

London 2012 and the Impact of the UK's Olympic and Paralympic Legislation: Protecting Commerce or Preserving Culture?

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The general commercial rights associated with the Olympic Movement are protected in the UK by the Olympic Symbols etc (Protection) Act 1995. In addition, the UK Government, in response to a requirement of the Host City Contract with the International Olympic Committee, created the London Olympic Association Right under section 33 and Schedule 4 of the London Olympic and Paralympic Games Act 2006. These provisions enable the London Organising Committee of the Olympic Games to exploit, to the fullest extent, the commercial rights associated with the London Olympic Games. This article questions whether the IOC's requirement for legislative protection and state enforcement of the commercial rights are compatible with the Fundamental Principles of Olympism as defined in the Olympic Charter, and its stated aim of being a celebration of sporting endeavour, culture and education.

INTRODUCTION

The Olympic Games is a sporting and cultural event unparalleled in terms of its global reach, outstripping even the FIFA World Cup Finals tournament in terms of popularity.¹ As such, it is subject to the same commercial forces that attach to all mega-events and can be seen as part of a growing commercialisation of sport that is linked to the development of technologies that have facilitated the globalisation of the consumption of sport.² However, this increased commercialisation of sport and sporting events has not been without its critics; the commercial imperatives associated with staging the most popular sporting events often create difficulties in reconciling the drift towards a business-oriented mindset with the history and ethos

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Total aggregate audiences are said to reach up to 4.7 billion viewers and the Games are the world's largest peacetime event, see A. Miah and B. Garcia, 'The Olympic Games: Imagining a New Media Legacy' (2010) 15 *British Academy Review* 37. See also S. Essex and B. Chalkley, '@Olympic Games: catalyst of urban change' (1998) 17 *Leisure Studies* 187, 187.

of the sport itself,³ or where the Olympic Games is concerned, with the Fundamental Principles of Olympism.⁴ As Toohey and Veal note:

The 'spirit' of Olympism is ostensibly non-materialist: the alliance between Olympism and commerce is therefore potentially a fragile one ... Olympism enshrines certain ideals which, as with a religion, its custodians are sworn to uphold. Many see commercialisation as undermining these ideals.⁵

This difficulty is perhaps most marked with respect to the Olympic Games. The Games are the public manifestation of Olympism, a notion defined by the International Olympic Committee (IOC) as being a 'philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind'.⁶ The increasing legal and commercial relevance of the Olympic Games, and their ramifications for

² As regards the Olympics, see for example K. Toohey and A. Veal, *The Olympic Games: A Social Science Perspective* (Oxford: CABI, 2007) especially chapter 11. See also the examples given in R. Stokvis, 'Globalisation, Commercialisation and Individualisation: Conflicts and changes in elite athletics' (2000) 3 *Culture Sport Society* 22, 24-26. On the Olympics specifically, see A. Tomlinson, 'The commercialisation of the Olympics: Cities, corporations and the Olympic commodity' (2005) in K. Young and K. Walmsley (eds), *Global Olympics: Historical and Sociological Studies of the Modern Games*, (Oxford: Elsevier, 2005) 179-200.

³ See C. Gratton and P. Taylor, *Economics of Sport and Recreation* (E & FN Spon: London, 2000) and also T. Slack, 'Studying the Commercialisation of sport: the need for critical analysis' (1998) *Sociology of Sport Online* at <http://www.physed.otago.ac.nz/sosol/v1i1/v1i1a6.htm> (last visited 11 February 2011).

⁴ See further, IOC, *The Olympic Charter* (Lausanne, Switzerland: IOC, 2010) 11 at http://olympic.org/Documents/Olympic%20Charter/Charter.en_2010.pdf (last visited 4 May 2010).

⁵ Toohey and Veal, n2 above 278-279.

⁶ First Fundamental Principle of Olympism in *The Olympic Charter* n 4 above.

the ethos and spirit of Olympism, and indeed sport more generally, are the points of departure for this article.

