

## 1. INTRODUCTION

Legal scholarship on the Olympics has previously tended to focus on outlining the legal landscape that exists around the Olympic Games.<sup>1</sup> Much of the work considering London 2012, for example, concentrated on descriptions of legal issues associated with ticketing, tax, eligibility to compete, doping, advertising, street trading and transport networks.<sup>2</sup> This piece adopts a different point of departure. Specifically, it critically locates what might be termed Olympic law within the tangled framework of an emergent transnational sports law,<sup>3</sup> as created by one of the world's most transnational bodies; the International Olympic Committee (IOC). What can be observed is that the IOC's process of law making is unique and does not appear to conform to the accepted paradigms associated with a transnational organisation. Essentially, a form of transnational law<sup>4</sup> is being created as a result of pressure being exerted by a single major

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<sup>1</sup> The best example of this is A Mestre, *The Law of the Olympic Games* (The Hague: TMC Asser Press, 2009). There are some notable exceptions, for example, M James and G Osborn, 'London 2012 and the impact of the UK's Olympic and Paralympic legislation: protecting commerce or preserving culture?' (2011) 74(3) *Modern Law Review* 410.

<sup>2</sup> See A Norris, 'Sporting chance' (2006) 156 *New Law Journal* 1465; V Horsey, R Montagon and J Smith, 'The London Olympics 2012 - restrictions, restrictions, restrictions' (2012) 7(10) *Journal of Intellectual Property Law and Practice* 715 and Hogan Lovells, 'London Olympics 2012 Restrictions on Marketing Strategies' available at: [http://m.hoganlovells.com/files/Publication/ba747e76-723b-4a49-865f-30d5a16c55a3/Presentation/PublicationAttachment/bad20ca5-22c4-4b97-9a6a-4ed84497eab2/London Olympics 2012 - restrictions on marketing strategies%20 2 .pdf](http://m.hoganlovells.com/files/Publication/ba747e76-723b-4a49-865f-30d5a16c55a3/Presentation/PublicationAttachment/bad20ca5-22c4-4b97-9a6a-4ed84497eab2/London%20Olympics%202012%20-%20restrictions%20on%20marketing%20strategies%202.pdf), last accessed 17/06/14.

<sup>3</sup> F Latty, 'Transnational Sports Law' [2011] 1-2 *The International Sports Law Journal* 34.

<sup>4</sup> A Duval, 'Lex Sportiva: A Playground for Transnational Law', 19(6) *European Law Journal*, 822 See also P Zumbansen, 'Transnational Law, Evolving' in J Smits (ed), *Encyclopaedia of Comparative Law*, (Cheltenham: Edward Elgar, 2012) 899-925 and K Foster, 'Global Administrative Law: the next step for global sports law?' (2011) 19(1) *Sport and the Law Journal* 45.

international private association.<sup>5</sup> The key distinction in this law making process is that this pressure to enact law is exerted upon individual nation states by the IOC for the benefit of its commercial partners and those of the organising committees of the Olympic Games,<sup>6</sup> whereas international law is usually created as a result of those nation states entering into Treaties with each other, or with transnational organisations, for the benefit of all.<sup>7</sup>

This article analyses the phenomenon of Olympic law making, and considers whether the legal framework demanded by the IOC via the Host City Contract conforms to accepted norms of transnational law creation, or whether in fact it provides evidence of a distinctive sub-category. Within this analysis, three specific issues are drawn out. First, that the IOC is a distinctive form of transnational body creating a distinctive type of sports law that is effectively forcibly transplanted from the host jurisdiction of one event to the next, under threat of removal of the hosting rights, thereby producing a self-referential normative framework. Secondly, that these enforced transplants are becoming accepted norms without any real Parliamentary interrogation as a pragmatic response to the IOC's requirement to pass legislation of this kind.<sup>8</sup> Thirdly, these

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<sup>5</sup> On the legal status of the IOC, see further below, n 17.

<sup>6</sup> For example, the only other entity whose symbols are protected specifically by law is the Red Cross (and related organisations) by s 6 Geneva Conventions Act 1957, a protection granted for obvious humanitarian, not commercial, purposes.

<sup>7</sup> Latty, above n 3, at 35. See generally on international organisations and their development within the context of international law J Alvarez, 'International Organizations: Then and Now' (2006) 100 *American Journal of International Law* 324.

<sup>8</sup> See in particular Lord Davies of Oldham, HL Deb, 11 January 2006, c249 and the general House of Commons debate at HC Deb, 21 March 2006, c208, where the scope of, but not the need for, these provisions is discussed. The need is attributed solely to the demands of the IOC as defined in the Host City Contract.

Olympic laws are regularly used as a template for similar legal protections to be demanded by, or offered to, the organisers of other sporting mega events.<sup>9</sup>

Whilst Olympic and sports law focussed, this article raises important broader points, in particular, the need to resist legal expansion without proper accountability and stress testing, and the need to guard against forced, and potentially dangerous, transplants. It examines the concept of legal transplant through the prism of Olympic law and analyses the impact that such transplants have on national law and the law-making process. It concludes by demonstrating that the IOC is able to exploit its unique position in world sport to create transnational legal norms that it then forces nation states to implement by means of the Host City Contract.

## **2. THE IOC AS TRANSNATIONAL BODY**

Transnational organisations (TNOs) have been defined as ‘all enterprises which control assets – factories, mines, sales offices, and the like in two or more countries.’<sup>10</sup> Huntington has provided a more sophisticated definition whereby a TNO,

[I]s characterised by: (1) being a “relatively large, hierarchically organised and centrally directed bureaucracy”; (2) performing “a set of relatively limited, specialized and in some sense, technical functions”; and

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<sup>9</sup> See further, A Louw, *Ambush Marketing and the Mega-Event Monopoly* (The Hague: TMC Asser Press, 2012), ch 4.

<sup>10</sup> United Nations Centre on Transnational Corporations, *Transnational Corporations in World Development: A Re-examination* (New York: UN E/C, 1978) and see also H Cantelon and M Letters, ‘The Making of the IOC Environmental Policy as the Third dimension of the Olympic Movement’ (2000) *International Review for the Sociology of Sport* 294.

(3) performing these “functions across one or more international boundaries and in so far as possible, in relative disregard of those boundaries”.<sup>11</sup>

The construction of a TNO is usually thought of in economic terms, that is to say theories of TNOs tend to concentrate around flow of capital and impact of infusions of capital upon host countries. Crucially though, it has been argued that other intangible aspects should also be taken into account, such as international solidarity and global culture.<sup>12</sup> This addition of a cultural component adds an important dimension in terms of understanding the Olympics,<sup>13</sup> especially given the cultural and commercial tensions at the heart of the modern Olympic Movement and Games.<sup>14</sup>

Further, the IOC describes itself as, ‘an international non-governmental non-profit organisation, of unlimited duration, in the form of an association with the status of a legal person, recognised by the Swiss Federal Council’.<sup>15</sup> Therefore, the IOC may be classified as a both a transnational organization *and* an international non-governmental organization.<sup>16</sup> Despite this categorisation, the IOC and its ‘law making’ capabilities do not sit comfortably with analyses of how other TNOs, particularly transnational sporting bodies, operate. For example,

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<sup>11</sup> Macintosh and Hawes are clear that the IOC is a TNO; see D Macintosh and M Hawes, ‘The IOC and the World of Interdependence’ (1992) *Olympika: The International Journal of Olympic Studies* 29, at 35.

<sup>12</sup> See A de Swann, *Social Policy beyond borders: The social question in transnational perspective* (Amsterdam: Amsterdam University Press, 1994)

<sup>13</sup> See further, Macintosh and Hawes, above n 11 and Cantelon and Letters, above n 10.

<sup>14</sup> James and Osborn, above n 1.

