities dealt with thousands of such direct ambushing marketing cases and stopped and fined a lot of individuals and companies from infringing the Olympic and EXPO symbols, relying on the special Regulations.

What’s more, even if the FICPI trademarks are not recognized as a “special symbols”, it is likely for FICPI or other interested party to report to competent authority or start a civil litigation before the court to stop such a direct ambush marketing activity with the ground that such an activity contains fake claim and uses another party’s name without permission which harms the interests and goodwill of FICPI or an interested third party, according to the Chinese Advertising Law and Unfair Competition Law.

So in conclusion, such a behavior of Advantage IP Inc. is very likely to be forbidden in China.

Coat-Tail Ambushing – “Advantage IP Inc. Proud Supporter of the FICPI Games”

EXPERT 3 (China): the conclusion in this case is the same as the previous one in terms of the *Chinese Trademark Law* and *Special symbols protection*. The use of the phrase “FICPI Games” or FICPI logo without authorization should be forbidden.

The difference between this one from the previous case is that this time the ambusher did not expressly say it is an “official supporter”, instead, it called itself a “proud supporter”. An official supporter should be someone official recognized by FICPI Games and normally have paid sponsor fees like IP Proof! Industries; however, a proud supporter is not necessarily to meet such requirements and a proud supporter can be someone who gives spiritual support to FICPI Games. So it may be hard to find out it is a fake

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claim but it uses FICPI’s name without authorization which may be still found to be violate the prescription of the Chinese Advertising Law.

Trade-mark Infringement (Comparative Advertising) – “Advantage IP Inc. Your Best Alternative to IP Proof! at Barcelona”

EXPERT 3 (China): Comparative advertising is not forbidden in China except for the medicine and medical device products but it should be true and honest comparison and the advertiser should provide proof and information to support its comparison conclusion. Otherwise, it may be forbidden according to the Unfair Competition Law and the Chinese Advertising Law. Article 12 of the Chinese Advertising Law prescribes “An advertisement shall not belittle commodities of other producers and dealers or services of other providers” and Article 2 of the Unfair Competition Law prescribes that “A business operator shall, in his market transactions, follow the principles of voluntariness, equality, fairness, honesty and credibility and observe the generally recognized business ethics” and Article 14 of the same says “A business operator shall not fabricate or spread false information to injure his competitors' commercial credit or the reputation of his competitors' commodities”. The goodwill of the competitors should not be impaired by comparative advertisement.

If Advantage IP Inc. is not a best alternative to IP Proof! Industries, such an advertisement will be determined as false advertisement and should be forbidden and if there is any damage caused to IP Proof! Industries, IP Proof! Industries may claim for damage compensation.

Trade-mark Infringement – “Advantage IP Inc. FICPI (design slightly altered)”

EXPERT 3 (China): although the design is altered, the distinctive part, FICPI, is still clearly seen; Advantage IP Inc. is using it as a trademark. So the protection of special symbols if FICPI is recognized as a special symbol and the protection under the Chinese Trademark Law are available for this case. To determine whether it is trademark infringement, it needs to determine (1) whether the goods/services are identical or similar; (2) whether the marks are identical or similar; (3) for similar ones, whether consumer confusion will be caused. If the answers to these three questions are all positive, it will be trademark infringement. Or if FICPI trademark can be proven to be a well-known trademark, such a use of FICPI may be forbidden even if Advantage IP Inc. did not provide services as registered by FICPI trademarks.

Trade-mark Infringement – “Advantage IP Inc. (design significantly altered).”

EXPERT 3 (China): Let’s suppose the services provided by Advantage IP Inc. are same or similar to FICPI’s TM registration. Then like these other jurisdictions, the main issue here is confusion. The trademark is different, but is it different enough that there is no likelihood of confusion between the FICPI trademark and the Advantage IP logo here? If confusion could result, then this conduct is prohibited. To judge that, the actual use status of the suspected infringing trademark and the suspected infringer’s commercial activities are important factors to consider; if Advantage IP Inc. attempted to associate them to FICPI in their commercial activities in any other means than using the sign we see on the T-shirt, the confusion is more likely to be incurred.