Following the successful bid to host the 2012 Olympic Games in London, Parliament passed the London Olympic and Paralympic Games Act 2006 (LOPGA 2006) to enable the effective organisation of the Games and to provide further protection for the iconography of the Olympic Movement. The protection of the words and symbols most commonly associated with the Olympic Games in general, and the London 2012 Games in particular, builds on those granted to the British Olympic Association by the Olympic Symbols etc (Protection) Act 1995 (OSPA 1995). These provisions will enable the London Organising Committee of the Olympic Games (LOCOG) to maximise the commercial exploitation of these words and symbols as a central part of its sponsorship and merchandising strategies. Inherent in the explanations for passing these two pieces of legislation is the apparent need to protect and promote the sporting, cultural and educational values of the Olympic Movement from unwanted commercialisation.⁷ This tension between what are often seen as being the competing interests of commerce and culture has been a central theme for sport, especially football,⁸ for a number of years.

In this article, the public justifications for enacting some of the more controversial parts of the 2006 Act will be examined in order to determine whether the legislation does in fact protect these sporting, cultural and educational aims, or whether they simply provide extensive statutory protection for the commercial rights vested in the Olympic Movement and their exploitation by the IOC and LOCOG. Specifically, the law regulating the use of the Olympic Properties and the provisions to prevent 'ambush marketing'⁹ around Olympic venues will be analysed. In conducting this examination, the dual nature of contemporary sport as both socio-cultural phenomenon and commercial product will be examined and the appropriateness of the law as a means of protecting sporting and cultural values will be interrogated.

⁷ First Fundamental Principle of Olympism in *The Olympic Charter* *ibid.* See also Department for Culture, Media and Sport FOI Response – CMS case number 106119 at http://www.culture.gov.uk/images/freedom_of_information/106119_Annex_A_.pdf (last visited 4 May 2010).

⁸ On football and the arguments from both sides as regards player movement, see P. Morris S. Morrow and P. Spink, 'EC Law and Professional Football: *Bosman* and its implications' (1996) 59 *Modern Law Review* 893 and more generally S. Greenfield and G. Osborn, *Regulating Football: Commodification, Consumption and the Law* (Pluto: London, 2001).

This analysis will enable a determination to be made about whether the Olympic legislation as enacted is capable of preserving the sporting-cultural values of the Olympic Movement or is in fact more concerned with protecting the commercial value of Olympic imagery and the requirements of the Games' sponsors and other stakeholders. This article examines the protection originally afforded to the Olympic symbols in OSPA 1995 before analysing in detail the impact of the extended protection provided by LOPGA 2006 and its regulation of the most creative ways of circumventing such provisions by means of ambush marketing. In order to understand and appreciate these provisions it is important to unpack some of the background to London 2012, the Olympics and the law more generally.

LONDON 2012: CONTEXT AND BACKGROUND

The London Olympic and Paralympic Games will take place in the summer of 2012 with most of the events being held on a purpose built site in Stratford, London.¹⁰ Although the successful bid was met with unbridled joy in some quarters, there has also been significant opposition and critical comment from a wide range of interest groups.¹¹ One of the key components of a successful bid is the notion that hosting the Games can inculcate a more permanent infrastructural change in the host city and the country in which it is located. Hosting the Olympics can have a significant impact upon urban policy and practice and has the potential to leave an important

⁹ Ambush marketing is the unauthorised association with an event by an advertiser with a view to exploiting its goodwill for commercial purposes. See further the discussion below.

¹⁰ Other key venues are also being utilised such as Lords' Cricket Ground for the archery, Greenwich Park for equestrian events, and football at historic and iconic venues such as Wembley and Hampden Park.

¹¹ This has crucially focussed on a cost-benefit analysis, see for example I. Macrury and G. Poynter, 'The Regeneration Games: Commodities, Gifts and Economics of London 2012' (2008) 25 *The International Journal of the History of Sport* 2072 especially the commentary on the hazards of regeneration at 2077-2080. See also more generally at a local level the excellent Games Monitor site at <http://www.gamesmonitor.org.uk/> (last visited 11 May 2010).

legacy in terms of sporting facilities, urban renewal and cultural icons.¹² At the same time, hosting such a mega-event may have concomitantly less palatable impacts, at least in the short term, on key local stakeholders including those whose land has been compulsorily purchased, whose businesses have been relocated and local, regional or national taxpayers in general.¹³