<sup>15</sup> Rule 15(1) Olympic Charter 2013. The full text of the Olympic Charter is available at: [http://www.olympic.org/Documents/olympic\\_charter\\_en.pdf](http://www.olympic.org/Documents/olympic_charter_en.pdf), last accessed 16/06/14.

<sup>16</sup> B Herguner, ‘The IOC as a Transnational Organisation: Paradigm shift and its rising role on global governance’ (2012) 15(2) *International Area Studies Review* 176, at 178.

the global governing body of football, the Fédération Internationale de Football Association, acts as a privately constituted regulatory body for its own family of sports;<sup>17</sup> the World Anti-Doping Agency (WADA) is a public-private partnership created as a joint venture between privately constituted international sports federations and governments/public bodies, such as national anti-doping agencies, to regulate doping;<sup>18</sup> and the Court of Arbitration for Sport (CAS) is an arbitral body overseeing good governance issues relating to many sports bodies.<sup>19</sup>

The IOC sits outside these paradigms as it has no sporting activity to directly regulate or govern, and is not acting in partnership with governments, or on the basis of responsibility delegated to it from either the public or private sector.<sup>20</sup> Instead, it posts invitations to tender for the Olympic Games and promotes the principles of Olympism, with its relationships with nation states governed by contract. Thus, the IOC is forced to act in a very distinct way with respect to its need to create law. It is this distinctiveness, this uniqueness, that makes the IOC an interesting 'playground'<sup>21</sup> in which to analyse transnational law as it does not sit comfortably within the traditional categorisations.

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<sup>17</sup> J Sugden and A Tomlinson, 'Power and Resistance in the Governance of World Football: Theorizing FIFA's Transnational Impact' (1998) 22(3) *Journal of Sport and Social Issues* 299.

<sup>18</sup> On the World Anti-Doping Agency as a hybrid form of public/private governance mechanism see L Casini, 'Global Hybrid Public-Private bodies: The World Anti-Doping Agency' [2009] *International Organizations Law Review* 421.

<sup>19</sup> On the role of the Court of Arbitration for Sport see, I Blackshaw (ed), *The Court of Arbitration for Sport 1984-2004* (The Hague: TMC Asser Press, 2006).

<sup>20</sup> L Casini, 'Beyond the state: the emergence of global administration' in S Cassese et al (eds, 3<sup>rd</sup> edn), *Global Administrative Law: The Casebook*, (New York: IRPA-IILJ, 2012) ch11.

<sup>21</sup> Duval, above n 4.

Whilst the IOC is non-governmental, it does often replicate the form and structure of a nation state. National Olympic Committees (NOCs) are the IOC's 'in-country' representatives, not a country's representative at the IOC,<sup>22</sup> replicating the basic structures within which individual nation states construct their own internal architecture to regulate athletes.<sup>23</sup> That the IOC transcends national boundaries is clear,<sup>24</sup> and as such it can be described as a 'norm carrier',<sup>25</sup> where its norm carrying capacity entails the ability to generate, diffuse and facilitate the cooperation needed to implement new norms.<sup>26</sup> A prime example of this can be seen in the IOC's requirement that host nations pass legislation that ensures key commercial, intellectual property and associated rights vested in the Olympic Movement, and the specific edition of the Olympic Games, <sup>27</sup> are protected adequately.<sup>28</sup> Thus, what begins to emerge is that the IOC's lack of a formal legislative capability has a direct impact upon national governments,<sup>29</sup> by requiring the enactment of the legal guarantees specified in

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<sup>22</sup> Rule 27(1) Olympic Charter 2013, 'The mission of the NOCs is to develop, promote and protect the Olympic Movement in their respective countries, in accordance with the Olympic Charter', above n 15.

<sup>23</sup> M Nelson, 'Stuck between interlocking rings: Efforts to resolve the conflicting demands placed on Olympic National Governing bodies', (1993) 26 Vanderbilt Journal of Transnational Law 895.

<sup>24</sup> The IOC also has observer status at the United Nations, further evidence of its accumulation of state-like trappings. See further, IOC, 'IOC becomes UN observer' 19 October 2009, available at: <http://www.olympic.org/content/news/media-resources/manual-news/1999-2009/20091/10/17/ioc-becomes-un-observer-/>, last accessed 16/06/14.

<sup>25</sup> M Finnemore and K Sikkink, 'International norm dynamics and political change' (1998) 52(4) International Organization 887. As Zumbassen notes, transnational law is constantly changing and evolving, and 'must be seen in the context of a vibrant interdisciplinary discourse about the status and role of law in an increasingly inchoate, globe-spanning web of regulatory regimes, actors, norms and processes', above n 4, p899.

<sup>26</sup> R Campbell, 'Specifying the global character of sports authority' (2013) 2 Public Diplomacy Magazine 17.

<sup>27</sup> S Stuart and T Scassa, 'Legal guarantees for Olympic legacy' [2011] Entertainment and Sports Law Journal, online, available at: <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/>, last accessed 16/06/14.

<sup>28</sup> These rights are incredibly valuable. In February 2014, Panasonic renewed its sponsorship of the IOC at a cost of \$50m per year for the period 2017-2024, <http://www.sportsbusinessdaily.com/SB-Blogs/On-The-Ground/2014/02/SochiSiteTOPprice.aspx>, last accessed 16/06/14.

<sup>29</sup> Herguner, above n 16.

the Host City Contract by the relevant legislatures,<sup>30</sup> and resulting in the creation of ‘Olympic law’.

### **3. THE IOC AS A DRIVER OF TRANSNATIONAL LAW**

The constitutional instrument for the Olympic Movement is the Olympic Charter, which also provides the governing statutes for the IOC.<sup>31</sup> As an instrument of transnational intent, it provides the overarching commitment of the IOC to other transnational bodies such as WADA and CAS, and identifies CAS as the ultimate arbiter of disputes concerning the Charter’s interpretation or application.<sup>32</sup> This illustrates the primacy of the Charter and how it can drive the creation of legal norms through the Host City Contract requirements (which defines the legal, commercial and financial obligations of the IOC, host legislature, host city and host NOC) and the various Technical Manuals (which are incorporated into the Host City Contract and cover areas such as accommodation, brand protection and media issues).<sup>33</sup>

The IOC is recognised and governed by Swiss law, but it promotes and organises Olympic events, and upholds Olympic ideals, across geographic and national borders. This rather curious arrangement corresponds neatly to Cotterell’s definition of transnational law:

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<sup>30</sup> Clauses 40-42 Host City Contract, available at: [www.gamesmonitor.org.uk/files/Host%20City%20Contract.pdf](http://www.gamesmonitor.org.uk/files/Host%20City%20Contract.pdf) last accessed 6 February 2015.

<sup>31</sup> Above, n 15.

<sup>32</sup> Rule 61 Olympic Charter (2013), above n 14, and further M James and G Osborn ‘The Sources and Interpretation of Olympic Law’ (2012) 12(2) Legal Information Management 80.

<sup>33</sup> Following a Freedom of Information request to the Greater London Authority, all 27 Technical manuals relating to the London 2012 Games were made available at: <http://www.gamesmonitor.org.uk/node/935>, last accessed 16 June 2014.

For many scholars, a new term has seemed necessary to indicate new legal relations, influences, controls, regimes, doctrines and systems that are not those of nation state (municipal) law, but, equally, are not fully grasped by extended definitions of the scope of international law. The new term is 'transnational law', widely invoked but rarely defined with much precision.<sup>34</sup>

Thus, the IOC is state located, but its reach is extended in a new form of legal relationship, as Cotterell says, not fully grasped by international law definitions. Scott et al note the emergence of forms of governance that were once designated by a specific nation state, but are now operating increasingly beyond the purview of municipal law, where the powers are exercised by bodies outside of national governments.<sup>35</sup> Sport provides a perfect example of this phenomenon and a useful testing ground for transnational lawyers to analyse, as the transnational nature of sports law has led to a form of law outwith traditional notions, or conceptualisations, of individual state led and oriented law.

