

Ambush in Beijing: New Efforts to Curb Ambush Marketing at the Beijing Olympics

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ABSTRACT

“Ambush marketing” remains a potent problem in the months leading up to the Summer Olympics in Beijing as companies vie for the benefits of sponsorship without paying the expensive licensing fees required for official sponsor status. To combat the increasingly inventive methods advertisers use to create an aura of sponsorship, without the costly price charged for such sponsorship, China has created a potent mix of new legal protections, and practical methodologies, which may prove useful in combating at least the most egregious efforts at usurping the economic value of “unpaid” Olympic “sponsorship.” Whether these new techniques ultimately prove useful in the digital era will depend upon a variety of factors, including the willingness of enforcement officials to monitor unauthorized uses and the ability of the relevant parties educate the public about the limits of Olympic “spirit” in the marketing arena.

INTRODUCTION

In 2001 Beijing was announced as the host city for the 2008 Summer Olympics.² With this announcement, China joined a special club of countries who have faced the challenge and opportunity of hosting an Olympic event. Similar to earlier Olympic Games and other single event mega sporting events such as the Super Bowl and the FIFA World Cup, the 2008 Beijing Olympics has already proven a bonanza for what has been referred to as “ambush” marketing. Briefly, ambush marketing can be broadly defined as the use of diverse marketing techniques to give the appearance of sponsorship of an event where no such official sponsorship status exists. The techniques covered by the term are as diverse as the strategists who engage in what has loosely been termed in some quarters “guerilla marketing” or “parasitic marketing,” depending on your point of view. While some engage in ambush marketing to avoid the high costs associated with corporate sponsorship of an event, others may engage in such tactics to blunt the advantage their competitors may gain from such sponsorship.³ As early as 1996, Tony Meenaghan identified a variety of techniques employed by ambush marketers, including sponsoring the broadcast of the event, purchasing advertising time during commercial breaks in

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² Beijing was selected as the Host City for the 2008 Summer Olympics at the 112th Session of the International Olympic Committee (IOC) in Moscow on July 13, 2001. See Beijing 2008 Election (available at http://www.olympic.org/uk/games/beijing/election_uk.asp).

³ See, e.g., John A. Tripodi and Max Sutherland, Ambush marketing – “An Olympic Event,” 7 *The Journal of Brand Management* 412 (2000).

such broadcast, giving away licensed souvenirs and free tickets to the event, and using photos of famous landmarks in advertising that coincides with the event.⁴

Ambush marketing is an extremely long-lived technique. The first well known instance of ambush marketing in connection with Olympic events most likely occurred in 1984 when Kodak became the broadcast sponsor of the Los Angeles Olympics and the “official film” of the US track and field team. As a result of its actions, many consumers mistakenly believed that Kodak was the official sponsor of the Games even though Fuji Film actually filled that role.⁵

Because “ambush” marketers do not generally use the Olympic Symbols in a typical sponsorship or direct trademark sourcing method, the question of the extent to which so called ambush marketing should be regulated remains problematic.⁶ There are numerous issues raised by the question of the regulation of so-called ambush marketing techniques, including the relationship of non-source designating uses and commercial free speech, trademark authenticity and consumer information costs, business ethics and the limits of protection for commercial goodwill.⁷ The extent to which such techniques should be regulated may be hotly debated.⁸ Regardless of whether or not all such marketing techniques should be prohibited, what is undeniably clear is that ambush marketing techniques are becoming more complex and more entrenched than ever before. So is the potential economic impact of such marketing.

AMBUSH MARKETING WITH CHINESE CHARACTERISTICS

Coca-Cola is one of the official sponsors of the Beijing Olympics. To achieve this status, it is estimated to have paid over 100 million dollars to be a global sponsor of the Olympics.⁹ In

⁴ Tony Meenaghan, “Ambush Marketing — A Threat to Corporate Sponsorship,” 38 Sloan Management Review 103 (1996).

⁵ Id. See also Edward Vassallo, Kristin Blemaster, Patricia Werner, An International Look At Ambush Marketing, 95 TMR 1338 (2005)(discussing diverse instances of ambush marketing globally).