Hosting the Games may provide a fillip to a city's infrastructure, as was the case with Athens in 2004, and can be an important part of urban renewal or renaissance, as was the case with Barcelona in 1992, leading many candidate cities to believe that a successful bid will be both lucrative and desirable. On the other hand, staging the Games is a hugely expensive and high-risk strategy that can leave the host city in debt for many years. For example, the Montreal Olympics in 1976 was riven by a series of problems including local opposition to the Games, technical and legal problems concerning construction of the stadia and were nearly cancelled a mere 16 days before the opening ceremony because of a political dispute. This was in addition to the fact that '[t]he period following the award of the Games to Montreal coincided with a worsening economic situation in Canada, and international recession and global inflation, which accentuated the financial burden of staging the Games'.¹⁴ The result of this combination of problems was a massive post-Games debt and a risk-averse strategy being implemented for the following Olympics in Moscow in 1980. Thus, a decision to bid for the Games is not taken lightly. It is coordinated at both national and regional levels and is usually an amalgam of public and private input:

12 On regeneration strategies see A. Smith and T. Fox. 'From "Event-led" to "Event-themed" Regeneration: the 2002 Commonwealth Games Legacy Programme' (2007) 44 *Urban Studies* 1125. See also Essex and Chalkley, n1 above.

13 There have been a number of critiques of Olympic (and indeed other mega-event) regeneration strategies, see for example H. Lenskyj, *The Best Olympics Ever? Social Impacts of Sydney 2000* (Albany: State University of New York Press, 2002) and C. Rutheiser, *Imagineering Atlanta* (London & New York: Verso, 1996).

14 Essex and Chalkley, n 1 above, 197. See also H. Preuss, *The Economics of Staging the Olympics* (Cheltenham: Edward Elgar, 2004) and G. Wright, 'The political economy of the Montreal Olympic Games' (1978) 2 *Journal of Sport and Social Issues* 13 and B. Kidd, 'The Culture Wars of the Montreal Olympics' (1992) 27 *International Review of the Sociology of Sport* 151.

A persuasive submission and campaign generally demands public-private sector cooperation, a high level of entrepreneurialism, an appreciation of the value of urban spectacles and an ability to use the media.¹⁵

This tension between the desire to stage an Olympic Games that is of positive benefit to the host city and the need to raise sufficient finance to host such an extravaganza is one of the first that any organising committee has to confront; as Miah and Garcia note, '[e]ach Olympic Games involves a negotiation of ... power relationships between private sponsors and the public good.'¹⁶

A separate tension concerns the purpose and ethos of the Olympic Movement and the need to act in a businesslike and commercially innovative manner. This is at the heart of this article as we explore the efficacy, and purpose, of the framework that exists. The Fundamental Principles of Olympism aim at, amongst other things, blending sport with culture and education, promoting a peaceful society and having respect for fundamental and universal ethical principles.¹⁷ These laudable aims embody the ethos of the Olympics, however, the ever-increasing costs of hosting the Games requires the local organising committee to maximise its commercial revenues in order to put on a spectacle of sufficient proportions to be considered to be a success by the IOC and the world's media. This in turn creates a problem of prioritisation of the Olympic Movement's Fundamental Principles and the commercial imperatives necessary for hosting an Olympic Games that, at the very least, does not run at a significant loss.

THE OLYMPIC MOVEMENT, THE IOC AND OLYMPIC LAW

¹⁵ Essex and Chalkley, n1 above, 187-191.

¹⁶ Miah and Garcia, n1 above, 37.

¹⁷ Fundamental Principles of Olympism in *The Olympic Charter*, n4 above.

In the UK, two specific Acts of Parliament provide legal protection for the Olympic symbols: OSPA 1995 provides for the general protection of the symbols for the benefit of the British Olympic Association (BOA), whilst LOPGA 2006 provides further specific commercial protections for LOCOG and creates the statutory framework within which a successful Games can be organised. The means by which the Olympic symbols are protected are analysed in the following section. Here, a brief overview of the organisations responsible for staging an edition of the Olympic Games and the key features of LOPGA 2006 is provided in order to better understand the framework in which this regulatory regime is located.

Members of the Olympic Movement

The Olympic Movement consists of any organisation or institution, and the individual members thereof, which has agreed to be bound by the Olympic Charter and is predicated on a body's adherence to the Fundamental Principles of Olympism.¹⁸ The Introduction to the Olympic Charter describes this instrument as being:

[The] codification of the Fundamental Principles of Olympism, Rules and Bye-Laws adopted by the IOC. It governs the organisation, action and operation of the Olympic Movement and sets further the conditions for the celebration of the Olympic Games.¹⁹

The Charter defines all aspects of the Olympic Movement and begins by defining the Fundamental Principles of Olympism, to which members of the Olympic Movement must adhere at all times, and contains the IOC statutes and the obligations of the main constituents of the Olympic Movement. Although technically the constitution of a private corporation established under Swiss law and a contract between its constituent members, the Charter is considered by some to have a

¹⁸ *The Olympic Charter*, n 4 above Rule 1. See further M. James, *Sports Law* (Basingstoke: Palgrave Macmillan, 2010) chapter 14 and A. Maestre, *Law and the Olympics* (Cambridge: Cambridge University Press, 2010).