The IOC is creating transnational legal norms by requiring specific laws to be enacted for its own benefit. These laws then act as a template for further forced legal transplants at later Olympic Games and, potentially, other sporting mega events, driving the development of transnational sports law through the creation of Olympic legal norms and, ultimately, Olympic law. Thus, these enforced transplants are a means of extending the law making power of the IOC from the

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<sup>34</sup> R Cotterell, 'What is transnational law?' (2012) 37 *Law and Social Inquiry* 500.

<sup>35</sup> C Scott, F Cafaggi and L Senden, 'The conceptual and constitutional challenge of transnational private regulation' (2011) 38(1) *Journal of Law and Society* 1.



contractual, through the Host City Contract, to the municipal, by legislation. For example, the London Olympic Games and Paralympic Games Act 2006 illustrates how the UK state ensured that it had dealt with the specific requirements of the IOC as detailed in the requirements of the Host City Contract.

Olympic law can, therefore, be distinguished from other commonly acknowledged forms of sports law. Whether in its Anglicised or Latinised form as *lex sportiva*, the definition of sports law remains highly contested, and indeed its existence as a discrete discipline continues to generate debate.<sup>36</sup> Siekmann has attempted to explore the etymology and scope of the various terminologies,<sup>37</sup> although sports law scholars have often been guilty of using these terms interchangeably.<sup>38</sup> This debate aside, it is now undeniable that there is in place a system of regulatory governance in sport, however it is conceptualised,<sup>39</sup> although it is premature to claim that a fully functioning transnational legal system for sport is yet in existence.<sup>40</sup> Despite this lack of agreement, the analysis of the predominant terms is of special interest to legal theorists who see sport as a regulatory regime juridifying into a form of transnational law outside the review of national courts.<sup>41</sup>

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<sup>36</sup> See T Davis, 'What is Sports Law?' (2011) 11 *Marquette Sports Law Review* 211, M Beloff, 'Is there a *lex sportiva*?' [2005] *International Sports Law Review* 49.

<sup>37</sup> R Siekmann, 'What is sports law? *Lex sportiva* and *lex ludica*: a reassessment of content and terminology' (2011) 3/4 *International Sports Law Journal* 3-13 and for a collection of essays on this topic, R Siekmann and J Soel (Eds), *Lex Sportiva: what is sports law?* (The Hague: TMC Asser Press, 2012).

<sup>38</sup> K Foster, 'Is there a Global Sports Law?' (2003) 2(1) *Entertainment Law* 1.

<sup>39</sup> Foster, above n 4.

<sup>40</sup> Duval, above, n 4, at 834.

<sup>41</sup> Foster, above n 3, at 45.

Engagement with this debate is beyond the scope of this article. There is, however, a degree of acceptance coalescing around the meanings of some of the more commonly used terms.<sup>42</sup> International sports law, as a branch or form of international law, is the law that can be applied by national and supranational courts, including areas of public international law that are applicable to sport and the engagement of EU law with sport.<sup>43</sup> Transnational, or global, sports law is the private, autonomous self-regulation of sport by sport;<sup>44</sup> it exists outside traditional definitions of law, is something ungoverned by national legal orders with an appearance of immunity from formal law and the potential to operate transnationally.<sup>45</sup> *Lex sportiva*, perhaps the most contested of the various terms, is used either co-extensively with transnational or global sports law, or to indicate a specific subset thereof, namely the jurisprudence and interpretative norms of CAS.<sup>46</sup>

Olympic Law does not fit easily within any of these definitions. On the one hand, if we are relatively agnostic towards the source of law,<sup>47</sup> then the Olympic Charter and anything associated with the Olympic Games can be seen as

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<sup>42</sup> See in particular the extended discussions in Siekmann and Soel, above n 37.

<sup>43</sup> R Siekmann, 'What is Sports Law? A Reassessment of Content and Terminology' in Siekmann and Soel, above n 37, 359-391 and R Parrish, 'Lex Sportiva and EU Sports Law', (2012) 37(6) European Law Review 716-733.

<sup>44</sup> Latty, above n 3 and Siekmann, above n 37.

<sup>45</sup> For example, complex sporting-legal issues are often heard before the Court of Arbitration for Sport instead of domestic courts, including the combined employment law and free movement cases of *Wigan Athletic FC v Heart of Midlothian* CAS 2007/A/1298, *Heart of Midlothian v Webster & Wigan Athletic FC* CAS 2007/A/1299 and *Webster v Heart of Midlothian* CAS 2007/A/1300 available at: <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1298.%201299.%201300.pdf>, last accessed 6 February 2015.

<sup>46</sup> Siekmann, above n 43, Beloff, above n 36 and K Foster, 'Lex Sportiva: Transnational law in action' in Siekmann and Soel, above n 37, 235-250.

<sup>47</sup> Duval, above n 4, at 836.

transnational law,<sup>48</sup> though it is not regulating a specific activity as would an international sports federation, as it is creating transnational legal norms. On the other, the creation of municipal law at the behest of the IOC is something outside of any of the accepted definitions of sports law and sits uneasily alongside accepted definitions of transnational law as it is the forced creation, or even the forced transplantation, of law in the jurisdiction hosting the Olympic Games. This alternative interpretation appears to be a new category of transnational law; it is national law forced into existence by transnational norms created by a private transnational organisation. Thus, the IOC does not fulfil its tasks in cooperation with states,<sup>49</sup> but by requiring them to act on its behalf.

#### **4. OLYMPIC LAW AND 'FORCED' TRANSPLANTS**

Discussing International Organizations generally, Alvarez noted that,

As [International Organisations], whether prompted by the functionalist needs of their members or the desires of their bureaucrats, expand their original mandates, their normative reaches extend beyond what their creators had anticipated, generating yet more regulatory imperatives to resolve the resulting potential conflicts.<sup>50</sup>

This neatly encapsulates the key issues relating to the growth and purview of Olympic law in particular and sports law more generally; it alludes to notions of juridification in its many forms, and that the original reach of sports bodies, their regulations and their rules will extend beyond what was originally intended or

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<sup>48</sup> Zumbansen, above n 4, at 900.

<sup>49</sup> S Hobe, 'Global challenges to statehood' (1997) 5(1) *Indiana Journal of Global Legal Studies* 191-209, at p 196.

<sup>50</sup> Alvarez, above n 7, at 328.

foreseen.<sup>51</sup> This latter issue is returned to below in Sections 5 and 6. However, in order to understand the extension and scope of this normative reach as regards the IOC we need to appreciate the processes that we are witnessing. Whilst we initially identified this process as one of legislative creep,<sup>52</sup> the process can also be seen through the lens of legal transplant.

The essence of the process of creep is that proven practices and approaches are utilised in similar contexts. According to Klauser, '[T]he reproduction of best practices involves not a mechanical succession of steps and procedures, but an iterative patch of meandering and temporally overlapping paths.'<sup>53</sup> The focus here is not a simple translating of practice across events and learning from past experiences generally, but something more specific concerning the provenance, reach and applicability of laws across such events. On one level, it can be observed how a mega event such as an edition of the Olympic Games might learn from experiences at previous Games. However, for our purposes it also necessitates an analysis of this process in terms of the creation of new legislation that expands the scope of the law beyond its predecessor and is driven by the transnational norms created by the IOC. By unpacking the concept of creep to illustrate the iterative, and arguably disconnected, process of the creation and

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<sup>51</sup> It must be borne in mind that juridification is a nuanced term; there is a voluminous literature but within the context of sport see K. Foster 'Juridification in Sport' in S. Greenfield and G. Osborn (eds) (2006) *Readings in Law and Popular Culture* (London: Routledge) and S. Greenfield, G. Osborn and JP Rossouw 'The juridification of sport: A comparative analysis of children's rugby and cricket in England and South Africa' *Journal for Juridical Science* 2011 36(1).