⁶ See, e.g., Anita M. Moorman, Consumer Attitudes of Deception and The Legality of Ambush Marketing Practices, 15 J. Legal Aspects Sport 183 (2005)(discussing the debate over the ethical objections to ambush marketing); Stephen McKelvey, An Analysis Of The Ongoing Global Efforts To Combat Ambush Marketing: Will Corporate Marketers “Take” The Gold In Greece?, J. Legal Aspects Sport 191 (2004); Jason K. Schmitz, Ambush Marketing: The Off-Field Competition at the Olympic Games, 3 Nw. J. of Tech. & Intell. Prop. 203 (2005) (available at <http://www.law.northwestern.edu/journals/njtip/v3/n2/6/> spring 2005).

⁷ Id.

⁸ For example some have suggested that differing rules should apply based on the size of the ambush marketer, or its status as a direct competitor of an official sponsor of the sporting event in question. See, e.g., Erinn Batcha, Who Are the Real Competitors in the Olympic Games? Dual Olympic Battles: Trademark Infringement and Ambush Marketing Harm Corporate Violations Against the USOC and Its Corporate Sponsors, 8 Seton Hall J. Sport L. 229 (1994)(suggesting differing applications for differently placed marketers). See also articles cited in notes 6 supra and 16 infra for additional dimensions of the debate).

⁹ Frederick Balfour, Ambush in Beijing: Official sponsors or not, companies are rushing to tie their products to the Summer Olympics (available at http://www.businessweek.com/magazine/content/08_12/b4076054803579.htm?campaign_id=rss_daily).

fact, eleven global sponsors--including Coca Cola —have reportedly spent a combined \$850 million to sponsor the Turin and Beijing Olympics.¹⁰ These monies are exclusive of the additional costs in promotional activities tied to the Games themselves. Given the strong cultural significance of the Olympics in China,¹¹ such affiliation with the Games is undoubtedly expected to have a positive effect on the merchandising activities and the brand reputation of Coca Cola, and other global sponsors, in China.¹²

While Coca Cola is an Olympic sponsor, its competitor, Pepsi Cola is not. Yet such non-sponsorship does not mean that Pepsi has withdrawn from the expected bonanza in good will and/or business expected from Olympic affiliation. To the contrary, in China, Pepsi's well known blue and red can has undergone a significant transformation. It has now become solid red and bears in Chinese characters the slogan "Team China."¹³ Similarly, Adidas is an Olympic Sponsor in China; its competitor Nike is not. However, over the past several months Nike has sponsored a series of advertisements in China featuring Chinese Olympic Gold Medalist Liu Xiang. Like Pepsi, Nike's ads do not feature the familiar Olympic five ring mark or make other direct reference to the Beijing Olympics. Yet, at a minimum, both companies' promotional endeavors are clearly designed to wrap the product in question with the aura of Olympic sponsorship and earn for their companies the anticipated benefits in goodwill and increased market sales such sponsorship may bring. Nike has gone even further and has entered into agreements with 22 of the 28 Chinese teams scheduled to compete in the Beijing Olympics so that these athletes will be wearing Nike branded clothing while competing.¹⁴

¹⁰ Shaun Rein, Beijing Olympic Sponsorship's a Waste, Forbes.com (April 24, 2008).

¹¹ See also Doris Estelle Long, *Trademarks and the Beijing Olympics: Gold Medal Challenges*, J. MARSHALL REV. INTEL. PROP. L (2008)(CHINA SYMPOSIUM ISSUE)(forthcoming).

¹² For a contrary view, see Rein, supra note 10 (contending that Olympic sponsorship is less important than reputation in China as a high quality product). The issue has become even more difficult to determine in light of diverse protests during the torch relay raised about China's conduct in connection with potential human rights abuses in Darfur and Tibet. See generally Joe McDonald, Tibet Conflict Increases Pressure On Olympic Sponsors (March 19, 2008)(available at http://www.huffingtonpost.com/2008/03/19/tibet-conflict-increases-_n_92467.html)(discussing the role of politics in diverse Olympic events including the scheduled Beijing Olympics and sponsor concerns); Navigating Olympic Sponsorship: Marketing Your Brand without Alienating the World, knowledge@wharton (April 16, 2008)(available at <http://knowledge.wharton.upenn.edu/article.cfm?articleid=1938>)(discussing various strategies sponsors may use in the face of political protests around sports events); Sophia Banay, Are the Olympics Worth It?, Conde Nast Portfolio.com (April 11 2008)(available at <http://www.portfolio.com/news-markets/top-5/2008/04/11/Olympic-Sponsorship-Dangers>)(discussing the potential adverse economic impact of political protests on sponsorship brands).