¹⁹ *The Olympic Charter*, n4 above Introduction.

status approaching an international treaty because of its near universal acceptance.²⁰

Secondly, it appoints the IOC as the supreme authority of the Olympic Movement and defines its operating protocols and procedures.²¹ This enables the IOC to administer the Olympic Movement on a day-to-day basis and to enter into the commercial contracts necessary to fund its existence. Thirdly, it defines the roles of the International Sports Federations, which run all major sports at the global level, and the National Olympic Committees, which represent the IOC's interests in member states. In the UK this role is fulfilled by the BOA.²² Fourthly, it asserts the IOC's rights over the key Olympic symbols, flags and anthems,²³ and finally, it provides the guiding principles for electing the host city of an edition of the Games and the framework within which an organising committee must operate.²⁴ The organising committee of each Olympic Games is considered to be an integral part of the Olympic Movement for the period of its existence, generally from the point at which the Games is awarded to a city until 31 December at the end of the year in which their edition of the Olympics takes place.²⁵

20 See for example A. Maestre, 'The legal basis of the Olympic Charter' (2007) 6 WSLR 6.

21 *The Olympic Charter*, n4 above Rules 2 and 15-25.

22 *Ibid* Rules 26-27 and 28-32.

23 *Ibid* Rules 7-14 and 54-55 and further below.

24 *Ibid* Rules 33-59.

25 At present, there are three members of this group comprising the organising committees of the summer Games to be held in London in 2012 and Rio in 2016 and the winter Games in Sochi in 2014.

The IOC has as its main role, therefore, the task of promoting Olympism throughout the world and ensuring that the Olympic Games take place. It has the right to exploit the iconography of the Olympic Movement, which it does through its Olympic Partnership Programme,²⁶ and elects the host city for each edition of the Olympic Games.

At state level, the BOA is a private company limited by guarantee under English law whose role is to represent the Olympic Movement's interests as the National Olympic Committee in the UK and its dependent territories. The BOA operates completely independently of both Parliament and the government and is self-funding. The creation of the Olympic Association Right in section 2 of OSPA 1995 enables the BOA to run successful sponsorship and partner programmes that support its work promoting the aims of the Olympic Movement in the UK and to send representative teams to the Olympic Games.²⁷ Although constantly involved in the promotion of sport and the Fundamental Principles of Olympism, its most high profile activities are to invite athletes to compete on its behalf at each edition of the Olympic Games and to promote bids from prospective host cities.

The election of a candidate city is made following an open competition that is managed by the IOC's Evaluation Commission.²⁸ The Commission reports to the IOC in order for its members to be able to vote on which of the candidates should be elected host city. In the case of London, once elected to act as host of the 2012 edition of the Olympics, the BOA handed over responsibility for the organisation of the Games to LOCOG. LOCOG is also a private company limited by guarantee. It was created in 2005 by the BOA, the Mayor of London and the Secretary of State for Culture, Media and Sport with the sole goal of organising the Olympic Games in 2012. In order to generate sufficient funds to enable it to stage a successful Games, LOCOG has sought to exploit as efficiently as possible the commercial rights at its disposal. Alongside the money generated by ticket sales, its share of the

²⁶ IOC, *Olympic Marketing Factfile* (Lausanne, Switzerland: IOC 2008) at http://www.olympic.org/Documents/marketing_fact_file_en.pdf (last visited 5 May 2010).

²⁷ See further below.