<sup>52</sup> On legislative creep see M James and G Osborn, 'Legislative creep: unpacking lex Olympica' presentation at Sport and EU Annual Conference, Swiss Graduate School of Public Administration, Lausanne, 21 June 2012 ([at 30:30mins](#)).

<sup>53</sup> F Klauser, 'The Exemplification of 'Fan Zones': Mediating Mechanisms in the Reproduction of Best Practices for Security and Branding at Euro 2008' (2011) 48(15) *Urban Studies* 3203, at 3206. Klauser's study focussed on the use of transnational security exemplars from EURO 2008 at World Cup 2010, his argument being that they potentially restrict local autonomy and reduce debate.

development of these transnational laws, this phenomenon can be viewed as a form of legal transplant

Legislative creep, as we originally defined it, is the incremental, and often unchecked, extension of legislative provisions to contexts and/or jurisdictions beyond the context or jurisdiction for which they were originally intended. Broadly construed, it refers to the process by which legal frameworks will develop and grow reflexively, drawing upon past experience and often responding to close loopholes identified by event 'post-mortems'. It tends to be iterative and has a tendency to increase the breadth of legislative scope by drawing upon past experience whilst also anticipating future developments. Whilst the concept describes the process that occurs,<sup>54</sup> from a transnational law perspective this process can be viewed as a form of legal transplant.

On one level this creep can essentially be seen as an iterative development of perceived legal 'best practice' from one thematically related event to another. Crucially, this is effectively a forced legal transplant – something that is required of the host in order to conform with transnational norms, dictated and required by the IOC in this case. The effect is the incremental extension of legislative provisions *within the same context*, but transplanted to a new jurisdiction outside that for which they were originally intended. The 'creep' identified is twofold: the *extension of the legislative protections offered* and that these protections are enacted in a *new jurisdiction*. This is illustrated below in section 5 with a case

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<sup>54</sup> We previously stratified this again as horizontal and vertical legislative creep, but both are instances of a process that can be seen as legal transplant

study detailing the extension and transplantation of laws to combat ambush marketing from one edition of the Olympic Games to the next. This is a development of the definition of 'horizontal creep' used by Johnson who sees the process as, 'the protection afforded to an event in one country...used to justify protection in another country'.<sup>55</sup> Thus, there is more than the transplantation of the justifications for transnational benchmarking occurring here; it is the assumption that such justifications persist, that the transplanted law is necessary and needs extending, and that it is appropriate for transplantation to the new host.<sup>56</sup> This lack of interrogation of this process is exacerbated where we see a further, more nuanced, form of transplant: the extension of existing legislative provisions to contexts and jurisdictions beyond those for which they were originally intended. It is the use of domestic, or municipal, law created for a specific reason as a template for the law concerning a mega event, or the provisions enacted for one event, for example, an edition of the Olympic Games, being utilised for a different event such as the FIFA World Cup or Commonwealth Games. This concept is examined below in our second case study on ticket touting. In situations such as these, the necessity and appropriateness of this form of transplant is not effectively interrogated prior to the transplant, but assumed on the basis of the perceived success of the original in its very different context.<sup>57</sup>

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<sup>55</sup> P Johnson, 'Look out! It's an ambush!' [2008] *International Sports Law Review* 24, at 27.

<sup>56</sup> Above, n 8.

<sup>57</sup> Above n 8 and see further the explanatory notes for ss 31 and 33 of the London Act, available at: <http://www.legislation.gov.uk/ukpga/2006/12/notes/contents> last accessed, 6 February 2015.

The notion of legal transplant is a potentially illuminating theoretical tool with which to interrogate the processes we have identified. Whilst the broader literature on legal transplants is vast,<sup>58</sup> Amos notes that the study is relatively underdeveloped in terms of its application in the United Kingdom.<sup>59</sup> When considering the creation of new laws or law reform Grajzl and Dimoitrova-Grajzl consider that 'jurisdictions face a choice between two basic means of supplying new laws: indigenous lawmaking and transplantation of legal rules from other jurisdictions.'<sup>60</sup> Small puts it thus:

The debate essentially revolves around the question of whether and to what extent law is transferrable between different cultures. On the one hand, the so called culturalists posit that success or failure of a legal transplant depends on the culture from which the law originates and the culture into which it is transplanted. On the other hand the transferists argue that law is autonomous from culture and, as such, good law is transplantable irrespective of culture.<sup>61</sup>

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<sup>58</sup> The classic underpinning work is perhaps that of Alan Watson, *Legal Transplants: An Approach to Comparative Law*, (Edinburgh: Scottish Academic Press, 1974) and 2<sup>nd</sup> ed. (Athens: University of Georgia Press, 1993) but others include O Khan-Freund, 'On uses and misuses of comparative law', (1974) 37 *Modern Law Review* 1 and a very useful typology is presented by J Miller 'A typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51 *American Journal of Comparative Law* 839.

<sup>59</sup> M Amos, 'Transplanting Human Rights Norms: The Case of the United Kingdom's Human Rights Act' (2013) 36 *Human Rights Quarterly* 386.

<sup>60</sup> P Grajzl and V Dimoitrova-Grajzl, 'The Choice in the Lawmaking Process: Legal Transplants vs Indigenous Law' (2009) 5(1) *Review of Law and Economics* 615, at 615.

<sup>61</sup> R Small, 'Towards a theory of contextual transplants' (2005) 19 *Emory International Law Review* 1431, at 1431. See further, N Foster, 'Transmigration and Transferability of Commercial Law in a Globalised World' in A Harding and E Özücü (Eds), *Comparative Law in the Twenty first Century* (The Hague: Kluwer Law International, 2002), 55-73.

Whichever approach is preferred, the essential debate is usually whether, in the case of law that is in some way transplanted, this operation is a success or failure. In terms of Olympic law, the process is extraordinarily self-referential and self-fulfilling.

Perhaps uniquely, we are seeing a very specific form of transplant, one that is forced upon the host by a private body, under threat that if there is a failure to comply, the invitation to host the Olympic Games will be withdrawn. Thus, Olympic Law is created as a condition or requirement of the private body. It is also a very one-sided process, led in this case by the IOC itself, that runs the risk of appearing to be an autonomous, closed, self-regulating system operating outside of the review of the courts.<sup>62</sup> Further, there could be instances of disconnection where the specificities of the host are not taken into account, for example, if the IOC's demands conflict with the new host's constitution or human rights obligations;<sup>63</sup> potentially too this disconnection becomes more pronounced as the transplant is de-contextualised across events, as in seen in case study 2.

## **5. CASE STUDY (1) AMBUSH MARKETING PROVISIONS AT THE OLYMPIC GAMES**

All prospective Host Cities will already have in place some form of intellectual property protection, enacted nationally and in many cases homogenised via

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<sup>62</sup> Foster, above n 4, at 45.

<sup>63</sup> For a discussion on how the IOC's anti-ambush marketing requirements may contravene the right to free speech, see K de Beer, 'Let the Games begin ... ambush marketing and freedom of speech' (2012) 6(2) Human Rights and International Legal Discourse 284.



protocols such as the Berne Convention and the Nairobi Treaty.<sup>64</sup> The question will be whether the efficacy and extent of the host's intellectual property regime meets the IOC's requirements or whether it needs to be altered or strengthened in order to secure compliance. As Marcus notes,

The IOC's mandate, while clearly defined appears self-contradictory. On one hand, a guarantee must be given that legislation will be passed. The inference here is that some new or additional law must be passed ... Yet, this requirement is followed by the instruction to "study existing laws" and discern "where additional legislation is needed."<sup>65</sup>

Here our focus turns to the IOC requirement that host cities create specific statutory provisions through their national legislatures to counter ambush marketing. That London 2012 drew on the experiences of earlier Olympics is evident and admitted.<sup>66</sup> This ultimately led to the enactment of legislative protections that were stricter than those seen at previous Games, with Bond noting that, 'I think it's a trend that is only going to increase in terms of protection of the Olympics at least.'<sup>67</sup>

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<sup>64</sup> Berne Convention for the Protection of Literary and Artistic Works and the Nairobi Treaty on the Protection of the Olympic Symbol. See further, R Jacob, 'Trade Marks and the Olympic Games throughout the years' [2001] *European Intellectual Property Review* 1.