¹³ Balfour, supra note 9. For a sampling of Pepsi commercials featuring "Team China" see generally Youtube.com under the heading "Pepsi Chinese Advertisements."

¹⁴ Nike, Adidas and the Olympics (August 16, 2007)(available at <http://www.chinaeconomicreview.com/olympics/category/adidas>). See also Nike hopes for strong Olympic performance, www.chinaview.com (April 16, 2008)(available at http://news.xinhuanet.com/english/2008-04/16/content_7985926.htm).

There is no question that these efforts have been effective in confusing the public with regard to the relationship between the product company and Olympic sponsorship. A recent survey of consumers conducted by Ipsos Group revealed that the Chinese company Li Ning, which sells athletic gear and was started by the Chinese Olympic athlete of the same name is among the top ten ranked Olympic sponsors in China.¹⁵ By contrast, Adidas ranks 17th in sponsorship recognition. Adidas is an official sponsor of the Olympics. Li Ning is not, although its advertisements rely heavily upon associations with former and present day Chinese Olympic athletes.¹⁶ In another survey, thousands identified Pepsi as an Olympic sponsor.¹⁷ It is not clear precisely why Coca Cola and Adidas fared less well in the consumer recognition. What is clear is that attempts to confuse consumers regarding a company's sponsorship relationship to the Olympics are certainly working. Such victories are even more important in light of a report by R3 that indicates that roughly $\frac{3}{4}$ of Chinese consumers say they would give preference to products they associate with the Olympics.¹⁸

I do not mean to suggest that the problem of ambush marketing is unique to China. To the contrary, ambush marketing has a long career which has never been bounded by either geography or ingenuity.¹⁹ It is also not limited to Olympic events.²⁰ Reports indicate that it is on the rise.²¹ Part of the reason for the rise is the perceived economic value of athletic sponsorships in promoting consumer loyalty, and the increasing costs of legitimate sponsorships. According to the official website for the Beijing Organizing Committee for the Summer Olympic Games ("BOCOG"), eleven companies share the vaunted status of global sponsors, including Kodak, McDonald's and Lenovo (the only Chinese company in the list),²² at a reputed cost of between \$80 million to \$100 million, including in kind benefits.²³

In addition to providing valuable market benefits to sponsoring companies, sponsorships also provide much needed income to support the mega events in question. Sponsor payments

¹⁵See, e.g., Wang Shanshan, Olympic sponsors' ranking released, China Daily (October 8, 2007)(available at http://www.chinadaily.com.cn/bizchina/2007-08/09/content_6018475.htm); Daniel Allen, One World, One Dream Five Billion Consumers, Beijing This Month (October 10, 2007)(available at <http://www.btmbeijing.com/contents/en/business/2007-10/economy/olympicmarketing>); Gareth Powell, Companies are rushing to tie their products to the Summer Olympics (March 18, 2008)(available at <http://www.chinaeconomicreview.com/olympics/category/adidas>).

¹⁶ Allen, supra note 15.

¹⁷ Powell, supra note 15.

¹⁸ Id.

¹⁹ For some interesting examples of previous attempts at ambush marketing in connection with the Olympics see, e.g., Erinn M. Batcha, Who Are the Real Competitors in the Olympic Games? Dual Olympic Battles: Trademark Infringement and Ambush Marketing Harm Corporate Sponsors, 8 Seton Hall J. Sport. L. 229 (1998) and Companies are rushing to tie their products to the Summer Olympics (March 18th, 2008)(available at <http://www.chinaeconomicreview.com/olympics/category/adidas>).

²⁰ Id.

²¹ See articles cited note 9 supra.

²² See Sponsors of the 2008 Beijing Olympics Game, <http://en.beijing2008.cn/bocog/sponsors/sponsors>.

²³ See, e.g., Balfour, supra note 9; Rein, supra note 10.

and other marketing revenues are expected to cover the Games operating costs, estimated at about \$2.1 billion – a figure that does not include spending on venues and public facilities.²⁴ Indeed for the Beijing Olympics, the BOCOG has developed 5 sponsorship categories,²⁵ thus spreading the wealth in Olympic sponsorship, while potentially also spreading confusion among the public over what it means to be an Olympic sponsor. Yet while expanding the categories of sponsorship, China has also developed some new methods for combating ambush marketing that may prove useful in future endeavors.