²⁸ *The Olympic Charter*, n 4 above Rule 34.

income generated by the Olympic Partnership programme and the IOC's sale of its broadcasting rights, LOCOG is able to exploit the Olympic Association Right, following amendments to OSPA 1995 made by section 32 and schedule 3 of LOPGA 2006, and the London Olympic Association Right, which has been created specifically for its benefit under section 33 and schedule 4 of LOPGA 2006.²⁹

London Olympic Law

LOCOG's private status means that it is unable to fulfil all of the obligations imposed on it by the IOC under the Host City Contract. The general purpose of LOPGA 2006 is to provide the necessary legislative framework within which the 2012 Olympics can be delivered and to provide additional protections for the commercial rights vested in the Games. In order to discharge any necessary public functions, sections 3-9 and schedule 1 of LOPGA 2006 created the Olympic Delivery Authority (ODA). Under section 4 of LOPGA 2006, the ODA has particular responsibility for delivering the physical infrastructure necessary for hosting the Games. Thus, the ODA is enabled to take any action necessary for preparing for the London Olympics, including making arrangements for the construction or adaptation of the necessary sporting, media and accommodation facilities, purchasing land and applying for planning permission and entering into the commercial contracts necessary for the achievement of these goals. By section 10 of LOPGA 2006, the ODA is required to devise and implement the Olympic Transport Plan that will enable the movement of athletes, officials and spectators around the capital. Finally, the ODA will have to disseminate information regarding the regulation of advertising and street trading in the vicinity of Olympic venues and will have the power to initiate criminal proceedings against those who breach the regulations under sections 23 and 29 of LOPGA 2006 respectively.

The totality of the powers vested in the ODA by LOPGA 2006 is extraordinarily wide-ranging. On the one hand, they enable a single body to oversee the development of the sporting and transport infrastructure necessary for the successful hosting of a 21st century Olympic Games. However, the ODA is also granted exclusive control of the advertising space and street trading licences around Olympic venues and the power to investigate and prosecute breaches of the Olympic Association Right and the London Olympics Association Right. No other public body combines the functions of a local council, planning authority, transport executive, trading

²⁹ See further below.

standards office and police service, yet the ODA has been granted powers similar to those exercised by each of these bodies.

Further, the commercial protections granted to a private organisation that are contained within LOPGA 2006 are unparalleled in English Law. Two specific manifestations of this are analysed in depth below, but it can also be seen in the control of ticketing policies and the regulation of ticket sales³⁰ and the licensing of street trading.³¹ Further, there have been claims that the powers contained in the legislation will give unwarranted and far reaching powers that could impact upon the right to peaceful protest.³² However, the focus here is on two specific areas that illustrate the problems created by this commercial expansion and its protection by statute. By examining the regulation of the Olympic symbols themselves, and the related issue of ambush marketing, it will be shown that the creep of commercialisation has had manifold effects on the culture and spirit of the Olympics as defined by the Fundamental Principles of Olympism.

REGULATING THE USE OF THE OLYMPIC PROPERTIES: SYMBOLS AND ICONOGRAPHY

Symbols are of central importance to, and in, sport. In terms of sporting identity, for example, the football club badge has an extraordinary resonance for the fan as a cultural reference point, or badge of allegiance. At the same time, the badge is a valuable form of intellectual property that the football club will want to both exploit

³⁰ See M. James and G. Osborn, 'Consuming the Olympics: the fan, the rights holder and the law' (2010) *Sport and Society: The Summer Olympics through the lens of social science* British Library: London, available at www.bl.uk/sportandsociety (last visited 29 April 2010), M. James and G. Osborn, 'Tickets, Policy and Social Inclusion: Can the European White Paper on Sport Deliver?' (2009) 9 *International Sports Law Journal* 1.

³¹ See M. James, *Sports Law* (Basingstoke: Palgrave Macmillan, 2010) 300-301.

³² See V. Dodd, 'Special powers for 2012 Olympics alarm critics' *The Guardian* 22 July 2009

for its own benefit and protect from unauthorised use by others.³³ The Olympic symbols are similarly important to the Olympic Movement:

The meanings and the values of Olympism are conveyed by symbols. Among these are the rings, the motto and the flame. These symbols transmit a message in a simple and direct manner. They give the Games and the Olympic Movement an identity.³⁴

Thus, these symbols, or properties, have an important cultural resonance and attempt to encapsulate modern Olympic values. Parry describes these values as being essentially 'humanistic' and reflecting both a universal philosophy and a more localised manifestation through an individual nation's own specific culture, history and location.³⁵ These values, and their symbolic representations, especially as re-imagined by the founder of the modern Olympic Movement Baron Pierre de Coubertin, would have been seen as being fundamental to Olympism and therefore sacrosanct. However, writing about commercialisation of the Olympics more generally, Tomlinson noted that everything in the Los Angeles Games in 1984 was for sale and an increased commodification of the ritualistic elements could be seen.³⁶ This included the Olympic torch,³⁷ a symbol that the IOC had heralded as imbued with monumental significance as it had evolved from a ritual of the ancient