<sup>65</sup> J Marcus, 'Ambush marketing: an analysis of its threat to sports right holders and the efficacy of past, present and proposed anti-infringement programmes', [2011] 3-4 *International Sports Law Journal* 97, at 101.

<sup>66</sup> See R Caborn, SC Deb, October 18, 2005, c 118 and M Miller, SC Deb, October 18, 2005, c 120.

<sup>67</sup> D Bond, Field Fisher Waterhouse, quoted in B Wilson, 'Canadian lessons on ambush marketing for London 2012', BBC website, 2010, March 1 available at: <http://news.bbc.co.uk/1/hi/business/8519967.stm>, last accessed 16/06/14.

Ambush marketing is generally understood to be where an advertiser makes a deliberate and unauthorised association with an event with a view to exploiting the goodwill or wider public interest in it for commercial purposes.<sup>68</sup> This can be broken down further into two discrete sub-categories of ambush marketing, although this typology does not capture the full range of potential ambush activity.<sup>69</sup> First, ambushing the event; this is where the ambusher tries to take advantage of the general goodwill and interest in the event and attempts to draw attention to its own brand.<sup>70</sup> Secondly, ambushing an official sponsor. This is where the ambush is directed specifically at one of the event's official sponsors and partners with a view to undermining and/or parodying its own event-related marketing campaign.<sup>71</sup>

The IOC and OCOGs have specific concerns about both kinds of ambush marketing strategies. The IOC requires 'clean venues' and 'clean event zones' within which all marketing is either prohibited or very strictly controlled.<sup>72</sup>

Further, there is a commercial imperative that requires the IOC to protect the

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<sup>68</sup> There is a wealth of literature on ambush marketing, its definition and examples of its impact. Useful starting points are J Hoek and P Glendall, 'Ambush Marketing: more than just a commercial irritant?' (2000) 1(2) Entertainment Law 72, James and Osborn, above n 1, and D Ellis, T Scassa and B Seguin, 'Framing ambush marketing as a legal issue: an Olympic perspective' (2011) 14 Sport Management Review 297.

<sup>69</sup> See footnote 78, below, and further, Louw, above, n 9.

<sup>70</sup> For example, Paddy Power's Olympic advert proclaimed that it was sponsoring the largest sporting event in London. This was strictly true, as it was sponsoring the World Egg and Spoon Championships in the French hamlet of London. See further, <http://www.marketingweek.co.uk/news/paddy-power-olympic-ambush-avoids-ban/4002953.article> and <http://www.theguardian.com/media/2012/jul/25/paddy-power-action-locog-billboards-campaign>, both last accessed 16/06/14. On the many small businesses that used the Olympic symbols without permission see, D Segal, 'Brand Police Are on the Prowl for Ambush Marketers at London Games' 24 July 2012, The New York Times, available at: <http://www.nytimes.com/2012/07/25/sports/olympics/2012-london-games-brand-police-on-prowl-for-nike-and-other-ambush-marketers.html?pagewanted=all>, last accessed 16/07/12.

<sup>71</sup> For example, the Oddbins campaign that offered a discount to anyone producing proof that they had bought a product or used the services of each of the main Olympic sponsors' rivals: <http://www.thedrum.com/news/2012/07/24/pepsi-drinking-nike-wearing-mastercard-using-customers-receive-30-oddbins>.

<sup>72</sup> Rules 40(3) and 50 Olympic Charter (2013), above n 15.

value of its commercial rights and those of each specific edition of the Games in order to raise sufficient funding to be able to host the Olympics to the standard expected by the watching world and the IOC.

Following Atlanta 1996, an event often described as being 'the most hyped and over-commercialized' Games ever,<sup>73</sup> the IOC decided to take action. From Sydney 2000 onwards, the IOC has demanded as a term of the Host City Contract that domestic legislation be enacted that regulates the opportunities for ambush marketing.<sup>74</sup>

The Australian legislation is the starting point from which the process of regulating ambush marketing can be clearly observed. The Sydney 2000 Games (Indicia and Images) Protection Act 1996 (the Australian Act) prohibited the use of any visual or aural representations that, without prior authorisation, suggested to a reasonable person a connection with Sydney 2000.<sup>75</sup> Further, an extensive list of specific words that could not be used without prior authorisation from the Sydney Organising Committee of the Olympic Games was provided.<sup>76</sup> In effect, the legislation created a quasi-trademark status for these

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<sup>73</sup> S McKelvey and J Grady, 'Sponsorship Program Protection Strategies for Special Sport Events: Are Event Organizers Outmaneuvering Ambush Marketers?' (2008) 22 *Journal of Sport Management*, 550, at 550.

<sup>74</sup> The technical manuals relating to London 2012 are available at: <http://www.gamesmonitor.org.uk/node/935>, last accessed 16 June 2014.

<sup>75</sup> Sydney 2000 Games (Indicia and Images) Protection Act 1996, ss 9 and 12.

<sup>76</sup> Sydney 2000 Games (Indicia and Images) Protection Act 1996, ss 8 and 12. The words or phrases controlled by s 8 were: Games City; Millennium Games; Sydney Games; Sydney 2000; any combination of the word 'Games' with the number '2000' or the words 'Two Thousand'; Olympiad; Olympic; Share the Spirit; Summer Games; Team Millennium; any combination of '24th', 'Twenty-Fourth' or 'XXIVth' with 'Olympics' or 'Games'; any combination of Olympian or Olympics with any of the following: Bronze, Games, Gold, Green and Gold, Medals, Millennium, Silver, Spirit, Sponsor, Summer, Sydney, Two Thousand or 2000 (and their various Paralympic equivalents).

terms that prevented anyone else from using them for their own commercial benefit, infringement of which could lead to an injunction or a claim for damages.<sup>77</sup> Although ambush marketing was less of a problem than at Atlanta, it is difficult to determine the efficacy of the Australian Act as no infringement proceedings were brought under it.<sup>78</sup> As most ambush marketing campaigns are sophisticated enough to avoid direct reference to the event and the protected words, phrases and symbols associated with it, a literal interpretation of the legislation by the police and prosecutors would have ensured that there were few, if any, actionable breaches of these provisions. Despite this outcome, the Australian Act was seen as a breakthrough in the regulation of ambush marketing that was built on at future editions of the Games.

Although enacted after, and influenced by, the London Olympic Games and Paralympic Games Act 2006 (the London Act), the legislation in place for the Vancouver 2010 Winter Games did not go as far as the UK's and, therefore, acts as a stepping stone between the Olympic laws in place in Sydney and London.<sup>79</sup> The Olympic and Paralympic Marks Act 2007 (the Canadian Act) extended the protections afforded to the Vancouver Organising Committee (VANOC) beyond existing trade-mark law on the basis of, 'the sheer volume of possible violations, within a short window of time,' that could occur at the Games.<sup>80</sup> The basic prohibition prevented the use of Olympic marks and symbols or 'any mark that

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<sup>77</sup> Sydney 2000 Games (Indicia and Images) Protection Act 1996, ss 43 and 46 respectively.

<sup>78</sup> J Curthoys and C Kendall, 'Ambush marketing and the Sydney 2000 Games (Indicia and Images) Protection Act: a retrospective' (2001) 8(2) eLaw Journal, online, available at: <http://www.murdoch.edu.au/elaw/issues/v8n2/kendall82nf.html>, last accessed 17/06/14.