Aware of the history of ambush marketing problems in connection with previous Olympic Games, the BOCOG has already conducted seminars directly aimed at dealing with the problem of ambush marketing.²⁶ It has also taken direct action to enhance the protection of Olympic Symbols in general, including against unauthorized business uses of the Olympics name.

SPECIAL PROTECTION FOR OLYMPIC SYMBOLS

In November 2001, the Beijing Municipality enacted Provisions for the Protection of Olympic Intellectual Property, effective November 1, 2001 which provided for protection for a broadly defined category of protected Olympic Intellectual Property, including “any trademarks, special symbols, patents, works and other creations related to the Olympics as stipulated in the Olympic Charter and any agreements concluded by the Beijing Municipal People's Government and the Chinese Olympic Committee (hereafter, the COC) with the International Olympic Committee (hereafter, the IOC).”²⁷ The protected Olympic Symbols included not merely the traditional Five Ring emblem of the Olympics, but also the “Flag, Anthem, Motto as well as the terms or designs containing the words OLYMPIC, OLYMPICS, OLYMPIAD, OLYMPIC GAMES, or any type of combination thereof,” as well as “the logos, mascots, names, symbols (including Beijing 2008), anthem and slogans developed by the Beijing 2008 Olympic Games Bid Committee and the BOCOG or others entrusted by them for their use during the period when Beijing bid for or host the Games of the XXIX Olympiad; and other Olympic intellectual property rights objects related to the Olympics.”²⁸ This broad definition for covered intellectual property was matched by an equally facially comprehensive definition of prohibited unauthorized uses, including “using the same or similar

²⁴ McDonald, *supra* note 12.

²⁵ See Sponsors of the 2008 Beijing Olympics Game, <http://en.beijing2008.cn/bocog/sponsors/sponsors>.

²⁶ BOCOG, sponsors join hands to fight ambush marketing (December 12, 2007)(available at <http://www.ebeijing.gov.cn/Recommendations/t908105.htm>).

²⁷ Protection of Olympic Intellectual Property Provisions by the Beijing Municipality, at Art. 2 entered into force November 1, 2001, English language translation available at <http://www.beijing12312.com/newsshow.asp?id=A200712191653506083091> (hereinafter “Declaration”). For an in depth discussion of the special laws established to protect Olympic Symbols in China, see generally Long, *supra* note 11.

²⁸ Declaration, Art. 3.

trademarks, special symbols, patents, works and other creations without authorization in production, business operations, advertising, propaganda, performance and other activities.”²⁹

The Declaration authorized municipal intellectual property, cultural, and enforcement offices, including the Beijing Administration for Industry and Commerce (BAIC), to enforce its provisions³⁰ and cited the “principles of safeguarding the dignity of the Olympic Games” as the basis for protection.³¹ The Chinese Government similarly enacted special regulations for the protection of the Olympic symbols.³² Similar to the Declaration by the Beijing Municipality, the Regulations define the protected “Olympic symbols” broadly, including “the Five Olympic Rings of the International Olympic Committee Flag, Motto, Emblem, and Anthem of the Olympic Games; the special terms of OLYMPIC, OLYMPIAD, OLYMPIC GAMES and their abbreviations” as well as “the mascots, anthem and slogans of the XXIX Olympic Games; the 'Beijing2008', the XXIX Olympic Games and their abbreviations” and “other symbols related to the XXIX Olympic Games prescribed in Olympic Charter and Host City Contract for the Games of the XXIX Olympiad.”³³

²⁹ Declaration, Art. 8.

³⁰ Declaration, Arts. 10 and 14. In Article 15, in keeping with the traditional “two paths” of enforcement, the Declaration provides that intellectual property owners also have the right to chose to file a lawsuit with the civil courts in lieu of pursuing administrative relief. It should be noted, that unlike the United States, administrative tribunals, such as the State Administration for Industry and Commerce (SAIC), which has primary administrative jurisdiction for trademark enforcement matters, the National Copyright Administration (NCA), which has primary administrative jurisdiction for copyright enforcement matters, and the State Intellectual Property Office (SIPO) which has primary administrative jurisdiction for patent enforcement matters, generally have enforcement powers, including the ability to investigate claims, secure evidence, seize infringing goods and adjudicate liability. They also usually have the power to issue injunctive relief (using in the form of a cease and desist orders) and to impose fines. They do not, however, have the ability to secure compensation for the intellectual property owner. Such relief is generally available, if at all, through civil litigation through the court system. This is an extremely telescoped explanation of Chinese enforcement modalities. The reality is far more complex, with numerous overlapping jurisdictions between the agencies listed above and several other agencies, including for example the Technical Supervisory Bureau. For a brief discussion of these issues see generally, Peter Ganea & Thomas Pattloch, *Intellectual Property Law in China* 289 - 341 (Kluwer Law International 2005).

