When Beijing submitted its bid to become the Host City for the Games of the XXIX Olympiad to take place in the summer of 2008, its bid proposal provided that the Chinese Olympic Committee (COC) and the Beijing Government would attempt to secure legislation protecting Olympic intellectual property rights (Olympic IPR). Shortly after Beijing was selected as the Host City, the Beijing Government passed local regulations protecting Olympic IPR, followed several months later by the State Council’s issuance of the Protection of Olympic Symbols Regulations (the Regulations), which were effective April 1 2002. These Regulations extend broad protection of Olympic IPR at the national level.

CHINA’S DEFINITION OF THE OLYMPIC SYMBOLS

Article 2 of the Regulations identifies six categories of Olympic IPR, mirroring the requirements of the Olympic Charter and the Beijing Host City Contract. The term “Olympic Symbols” used in the Regulations is an expansive term referring to all of the Olympic IPR, rather than simply the five interlocked rings commonly referred to as the “Olympic Symbol”. The Regulations define the Olympic Symbols to include not only words, signs and other things normally trademarked, but also those objects customarily protected by copyrights, such as medal designs, databases and statistics relating to the Games.

The first five sub-items of Article 2 identify specific elements of the Olympic Symbols, while the sixth sub-item is a catch all category that is meant to encompass all other elements of the Olympic IPR referenced under the Olympic Charter and Host City Contract. This catch all provision creates compliance problems, however, since the Host City Contract is not a publicly available document and the general public therefore cannot know what is or is not restricted. Problems may also arise due to the fact that the government enforcement agencies themselves do not know what is contained in the Host City Contract. Although Article 7 is apparently intended to alleviate this ambiguity by providing that the Olympic Symbols be filed with the government, as discussed in more detail below, there remains the risk that third parties may unintentionally violate the Regulations by using Olympic Symbols that were not publicly identified prior to such use.

In order to eliminate this risk, the State Council should issue supplemental guidelines that clearly identify the entire scope of the Olympic Symbols - either by listing with specificity the items covered under the Host City Contract, or else by providing that the filing procedure identified in Article 7 is a prerequisite to enforcement.

EXCLUSIVE RIGHTS TO THE OLYMPIC SYMBOLS

The Regulations identify the International Olympic Committee (IOC), COC and the Beijing Organizing Committee of the Olympic Games (BOCOG) as the exclusive rights-holders of the Olympic Symbols (collectively, the Rights-holders), with the rights of each of these entities defined in the Olympic Charter and Host City Contract. Cross-referencing the Regulations against these two documents shows that the IOC retains exclusive ownership of the Olympic Symbols described by sub-items (1), (2), (4), (5) and (6) of Article 2 of the Regulations. The COC has limited rights to the Olympic Symbols described by sub-item (3), and BOCOG has the rights to the Olympic Symbols described by sub-items (4), (5) and (6), although those rights must be assigned to the IOC after the Games.

Article 4 of the Regulations provides that the Rights-holders have exclusive rights to the Olympic Symbols. As such, there is a presumption that any use by a third party of the Olympic Symbols would require the consent of the applicable Rights-holder. Article 4 elaborates upon this consent requirement by explicitly stating that no third party can use the Olympic Symbols for commercial purposes without the consent of the Rights-holders. This consent for commercial purposes requirement is further extended by Article 8 that requires any commercial use of the Olympic Symbols for commercial purposes without the consent of the Rights-holders. This consent for commercial purposes requirement is further extended by Article 8 that requires any commercial use of the Olympic Symbols be pursuant to a licence. It should be noted that while the Regulations explicitly provide that commercial use of the Olympic Symbols requires the consent of the Rights-holders, non-commercial use is also limited since the Rights-holders have exclusive rights.
Protection of the Olympic Symbols is automatic under the Regulations. The exclusive rights to the Olympic Symbols vested in the Rights-holders upon promulgation of the Regulations, and no further action was required on the part of the Rights-holders to perfect those rights. As noted above, though, Article 7 of the Regulations provides that the Rights-holders must file the various Olympic Symbols for publication with the Administration of Industry and Commerce (AIC). It is our understanding that the intent of the drafters of the Regulations was that filing of the Olympic Symbols not be a pre-requisite for protection, but simply a means of identifying the Olympic Symbols in order to allow more efficient enforcement.