<sup>79</sup> See A Kitching and M Pigeon, *Bill C-47: The Olympic and Paralympic Marks Act: Legislative Summary* (April 30, 2007), available at: [http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills\\_ls.asp?ls=c47&Parl=39&Ses=1](http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c47&Parl=39&Ses=1), last accessed 17/06/14.

<sup>80</sup> Ibid.

so nearly resembles an Olympic ... mark as to be likely to be mistaken for it' or any translation thereof.<sup>81</sup> Further, under s 4 of the Canadian Act, directing public attention to a business, wares or services in a manner that was likely to mislead the public into believing that approval, authorisation or endorsement had been secured from VANOC or that a business association existed with VANOC was prohibited. In determining whether or not these provisions had been breached, the court could take into account whether the prohibited words or expressions listed in Sch 2 had been used,<sup>82</sup> or whether the words in part 1 of sch 3 had been used in combination with each other or any of them general words and phrases listed in part 2.<sup>83</sup>

This extension of the law from the Australian Act partially closed the loophole identified above by preventing not just the use of specific words and symbols, but also the deliberate confusion of the public by such advertising. Notwithstanding this, the ambushers were able to exploit the narrowness of the framing of the legislation to their benefit. The sportswear manufacturer Lululemon avoided all mention of the protected words by launching a range of clothing just before the start of the Vancouver Olympics alluding to the 'Cool sporting event that takes place in British Columbia between 2009 & 2011

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<sup>81</sup> Olympic and Paralympic Marks Act 2007, ss 3(1) and (2).

<sup>82</sup> Olympic and Paralympic Marks Act 2007, s 4(2). The words or phrases referred to in s 4 and controlled by Sch 2 were: Canada 2010; Canada's Games; Games City; Sea to Sky Games; Vancouver 2010; Vancouver Games; Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games; VANOC; Whistler 2010; Whistler Games together with their French and Paralympic equivalents.

<sup>83</sup> Part 1: Games; 2010; Twenty-ten; 21<sup>st</sup>; Twenty-first; XXI<sup>st</sup>; 10<sup>th</sup>; Tenth; Xth; Medals. Part 2: Winter; Gold; Silver; Bronze; Sponsor; Vancouver; Whistler.

Edition'. Despite the displeasure of both VANOC and the IOC,<sup>84</sup> this particular marketing campaign fell outwith the Canadian Act and was, therefore, lawful.

By London 2012, however, a step change in the level of event-specific protection provided to the Olympics can be observed; the creation of the association right. The London Olympic Association Right (LOAR) conferred exclusive rights on LOCOG in relation to the use of any representation, of any kind, in a manner likely to suggest to the public an association between the London Olympics and any goods or services, or any person providing goods or services.<sup>85</sup> For these purposes, 'association' meant suggesting any kind of contractual or commercial relationship, any kind of corporate or structural connection, and/or the provision of financial or in-kind support for London 2012.<sup>86</sup> The LOAR was infringed by any such unauthorised association made in the course of trade.<sup>87</sup> In determining whether or not an infringement had occurred, the court could take into account whether any of the following words had been used in combination with each other: games, Two Thousand and Twelve, 2012 and twenty twelve; or with any of the following words: gold, silver, bronze, London, medals, sponsor and summer.<sup>88</sup> Infringement of the LOAR provided LOCOG with relief by way of damages, injunctions, accounts or otherwise as is available in respect of the infringement of a property right.<sup>89</sup>

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<sup>84</sup> See further, Canadian Broadcasting Corporation, 'Lululemon scolded for linking clothing line to Olympics' available at: <http://www.cbc.ca/news/lululemon-scolded-for-linking-clothing-line-to-olympics-1.843999>, last accessed 17/06/14.

<sup>85</sup> London Olympic Games and Paralympic Games Act 2006, Sch 4 para 1(1).

<sup>86</sup> London Olympic Games and Paralympic Games Act 2006, Sch 4 para 1(2).

<sup>87</sup> London Olympic Games and Paralympic Games Act 2006, Sch 4 paras 2 and 4.

<sup>88</sup> London Olympic Games and Paralympic Games Act 2006, Sch 4 para 3.

<sup>89</sup> Olympic Symbol etc. (Protection) Act 1995, s 6.

Section 30 and Sch 4 of the London Act are acknowledged as being based on the Australian legislation.<sup>90</sup> Further, LOCOG produced its own interpretative guide to the law as part of its programme of education about brand awareness and brand protection.<sup>91</sup> Although this carried no weight in law and the relevant provisions could have been interpreted differently had they been litigated,<sup>92</sup> it was a clear statement of intent that LOCOG intend to police the use of its brand intensively and enforce the protections rigorously. Where the basic structure of the LOAR is clearly based on earlier Olympic laws, the incremental development of what is prohibited is marked.

Thus, where the Australian Act prohibited the use of certain words and phrases where a connection to the Games was suggested by their use to the reasonable person, and the Canadian Act added the creation of confusion in the minds of the public as to whether the ambusher was an official sponsor, the London Act went further still by prohibiting *any* unauthorised association with the Games, regardless of whether or not any confusion as to the existence of an official or authorised relationship existed between LOCOG and the advertiser. If the legislation is read alongside LOCOG's brand awareness advice, which takes a much more self-interested and purposive approach to interpretation of the Act, then this amounted to a near total ban on mentioning London 2012 by a commercial undertaking without the relevant permissions from LOCOG.<sup>93</sup>

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<sup>90</sup> Above, n 57.

<sup>91</sup> The London Organising Committee of the Olympic and Paralympic Games Limited, *London 2012's UK statutory marketing rights: Brand Protection* (London: LOCOG, 2010).

<sup>92</sup> Tacitly acknowledge by LOCOG, *ibid* at 2.

<sup>93</sup> Limited defences applied for use in pre-existing trademarks, honest commercial practices (including denominations of origin and date) and journalism or publishing information about the Olympics, sch 4 paras 6-8.

What can be seen in these instances is that each iteration of Olympic law is reviewed by the IOC and the next Organising Committee and any shortcomings, whether perceived or actual, can be addressed and any successes reinforced. At that point transplantation of the extended protections is required of the next host jurisdiction. By building on what the IOC and OCOGs see as best practice, on each occasion a more expansive framework of regulation is imposed than was in place under the previous regime. The increasing sophistication of anti-ambush marketing laws has had unintended consequences for those seeking legislative protection of their commercial rights and concomitantly reinforces the process. Once the boundaries of legitimate and illegitimate conduct are set, they will be tested by prospective ambushers. This in turn leads the event organisers to seek increased protections from the next host.<sup>94</sup>

These developments illustrate an iterative evolution that, notwithstanding the more difficult problem of the IOC requiring the implementation of these regulations by a state, and the intrinsic need and suitability of such restrictions, is a broadly logical extension across events of a related nature. The key problem here is that this is forced upon the host without critical engagement with either the need for the law's extension or the appropriateness of its transplant to the new host..<sup>95</sup>

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<sup>94</sup> D Ellis, T Scassa and B Seguin, 'Framing ambush marketing as a legal issue: an Olympic perspective' (2011) 14 *Sport Management Review* 304.

<sup>95</sup> The process continues to be observed through the laws in place at Sochi 2014, which extended the protections afforded to the Games by preventing the use of words or symbols that are *similar* to those granted legislative protection, and the Brazilian laws for Rio 2016 going further still, prohibiting *any improper connection*. See further Louw, above n 9, 187 et seq.