³¹ Declaration, Art. 5 (“The protection of Olympic intellectual property rights shall comply with *the principles of safeguarding the dignity of the Olympic Games*, prohibiting any infringement of proprietary rights, as well as protecting and using such rights according to law.”)(emphasis added).

³² Regulations on the Protection of Olympic Symbols, Promulgated by Decree No. 345 of the State Council on February 4, 2002, with an effective date of April 1, 2002. English translation available at www.china.org.cn/english/China/208301.htm(hereinafter “Symbol Regulations). The State Council is the Highest Executive Organ of the Chinese Government. These Symbol Regulations and the Beijing Municipal Declaration are not the only special laws and regulations enacted in China in connection with protection of the Olympic Symbols. China also enacted a special registration processes to assure protection of the Olympic Symbols. See generally Stacey Wang, *Great Olympics, New China: Intellectual Property Enforcement Steps Up to the Mark*, 27 *Loyola L.A. J. Int’l & Comp. L. Rev.* 29 (2005)

³³ Symbol Regulations, Art. 2. With its reference to protection of “other symbols prescribed in the Host Contract for the Games.” Art. 2(6), the Symbol Regulations are clearly designed to assure that

Under the Regulations, unauthorized uses of the Symbols “for business purposes” (commercial use) are prohibited, including the unauthorized use of “the Olympic Symbols in advertisements, commercial exhibitions, commercial performance and other commercial activities.”³⁴ The Regulations expressly prohibit “[a]ny other activities [that] may make the third parties believe that there are sponsorship or other support relationships between the users and the right owners of the Olympic Symbols.”³⁵ The enforcement of these Regulations is given to the SAIC (State Administration for Industry and Commerce).³⁶ The Regulations, however, do not grant the SAIC exclusive jurisdiction over Olympic Symbol violations. Instead, Article 14 of the Regulations provides that Olympic Symbols “shall also be protected under the provisions of related laws and regulations, such as Copyright Law, Trademark Law and Regulations on the Administration of Special Signs (famous marks).”³⁷ Furthermore, Article 10 specifically recognizes the right of the owner to seek relief in the court if it so chooses.³⁸

The Chinese Government has mobilized an impressive array of enforcement measures to combat illegal use of the Olympic Symbols, including increased training programs for enforcement personnel and the establishment of a “rapid city Olympic intellectual property protection linkage mechanism” to provide fast action on potential infringements.³⁹ These enforcement efforts have not been limited to Beijing. To the contrary, enforcement sweeps have been planned for other major cities in China, including Qingdao, Tianjin and Shanghai during the critical pre and post Olympic Games period.⁴⁰

In addition to mobilizing traditional enforcement personnel, the Government has also mounted a public relations and education campaign that directly involves the public in protecting the Olympic Symbols. Not only have articles appeared stressing the harm that counterfeit

any Olympic Symbol required to be protected in accordance with the Host Contract with the IOC falls within their scope of protection. Unfortunately, it is not clear precisely which terms fall within the scope of this protection since the Host Contract is not publicly available. For purposes of this Article I will be focusing largely on efforts to protect the traditional Olympic symbols, including the five circle design, as well as the specialized symbols of the Beijing Olympics itself, including the five “mascots” of the Beijing 2008 Olympics and other marks containing Olympic references. For images of some of these symbols, see Beijing Olympics Website at <http://en.beijing2008.cn>. The five special mascots are generally referred to as “fuwa.” Each one represents one of the colors of the Olympic Rings. See generally The Official Mascots of the Beijing 2008 Olympic Games (available at <http://en.beijing2008.cn/spirit/beijing2008/graphic/n214068254.shtml>)

³⁴ Symbol Regulations, Art. 4.

³⁵ Symbol Regulations, Art. 5(6).

³⁶ Symbol Regulations, Art. 6. This agency is sometimes referred to as “AIC” for Administration for Industry and Commerce. Like the other administrative agencies referred to in this article, SAIC has diverse offices including those at the local level such as the Beijing Administration for Industry and Commerce (BAIC) which would be on the agencies with primary responsibility for enforcement activities around Olympic sites.