Article 9 provides one exception to the exclusive rights reserved for the Rights-holders. This exception provides that any Olympic Symbols that were being legally used prior to the promulgation of the Regulations can continue to be used within their original scope of use. Although this carve-out of existing rights-holders may protect some freeloaders who began using the Olympic Symbols in anticipation of Beijing being awarded the Games, it is consistent with a policy of avoiding legislative usurpation of private property rights.

In addition to the broad protection afforded under the Regulations, Article 14 also provides that the Rights-holders may obtain protection by taking advantage of existing intellectual property registration mechanisms. Rights-holders can register the Olympic Symbols in accordance with existing laws, including the Trademark and Copyright Laws.

USE OF OLYMPIC SYMBOLS

Although the focus of the Regulations is clearly on preventing unauthorized commercial use of the Olympic Symbols, the Regulations provide that any unauthorized use - commercial or otherwise - requires the consent of the Rights-holders. Article 10 of the Regulations provides that any use of the Olympic Symbols without consent constitutes infringement of the Rights-holders’ exclusive rights.

Commercial use of the Olympic Symbols is identified in Article 5, which lists six primary categories of usage including production, sales, advertising and services. Article 8 further provides that for any third party to use the Olympic Symbols on a commercial basis, it is necessary to enter into a licence contract with the Rights-holder. Although Article 8 requires that the Rights-holder file the licence with the AIC, such filing is not a condition precedent for effectiveness of such consent. It is of interest that the Regulations do not provide any requirements for formalizing consent for the non-commercial use of the Olympic Symbols.

The Regulations also include reference to “implied commercial purposes”, which is commonly referred to within the Olympic Movement as ambush marketing. Ambush marketing prevention efforts are designed to ensure that no entity creates a false or unauthorized association with the Olympic Movement. The IOC considers prevention of ambush marketing one of the top priorities of the Olympic Movement, since such tactics diminish the value of the Olympic IPR, which therefore jeopardizes the ability of the Olympic Movement to raise funding for the Games. Although this is a critical issue, the Regulations only address this indirectly by including a broad reference under item (6) of Article 5, which refers to activities that might be deemed by others as an existing sponsorship or other supportive relationship. Due to this unclear language of Article 5, it is expected that there will be a significant amount of discretion on the part of the AIC as it enforces the Regulations.

ENFORCEMENT AND REMEDIES

Article 6 of the Regulations provides that the AIC is the primary enforcement agency, and that it has broad authority for protecting the Olympic Symbols throughout China. In addition, the General Administration of Customs is authorized under Article 12 as being responsible for enforcing the Regulations with respect to goods being imported and exported.

The actual mechanisms for preventing unauthorized commercial use of the Olympic Symbols are provided under Article 10. If an entity engages in activities that infringe upon the exclusive rights of the Olympic Symbols, the Rights-holders can bring an action in the People’s Court, or else submit the dispute to the AIC for handling. The AIC has broad administrative powers that include confiscation, seizure of funds and levying of fines. The AIC may also bring a civil action before the People’s Court, or in cases involving fraudulent activities, initiate criminal prosecution.

Article 13 provides a mechanism to determine the amount of compensation that a Rights-holder may seek. While the mechanisms contained in Articles 10 and 13 are broadly similar to those in the PRC Trademark Law, one of the mechanisms available under the Regulations is reference to the licensing fee of the relevant Olympic Symbol. Since the licensing fees for Olympic Symbols are typically substantial, this is potentially a very severe penalty to a perpetrator and establishes a level of protection beyond that available under the Trademark Law.

While there remain some areas of ambiguity under the Regulations, it is clear that the PRC government at many levels is committed to ensuring strong protection of Olympic IPR. It is also expected that the experiences gained by the AIC and other government bodies in enforcing the Regulations will lead to stronger enforcement of intellectual property rights generally in the PRC. If this is the case, then the Games of the XXIX Olympiad will leave a legacy that extends beyond the sports and cultural arena.