## 6. CASE STUDY (2) REGULATING SECONDARY TICKET SALES AT THE OLYMPICS

In the case study outlined above, the process was an essentially linear progression across editions of the same event. There is a different aspect that can be identified, however, where legal provisions are adopted and adapted from unrelated contexts, and the ‘disconnection’ noted by Johnson is even more marked in these instances of ‘recycling’ municipal laws out of context. We illustrate this here by charting the evolution of regulations concerning ticket touting for the London 2012 edition of the Olympic Games

The unauthorised resale of sporting and entertainment event tickets, or touting, is of considerable concern to both the police,<sup>96</sup> and government.<sup>97</sup> The government’s preference for self-regulation resulted in Sharon Hodgson MP sponsoring the Sale of Tickets (Sporting and Cultural Events) Bill in 2010 and 2012, which would have criminalised all unauthorised resales except in very limited circumstances.<sup>98</sup> The law relating to the resale of tickets has traditionally been covered by private law, specifically contract law, with the terms and

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<sup>96</sup> Metropolitan Police, ‘Ticket Crime: problem profile, February 2013’ available at: <http://content.met.police.uk/News/Ticket-Crime-report-published/1400015231049/1257246745756>, last accessed 17/06/14.

<sup>97</sup> Between November 2005 and February 2007, the Department for Culture, Media and Sport hosted four ‘Ticket Touting Summits’ and undertook a Consultation on the operation of the secondary market. For further context and the other DCMS initiatives see, P Ward, *Ticket Touting*, House of Commons Library Standard Note SN/HA/4715, 16 January 2014. The Culture Media and Sport Select Committee has also reported on this area, *Ticket Touting. Second Report of Session 2007-8* (London: HMSO, 2008) HC 202, and the government has responded: Department for Culture, Media and Sport, *Government Response to the Culture, Media and Sport Select Committee Report on Ticket Touting*, (London: HMSO, 2008) Cm 7346.

<sup>98</sup> See <http://www.publications.parliament.uk/pa/cm201011/cmbills/013/11013.i-i.html>. This Private Members Bill was filibustered by Conservative MPs at its Second Reading on 11 January 2011, see <http://www.sharonhodgson.org/ticket-touting-private-members-bill> last accessed 18/06/14.

conditions of sale dictating what can be done with these tickets.<sup>99</sup> Primarily this is provided through the stipulation of non-transferability of the ticket without the rights holders' permission, with the traditional civil penalties available for breach of this term.<sup>100</sup>

However, s 166(1) Criminal Justice and Public Order Act 1994 criminalised the unauthorised resale of tickets for a designated football match. This provision was part of the legislative package of football-related laws that were passed in the aftermath of the Hillsborough disaster, and in particular as a response to the Taylor Report.<sup>101</sup> In terms of ticket touting, Taylor LJ considered that the presence and activities of touts had a grossly antisocial effect both directly, where disorder centred on the tout, and indirectly through the breakdown of segregation between rival groups of fans.<sup>102</sup> Debate at the time focussed on why the legislation should only apply to football,<sup>103</sup> and although it is possible for these measures to be extended to other sporting events, it has never been

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<sup>99</sup> Prosecution for fraud under Fraud Act 2006, ss 1 and 2 (previously as obtaining property by deception) is a possible, though often not appropriate means, of regulating touting. See *R v Marshall* [1998] Cr App R 282.

<sup>100</sup> See for example the tickets for London 2012. On the front the ticket is clearly marked 'Not for Resale' and on the reverse the terms and conditions of sale note, inter alia: 'Tickets are STRICTLY NON TRANSFERABLE ... Tickets obtained from Persons other than directly from LOCOG (or from a Person authorised by LOCOG) shall be VOID and may be SEIZED or CANCELLED WITHOUT REFUND OR ENTRY TO A SESSION. Any person seeking to use a Ticket obtained in breach of the Terms and Conditions may be considered a trespasser, may be ejected and may face legal action' [Material on file with authors]. See further *Rugby Football Union v Viagogo* [2012] UKSC 55, where personal information was demanded from the defendant in order for the claimant to bring actions for breach of contract were sought against those selling tickets and trespass to property against those seeking to gain entrance to England international matches with a touted ticket.

<sup>101</sup> Taylor LJ, *Final Report into the Hillsborough Stadium Disaster* (London: HMSO, 1990) Cmnd 962.

<sup>102</sup> HMSO, above fn.97 at para.275.

<sup>103</sup> See S Greenfield and G Osborn 'After the Act? The (re)construction and regulation of football fandom' *Journal of Civil Liberties*, 1996, Volume 1.

considered necessary.<sup>104</sup> The sole rationale for this provision was the prevention of public disorder; commercial considerations were not part of Taylor LJ's analysis, nor did they form part of the Parliamentary justification for the provision.<sup>105</sup>

Ticket touting at designated football matches is an offence where a person sells or otherwise disposes of a ticket for a designated football match,<sup>106</sup> unless they are authorised to do so in writing by the organisers of the match.<sup>107</sup> 'Selling' is given an expansive meaning to ensure that the full range of touting activities are caught, including: offering to sell a ticket; exposing a ticket for sale; making a ticket available for sale by another; advertising that a ticket is available for purchase; and giving a ticket to a person who pays or agrees to pay for some other goods or services or offering to do so.<sup>108</sup>

For London 2012, it was a requirement of the Host City Contract that all ticketing and admission matters be approved by the IOC at least two years before the commencement of the Games. This included a requirement that anti-touting laws would be in place at least one year before the start of the Games.<sup>109</sup> These

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<sup>104</sup> Criminal Justice and Public Order Act 1994, s 166(6) allows the Secretary of State to extend the provisions to other sporting events.

<sup>105</sup> See Lord Bassam, (2006) HL Deb col 673, 22 May 2006 and S. Greenfield, G. Osborn and S. Roberts, 'Contradictions within the criminalisation of ticket touting: what should be the role of the law?' [2008] 3 Web Journal of Current Legal Issues, online, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1334624](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1334624), last accessed 17/06/14.

<sup>106</sup> The definition of 'designated football match' is provided in The Football (Offences) (Designation of Football Matches) Order 2004/2410 and covers most professional, semi-professional and international representative matches that take place in England and Wales.

<sup>107</sup> Criminal Justice and Public Order Act 1994, s 166(2).

<sup>108</sup> Criminal Justice and Public Order Act 1994, s 166(2)(aa).

<sup>109</sup> IOC, *Technical Manual on Ticketing*, November 2005. This document was secured via a Freedom of Information Request made to DCMS by Games Monitor, an Olympics pressure group, available at: <http://www.gamesmonitor.org.uk/node/935>, last accessed 17/06/14.

guarantees were discharged by the enactment of s 31 LOGPA 2006, which gave effect to LOCOG's Host City Contract commitments by criminalising the unauthorised resale of Games tickets in the same way as s 166 Criminal Justice and Public Order Act 1994.<sup>110</sup> The definition of selling is the same as in s 166(2)(aa).<sup>111</sup> The main difference in the Olympic offence is that it is committed only where the sale takes place in public (to catch the on-street tout) or in the course of business,<sup>112</sup> which is defined in s 31(2)(c) of the London Act as where the seller makes or aims to make a profit. This ensured that all sales other than those made in private at face value were lawful, but any unauthorised profiteering was criminal.

The legislative provisions thus ensured compliance with requirements that a private body, the IOC, placed on the national government of the Host City. The explanatory notes stated explicitly that s 31 was based upon s 166 CJAPOA 1994.<sup>113</sup> In fact, the section is *directly lifted* rather than 'based upon' the football offence, leaving a provision that was created to deal with public order issues for a specific sport being used as the template for a provision that is avowedly being used to comply with the commercial requirements of a private body.<sup>114</sup> Indeed,

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<sup>110</sup> London Olympic Games and Paralympic Games Act 2006, Explanatory Notes, 3

<sup>111</sup> With the omission of ss 2(aa)(ii), London Olympic Games and Paralympic Games Act 2006, s 31(2)(b).

<sup>112</sup> London Olympic Games and Paralympic Games Act 2006, s 31(1)(a).

<sup>113</sup> London Olympic Games and Paralympic Games Act 2006, Explanatory Notes, 71.