³⁷ Symbol Regulations, Art. 14.

³⁸ Symbol Regulations, Art. 10.

³⁹ Protection of the Olympic Symbol: Beijing is Resolute (available at www.chinafun.net/2008/preparation).

⁴⁰ Id.

products can cause,⁴¹ consumers have been drafted into the front lines of the enforcement effort. A hot line has been set up in Beijing and rewards are being offered for truthful information regarding infringing activity.⁴² Corporations are further being urged to take pledges to avoid infringing the Symbols.⁴³ Those who violate the Olympic Symbols may also find themselves subject to public criticism in the press.⁴⁴

CHALLENGING AMBUSH MARKETING: THE DIRECT APPROACH

The Chinese Government has developed a wide array of methodologies for combating ambush marketing. Significantly, both the Beijing Declaration and the Olympic Symbol Regulations contain express language that could be used as the basis for civil action against ambush marketers. The language in the Beijing Declaration and the Symbol Regulations regarding “other commercial activities”⁴⁵ that might be actionable could arguably include false sponsorship associations or false advertising claims regarding such sponsorship status. Thus, for example, Article 8 of the Beijing Declaration expressly prohibits “using the same or similar trademarks, special symbols, patents, works and other creations without authorization in production, business operations, advertising, propaganda, performance *and other activities*.”⁴⁶ It further prohibits “using the same or similar trademarks, special symbols, patents, works and other creations in a disguised form.”⁴⁷ The “other activities” language and the language regarding the use of Olympic symbols “in a disguised form” might provide a regulatory basis for challenging certain types of ambush marketing. The potential for such challenge appears heightened by the concluding section of Article 8 which prohibits “other infringements in violation of relevant laws and regulations of the State.”⁴⁸ Since Article 8, however, is largely based on the presence of unauthorized Olympic Symbols, it may prove less effective in mounting

⁴¹See, e.g., Beijing Seizes Nearly 30,000 Fake Olympic Products (available at <http://english.ipr.gov.cn/ipr/en/info>)(in case involving seizure of 12,800 partially finished Fuwa (the five mascots of the Beijing Olympics) and more than 12,700 finished products confiscated in February 2007, local official quoted in Beijing Daily Messenger as warning people against the health hazard posed by the products, which were sometimes filled with industrial waste that could threaten people’s health).

⁴² Symbol of Protection, *supra*. See also Declaration, Art. 11 (providing “Any organization and individual may report any activity in violation of Olympic intellectual property rights to the administrative departments of industry and commerce, intellectual property rights, copyright, etc.; and shall be rewarded if the case reported proves to be true.”).

⁴³ *Id.*

⁴⁴ Fake Ties, *supra*.

⁴⁵ Symbol Regulations, Art 5(3)(defining unauthorized uses as including “[t]o use the Olympic Symbols in advertisements, commercial exhibitions, commercial performance and *other commercial activities*”)(emphasis added); Declaration, Art.8 (providing “The following acts that infringe upon Olympic intellectual property rights are prohibited (1) using the same or similar trademarks, special symbols, patents, works and other creations without authorization in production, business operations, advertising, propaganda, performance and *other activities*.”)(emphasis added).

⁴⁶ Declaration, Art. 8(1).

⁴⁷ Declaration, Art. 8(3).

⁴⁸ Declaration, Art. 8(6).

challenges to marketing techniques such as those employed by Pepsi or Nike, where none of the Olympic symbology appears.⁴⁹

By contrast, however, Article 5(6) of the Regulations, prohibiting “any other activities [that] may make the third parties believe that there are sponsorship or other support relationships between the users and the right owners of the Olympic Symbols” appears to provide direct legal support to combat ambush marketing. Although the language itself is contained in a list of activities based on unauthorized use of Olympic Symbols, Article 5(6) does not contain such introductory wording. In fact, it is notable for the *absence* of any such direct reference to Olympic symbology in its prohibition.⁵⁰ To the contrary, the provision seems to anticipate false sponsorship claims even where Olympic marks do not directly appear. It is too soon to tell if such civil actions will be successful but at least the legal infrastructure is in place for them if any Olympic sponsor decides to seek relief.