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In addition, I would like to mention that during the Beijing Olympics, the phrase “Beijing 2008” was protected as a special symbol and unauthorized use of “Beijing 2008” was an infringing activity. So for FICPI, if it may register “Barcelona 2014” as a special symbol, it then can stop others from using it without its authorization. However, it may be difficult to get recognized as a special symbol as China will have less duty to protect FICPI symbols if it is not held in China.

Value-based Ambushing: “Advantage IP Inc. IP Protection for Champions”

EXPERT 3 (China): It is an indirect ambush marketing conduct. It did not use FICPI or its logo or any other symbols of FICPI. As I mentioned earlier, China has passed event-specific legislation for the 2008 Beijing Olympic Games and 2010 Shanghai EXPO. It is true that during the course of the Olympics and EXPO, increased penalties, new enforcement mechanisms and national support for the event reduced the cases of violation of those protected symbols. However, it will be arguable whether the ambush marketing tactic in this case should be stopped; more likely, it will be decided that it goes beyond the protection scope and should be allowed. It may be a bit unfair to the public and go too far if too broad exclusive right is given to FICPI. During the Beijing Olympic Games, we saw the advertisers used the elements of “champions”, “Beijing”, etc. although they were not official sponsors for Beijing Olympics.

Ambushing by Association/Distracted – “Advantage IP Inc. (Soccer Ball)”

EXPERT 3 (China): As mentioned previously, “Barcelona 2014” is possibly to be recognized as a special symbol for FICPI Games just as “Beijing 2008”, which will be protected by special Regulations. Therefore, different from the previous tactic, Chinese officials may be able to restrain this type of conduct even in the absence of traditional forms of trademark infringement. Particularly where the conduct interferes with the event or undermines official sponsorship agreements, these marketing tactics likely would not be permitted. However, to stop using the soccer ball sign is less likely as it is very different from the registered FICPI logo.

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Annex: FICPI trademark registration in China

注册号/申请号	6360104	申请日期	2007年11月05日
国际分类号	41	颜色组合	否
申请人名称(中文)	国际知识产权律师联合会		
申请人名称(英文)	FEDERATION INTERNATIONALE DES CONSEILS EN PROPRIETE INDUSTRIELLE		
申请人地址(中文)	瑞士巴塞尔霍尔拜因街36-38号,邮编:CH-4003		
申请人地址(英文)	HOLBEINSTRASSE 36-38, CH-4003 BASEL, SWITZERLAND		
商标图样	 <p>教育 安排和组织大会 安排和组织专家讨 论会 组织文化或教育展 览 商品 安排和组织会议 信息公告出版(有关 工业产权和知识产 权领域) 书籍出版(有关工业 产权和知识产权领 域) 杂志出版(有关工业 产权和知识产权领 域)</p> <p>类 41(01;4102;4104; 4105)</p>		
代理组织名称	北京纪凯知识产权代理有限公司		
初审公告期号	1210	注册公告期号	1222
初审公告日期	2010年04月06日	注册公告日期	2010年07月07日
专用期限	2010年07月07日 2020年07月06日 10年		
后期指定日期		国际注册日期	
优先权日期		商标类型	一般

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注册号/申请号	6360103	申请日期	2007年11月05日
国际分类号	45	颜色组合	否
申请人名称(中文)	国际知识产权律师联合会		
申请人名称(英文)	FEDERATION INTERNATIONALE DES CONSEILS EN PROPRIETE INDUSTRIELLE		
申请人地址(中文)	瑞士巴塞尔霍尔拜因街36-38号,邮编:CH-4003		
申请人地址(英文)	HOLBEINSTRASSE 36-38, CH-4003 BASEL, SWITZERLAND		
商标图样	 <p>工业产权和知识产权咨询 为联合会成员、协会和机构提供工业产权和知识产权领域的法律服务 有关工业产权和知识产权的法律研究 仲裁</p> <p>商品/服务列表</p> <p>4506;</p>		
代理组织名称	北京纪凯知识产权代理有限公司		
初审公告期号	1197	注册公告期号	1209
初审公告日期	2009年12月27日	注册公告日期	2010年03月28日
专用期限	2010年03月28日 2020年03月27日 10年		
后期指定日期		国际注册日期	
优先权日期		商标类型	一般