<sup>114</sup> On the commercial aspect, see the comments of Richard Caborn MP, cited in M James and G Osborn, 'Consuming the Olympics: the fan, the rights holder and the law' for the British Library, *Sport and Society: The Summer Olympics through the lens of social science*, at 4, available at: <http://www.bl.uk/sportandsociety/exploresocsci/parlaw/law/articles/consuming.pdf>, last accessed 17/06/14.

even LOCOG's Brand Protection guidance covers the sale and resale of tickets,<sup>115</sup> reinforcing that these provisions were brought in for a commercial imperative.

This example highlights even more explicitly how a transplantation of law from one context can be inappropriately extended and applied to a new and unrelated one. Here, the law created for one purpose (preventing public disorder) and in a highly specific context (English football), is utilised wholesale for an entirely different purpose (protecting the commercial rights of a private undertaking) and for a totally different type of event (the Olympic Games). No discussion of whether this transplantation was necessary, nor whether it was appropriate for the state to police and enforce the contractual provisions of a private commercial body, was undertaken.<sup>116</sup>

The impact of this process can be seen when the laws created for an event such as the Olympics are then replicated without further interrogation for a similar, usually smaller, event. This process does not necessarily occur within the same jurisdiction, however, and increasingly can be seen to have a transnational element. For example,, the legal framework in place for the Glasgow Commonwealth Games Act 2008 draws heavily on the London Olympic and Paralympic Games Act 2006 and its supplementary Regulations. There is, however, a more subtle element to this transplant. Ticket touting is criminalised by s 17 Glasgow Commonwealth Games Act 2008, a provision that has emanated from the offence in s 31 of the London Act. The Glasgow offence has the same

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<sup>115</sup> LOCOG, above n 91, Part D.

<sup>116</sup> Above, n 8 and further, Freedom of Information Act request, CMS case number 106119, where it was stated that touting was detrimental to the image of the Olympic Games.

definition of selling as the football and Olympic offences, adding only that giving away a ticket but charging a booking or other fee constitutes selling.<sup>117</sup> As with the Olympic offence, sales in public and with a view to making a profit are criminal, as is any sale for a price in excess of the ticket's face value.<sup>118</sup>

Thus, the Olympic legislation 'cleanses' the inappropriate football-specific public order offence enabling it to be transplanted to a subsequent multi-sport festival in a different legal jurisdiction. In neither case, whether 'upwards' from football to the Olympics or 'downwards' from the Olympics to the Commonwealth Games, is a justification provided for why touting should be criminalised in this way, or indeed at all at these events.

## 7. CONCLUSION

What has been identified above, and illustrated via the two cases studies, is that within the Olympic environment, new forms of legal transplant have been used as convenient shortcuts to implement law. Whilst Duval identifies the paradigm of *lex sportiva* versus law and *lex sportiva* meets law,<sup>119</sup> what is actually being witnessed here is one aspect of *lex sportiva*, Olympic law, *demanding the creation of law*. Crucially and uniquely, these transplants are driven by a private transnational organisation and forced upon the host. As we have argued above, the IOC occupies part of the transnational space, from where it acts as an originator of legal norms and ultimately forces the creation of *lex Olympica* and *lex sportiva*. By using transnational law as a methodology for interrogating this

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<sup>117</sup> Glasgow Commonwealth Games Act 2008, s 17(3).

<sup>118</sup> Glasgow Commonwealth Games Act 2008, s 17(2).

<sup>119</sup> Above n 4, at 836 and 839 respectively,

norm creation in the space between the domestic and global, Olympic law is seen to be able to move back from the transnational space to the realms of national law by forcing its norms into 'life' through the requirements of the HCC.<sup>120</sup> In the absence of any identifiable public good,<sup>121</sup> it is difficult to justify the IOC's imposition of self-serving norms on individual nation states by means of an informal legislative capability for which it is not held accountable. The inclusion of a sunset clause in the Act provides little comfort to those affected by its restrictions and can even be interpreted as a tacit acknowledgement of the Act's disproportionate impact.

The analysis provided here is of importance as it provides glimpses of possible drivers of future law-making. First, it is already observable that generic legislation within the sporting context is being passed, with a view to bypassing the need for new legislation each time an event is hosted. New Zealand has, for example, already passed the Major Events Management Act 2007,<sup>122</sup> and Australia has recently followed suit with the Major Sporting Events (Indicia and Images) Protection Act 2014.<sup>123</sup> These provisions bypass the need for 'inconvenient' Parliamentary debates on the necessity of event specific

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<sup>120</sup> P Zumbansen, 'Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective' (2011) 38(1) *Journal of Law and Society* 50.

<sup>121</sup> On cost overruns see, B Flyvbjerg and A Stewart, *Olympic Proportions: Cost and Cost Overrun at the Olympics 1960-2012*, (Oxford: Saïd Business School Working Papers, 2012), available at: <http://ssrn.com/abstract=2238053>, last accessed 6 February 2015. On falling participation rates see, Sport England, *Active People Survey 8*, (London: online, 2015), available at: <http://www.sportengland.org/research/who-plays-sport/> last accessed 6 February 2015. See also M Weed, E Coren, J Fiore, I Wellard, D Chatziefsthathiou, L Mansfield and S Dowse, 'The Olympic Games and raising sport participation: a systematic review of evidence and an interrogation of policy for a demonstration effect' [2015] *European Sport Management Quarterly*

<sup>122</sup> S Corbett and Y van Roy, 'Events management in New Zealand: one law to rule them all?' [2010] 4 *Journal of Business Law* 338.

<sup>123</sup> For a commentary of the Bill, see L Dale, 'Australia's Major Sporting Events Protection Bill 2014 (Cth)' 3 June 2014, *World Sports Law Report*, online, available at: <http://www.e-comlaw.com/sportslawblog/>, last accessed 17/06/14.

legislative intervention by, for example, enabling the Economic Development Minister, under section 7 of the Major Events Management Act 2007 to recommend to the Governor-General that an event be declared a 'major event' following consultations with only the Commerce and Sports Ministers.<sup>124</sup> This could eventually result in the situation where only sufficiently pliant jurisdictions are allowed to host major sporting events in the future, having the concomitant effect of making such jurisdictions attractive hosts to bodies such as the IOC. Second, this approach to law making could be used as a template by other sectors seeking analogous commercial protections. One example of this would be The Sale of Tickets (Sporting and Cultural Events) Bill which sought to extend anti-ticket touting provisions to music and cultural events. As this trend continues across sport and into other related sectors, care must be taken to ensure that dominant transnational organisations do not begin to make similar demands of legislatures.

At the same time, it could be asked whether it actually matters where this material comes from. A further way to examine this transplant might be via functionality; rather than examining the process in terms of similarity, the usefulness or functionality of the proposal is a better lens through which to conduct the analysis:

As long as the transplant can serve the social need to be addressed, the transplant can work well in new legal ground. In fact it is this transfer of

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<sup>124</sup> For further information on the procedure see: <http://www.med.govt.nz/majorevents/major-events-management-act-2007>, last accessed 30/04/15.



the transplant to national contexts that promotes indigenization of positive transplants as a block to indiscrete globalization and modern legal colonialism.<sup>125</sup>

Whilst we agree with Xanthani's point that a transplant might work well in a new host, this does not affect the underlying problem that irrespective of its utility, whether any social need is served or whether such laws are *necessary* or *appropriate* in the first place still needs to be justified objectively rather than self-referentially, and should be the focus for future studies. In addition, the very fact that the process is driven by a private body leveraging its own terms on hosts is a great cause for concern and increases the possibility that such events are only held in pliant jurisdictions prepared to promulgate Olympic Law and accept such transplants without critical reflection.

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<sup>125</sup> H Xanthaki, 'Legal transplants in legislation: defusing the trap' (2008) 57 *International and Comparative Law Quarterly* 659, at 662.