In addition to the *promise* of enforcement contained in Article 5(6) of the Regulations, public enforcement against ambush marketers who use descriptive references to the Olympics appears readily available. Reported cases involve a wide array of Chinese businesses using references to the Olympics on packaging, napkins and other service items including a Chinese fireworks manufacturer who used the phrase “Wishing Success to the Beijing Olympics” on his product.⁵¹ He was not only fined and the packaging confiscated, his illegal activity was used as a public education tool so that others would learn about why such uses are illegal. This enforcement effort represents two interesting developments in ambush marketing protection. The first is the public relations aspect. In addition to seizing the items bearing the unauthorized references to the Olympics, reported stories indicate that enforcement officials are taking time to explain the regulations and the importance of protecting Olympic sponsorship. Unauthorized users are depicted as appreciating the need to protect the Olympic symbols after such educational efforts.⁵² The simple reporting of these efforts itself is a notable demonstration of a relatively new technique in China of directly engaging the public in the battle against ambush marketing and other false association efforts.

⁴⁹ Actions based on violations of unfair competition and anti-monopoly provisions, however, are arguably included within these prohibitions, thus, tying the special protection of the Beijing Declaration directly to the Chinese Unfair Competition Law. For a discussion of the application of Unfair Competition Law in China to ambush marketing, see notes 54 - 56 and accompanying text.

⁵⁰ By contrast, Sections 1 through 5 of Article 5 all expressly refer to the use of Olympic Symbols. Symbol Regulations, Arts. 5(1) – 5(5).

⁵¹ Fake Ties, China Daily (March 17, 2008) (available at http://www.sipo.gov.cn/sipo_English/news/iprspecial/200803/t20080317_236971.htm).

⁵² The fireworks manufacturer described his reaction to the enforcement effort against him as follows: “Originally, I felt the fine was undeserved as our incentive was to show our enthusiasm for the Games. However, after I learned the detailed regulations, I felt ashamed and became aware of the importance of the IPR.” Id. See also Symbol of Protection (available at <http://www.bjreview.com.cn/olympic/text/2007-01/16/content>)(describing efforts of enforcement personnel to explain to a restaurant owner why it could not use the phrase “Wishing The 2008 Beijing Olympics success on its napkins).

Second, these reported enforcement efforts demonstrate an interesting use of copyright law to combat ambush marketing. Problematic issues regarding whether the use of “Olympics” was as a source or association designator, or was simply a descriptive “fair use” of the term, are eliminated. Instead, the unauthorized use of phrases such as “Wishing you success in the Olympics” or “Wishing success to the Beijing Olympics” is deemed a copyright infringement.⁵³ Since China provides for administrative remedies in cases of copyright infringement, the National Copyright Administration (NCA) has jurisdiction and has bureaus through-out China that can be engaged in enforcement efforts aimed at such tactics.

In addition to legal infrastructures devised specifically to deal with the demands of the Beijing Olympics, existing unfair competition laws may also serve as a potent basis for supporting ambush marketing regulation. Article 9 of Chinese Unfair Competition Law expressly provides that “[m]anagers shall not use advertisement or the other methods to make a false propaganda for the quality, composition, function, usage, producer, time of efficacy and place of production of commodities.”⁵⁴ The “quality” of a good as being produced by an Olympic sponsor should qualify as the type of representation which, if false, is actionable under this provision. This argument is bolstered by Article 2 of the same law which provides: “Managers shall abide by the principle of voluntariness, equality, impartiality, honesty and good faith, and also adhere to public commercial moral in their business transactions.”⁵⁵ The term “manager” is defined under the law as “the legal person, the other economic organisations and individuals who deal with commercial business or profitable service (commodities in this Law in hereafter as to commodity which includes service)”⁵⁶ and should include most companies that might engage in ambush marketing. The SAIC and the Courts have joint enforcement responsibilities under this Act.

BEYOND LEGAL INFRASTRUCTURE

In addition to providing a legal infrastructure for combating ambush marketing, China has also planned a variety of other protection measures. In addition to public relations efforts to gain public participation in Olympic enforcement, the BOCOG has also entered into an extensive public relations effort to educate both Chinese businessmen and the general public about what qualifies as appropriate use of Olympic symbols. The main website on the Beijing Olympics sponsored by the BOCOG contains extensive English and Chinese language instructions regarding licensing and use of Olympic symbols.⁵⁷ As noted above, as opposed to offering two standard sponsorship categories: global sponsorship and China partnership, the BOCOG has arguably made sponsorship for smaller companies more affordable by offering lower cost

⁵³ Although short phrases are often seen as lacking the necessary originality under copyright, even under US law, such minimal phrases as “E.T. Phone Home have been held protectable. *Universal City Studios, Inc. v. Kamar Industries, Inc.*, 217 U.S.P.Q. 1162 (S.D. Tex. 1982),

⁵⁴ Anti Unfair Competition Law of the People's Republic of China, Art. 9 (English text available at <http://en.chinacourt.org/public/detail.php?id=3306>)(hereinafter “Unfair Competition Law”).