33 See for example *Arsenal Football Club Plc v Reed (No 2)* [2003] EWHC Civ 96. Apart from a general disquiet about a perceived lack of respect for the club's heritage, one of the key issues for some fan groups was the fact that the cannon was to be reversed and whereas before had pointed inwards towards the heart, now was to point away, or outwards. At Manchester United a similar furore took place when the words 'football club' were removed from the club badge.

34 The Olympic Museum, *The Olympic Symbols* (Lausanne, Switzerland: IOC, 2nd ed, 2007) at http://multimedia.olympic.org/pdf/en_report_1303.pdf (last visited 5 May 2010). See also K. Lennartz, 'The Story of the Rings' (2001/2002) 10 *Journal of Olympic History* 29.

35 See generally here J. Parry, 'Olympism for the 21st century' in D. Macura and M. Hosta (eds), *Philosophy of Sport* (Ljubljana: University of Ljubljana, 2003) 93-98.

36 A. Tomlinson, n2 above.

Olympics, which involves a torch being carried in celebration from Olympia to the host city and which is a key signifier of the international importance, and reach, of the modern Games.

The Olympic charter defines the range of Olympic Properties as including the Olympic symbol, flag, motto (*citius, altius, fortius* and any translations of it), anthem, identifications (including but not limited to 'Olympic Games' and 'Games of the Olympiad'), designations, emblems, flame and torches.³⁸ Of these, the Olympic symbol of the five interlocking rings representing 'the union of the five continents and the meeting of athletes from throughout the world at the Olympic Games'³⁹ is, according to Meenaghan, the most recognisable logo in the world; in a survey of nine nations outside of a Games period in 1997, around 80 per cent of the general public identified the rings as being associated with the Olympics.⁴⁰ By 2002 the Olympic symbol was said to have unaided brand awareness of 93 per cent attesting to its recognisability and inherent commercial possibilities.⁴¹

The Olympic symbol was designed by de Coubertin in 1913 and was inspired by the symbol of the Union des Sociétés Françaises de Sports Athlétiques.⁴² The symbol was unveiled at the 1914 Olympic Congress in Paris and, according to Michalos, was seen by de Coubertin as embodying 'the five parts of the world won over to

³⁷ *The Olympic Charter*, n4 above Rule 13.

³⁸ *Ibid* Rule 7(2). Further definitions of each of these properties can be found in Rules 8-13.

³⁹ *Ibid* Rule 8.

⁴⁰ See T. Meenaghan, *Olympic Market Research: Analysis Report* (Lausanne, Switzerland: IOC, 1997).

⁴¹ See H. Padley, 'London 2012: Five Years, 9 months and counting' (2006) 28 *European Intellectual Property Review* 586 referring to A. Wall, 'The Game behind the Games' (2001) 91 *Trademark Reports* 1243.

Olympism' rather than representing each of the continents with at least one of the colours used being found in the flags of each of the nations that had competed at the Games up to 1912.⁴³

Whilst the Olympic symbol and the various other properties were originally part of a broader Olympic vernacular, they quickly became recognised as lucrative commercial entities in their own right. Barney, Wenn and Martyn cite the case of the contract to supply 'Helms Olympic Bread' at the Los Angeles Olympics in 1932.⁴⁴ After the Games, the IOC were unhappy with the continued use of the word 'Olympic' but nothing further was done until 1949 when a circular was issued asking National Olympic Committees to legislate to protect Olympic words and symbols.

The Olympic symbol has a long history of protection that pre-dates the rise of modern aggressive marketing practices. Historically, issues of infringement would have been regulated by contractual provisions, intellectual property law or the tort of passing off.⁴⁵ However, what is interesting where the

42 C. Michalos, 'Five golden rings: development of the protection of the Olympic insignia' (2006) *International Sports Law Review* 64.

43 See further here P. Coubertin, *Textes Choisis Vol II* (Lausanne, Switzerland: CIO, 1971, originally published 1931).

44 R. Barney, S. Wenn, S. Martyn, *Selling the Five Rings: The International Olympic Committee and the Rise of Olympic Commercialism* (Salt Lake City: University of Utah Press, 2002), see also C. Michalos, n42 above for commentary.