⁵⁵ Unfair Competition Law, Art. 2.

⁵⁶ Id.

⁵⁷ <http://en.beijing2008.cn/bocog/sponsors>.

categories. As a result, as of March 2008, over 60 companies had become registered Olympic sponsors.⁵⁸

The BOCOG is also applying practical solutions to reduce the economic benefit which might be derived from ambush marketing. Thus, for example, while athletes on Nike sponsored teams will be wearing Nike gear, if any of the athletes win, they are required to switch to Adidas clothing for all platform ceremonies, including the awarding of any medals.⁵⁹ Similarly, the BOCOG has established a black out in areas around and inside Olympic stadia and playing fields during the Games. Non-alcoholic beverages will be banned from Olympic venues.⁶⁰ T-shirts which prominently feature corporate logos or names not linked with the Olympic Games will similarly be banned.⁶¹ A ban has also been established on all non-Olympic national and international conferences in the city from August 1-September 23.⁶² Tight restrictions have been placed on outdoor advertising around Olympic venues and TV broadcasts will be monitored for illegal Olympic-related advertising. In addition to monitoring advertising content, the BOCOG has also placed a ban on any athletes making advertisements for non-Olympic-affiliated companies during the Games and will expel any athletes who violate the ban.

This monitoring effort is not limited to advertising venues in the hard goods world. To the contrary, the BOCOG has granted China Central Television (CCT) exclusive rights to stream Olympic events on the internet. CCT has established a working arrangement with My Space and the on-line video site Tudou.com to run an interactive Web site for the August Games. The website will go live on August 8, 2008, the opening day of the Games.

It is not yet clear who will be responsible for monitoring violations of these bans, or the extent to which such exclusivity will be effective particularly in the face of current disputes between two Chinese website operators over who has the exclusive right to post internet advertising for Olympic sponsors. Sohu, the Internet content sponsor of the Beijing Games, claims that online ads from other sponsors with the Beijing Olympics logo can only appear on its website. By contrast, Sina claims it has the right to attract advertisers, including Olympic sponsors, to its own website.⁶³ Who will ultimately win this dispute remains to be seen.

SELF HELP

In addition to the legal and practical efforts underway in China, many sponsors are also using self help methods to combat ambush marketing. Thus, for example, Coca Cola held an outdoor concert in Beijing on December 31, 2007, featuring a 50-foot-high Coke bottle covered

⁵⁸ <http://en.beijing2008.cn/bocog/sponsors/sponsors>.

⁵⁹ Balfour, *supra* note 9.

⁶⁰ Karolos Grohmann, IOC Braces for Beijing Ambush Marketing (Jan. 18, 2008)(available at <http://www.reuters.com/article/sportsNews/idUSL186277520080118>).

⁶¹ *Id.*

⁶² Fake ties, Chofn Trademark (March 2008) (available at http://www.bj-chofn.com/chofn_en/list.asp?id=420)

⁶³ Olympic war of words on Web, China Daily (September 21, 2007)(available at http://www.chinadaily.com.cn/olympics/2007-09/21/content_6124879.htm).

with LED screens flashing Olympic images. Lenovo, another Olympic sponsor has booked CCTV1 just before the 7 p.m. evening news—the top ad slot in China—and is running an animated "countdown to the Olympics" every day. These and other efforts serve as a useful adjunct in curbing the effectiveness of ambush marketing.

CONCLUSION

“Ambush marketing” remains a potent problem in the months leading up to the Summer Olympics in Beijing as companies vie for the benefits of sponsorship without paying the expensive licensing fees required for official sponsor status. To combat the increasingly inventive methods advertisers use to create an aura of sponsorship, without the costly price charged for such sponsorship, China has created a potent mix of new legal protections, and practical methodologies, which may prove useful in combating at least the most egregious efforts at usurping the economic value of “unpaid” Olympic “sponsorship.” Combining new uses for old doctrines such as copyright, with broadening bans on venue activities, China is struggling to deal with the mounting problem of ambush marketing in new ways. Whether such approaches ultimately prove effective remains to be seen.