45 See for example T. Miller, 'London 2012 – meeting the challenge of brand protection' (2008) *International Sports Law Review* 44, 45: 'Like other sports and businesses, LOCOG has registered or is in the process of registering trade marks in the United Kingdom for all of the emblems it has created, including the new *Inspire* mark. It is also able to rely on longstanding UK laws such as those protecting copyright and registered and unregistered design rights, and giving rights to address passing off'. A. Kelham, 'Tackling Ambush Marketing of the Olympic and Paralympic Games – London 2012: A Case Study' in A. Lewis and J. Taylor (eds), *Sport: Law and Practice* (Haywards Heath: Tottel Publishing Ltd, 2008) ch 2.

Olympic Properties are concerned is the specificity and detail of the provisions protecting the symbol and the creeping legislative protection that these offer.

Rule 7 of the Olympic Charter states that all rights in the Olympic Games and the Olympic Properties lie with the IOC, which has the exclusive right to exploit them. Once a Games' organising committee has been established, these rights can be exploited jointly by it and the IOC. The level of protection afforded to the Olympic Properties varies significantly between jurisdictions. Since 1981, 45 nations have ratified the Nairobi Treaty on the Protection of the Olympic Symbol, which provides the IOC with specific protection for the Olympic Symbol. In other jurisdictions, such as the UK, specific legislation has been introduced to protect the Olympic Symbol and associated words and phrases for the benefit of the appropriate National Olympic Committee. In other countries, the relevant protection is enforced by a mixture of copyright and trademark law. The variety of means of protecting the Olympic Properties has led to the IOC requiring legislation to be implemented by the national government of the city where the Olympic Games is to be staged as a condition of the Host City Contract.⁴⁶ As each Games sees the emergence of ever more creative means of circumventing these provisions, so too does the protection of the Olympic brand become more extensive and the punishment of transgressors more draconian.

Olympic Symbols Etc (Protection) Act 1995

The original aim of OSPA 1995 was to protect the Olympic symbol, motto and certain 'protected words' from unregulated use by unofficial enterprises, with the preamble stating that it was 'An Act to make provision about the use for commercial purposes of the Olympic symbol and certain words associated with the Olympic games; and for connected purposes.' This protection was achieved by section 2 of OSPA 1995 creating the Olympic Association Right (OAR), the exclusive exploitation of which was granted to the BOA.⁴⁷ The Act was passed in preference to the UK becoming a signatory of the Nairobi

⁴⁶ See further below, n74.

⁴⁷ A similar right as regards the Paralympics, the Paralympics Association Right, was added by the LOGPA 2006 Sch 3, para 6, and is now contained in OSPA 1995, s 5A.

Convention in order that the beneficiary of the protections would be the BOA, which would then be in a position to remain self-funding and politically independent, rather than the IOC, as is the case under the Convention. Following the election of London as the host city for the 2012 Olympic Games, article 4 of the Olympics and Paralympics Association Rights (Appointment of Proprietors) Order grants joint and concurrent exploitation of the OAR to the BOA and LOCOG until 31 December 2012, when the BOA will revert to being the exclusive proprietor.

The OAR is infringed when the Olympic symbol, motto, or any of the protected words, 'Olympiad', 'Olympian', 'Olympic' and the plurals thereof,⁴⁸ are used in a controlled representation without the consent of either the BOA or LOCOG:

3 Infringement

(1) A person infringes the Olympics association right if in the course of trade he uses –

- (a) A representation of the Olympic symbol, the Olympic motto or a protected word, or
- (b) A representation of something so similar to the Olympic symbol or the Olympic motto as to be likely to create in the public mind an association with it or a word so similar to a protected word as to be likely to create in the public mind an association with the Olympic Games or the Olympic movement (in this Act referred to as 'a controlled representation'.)

(2) For the purposes of this section, a person uses a controlled representation if, in particular, he –

- (a) affixes it to goods or the packaging thereof,
- (b) incorporates it in a flag or banner,
- (c) offers or exposes for sale, puts on the market or stocks for those

⁴⁸ OSPA 1995, s 18 (2).

- purposes goods which bear it or whose packaging bears it,
- (d) imports or exports goods which bear it or whose packaging bears it,
 - (e) offers or supplies services under a sign which consists of or contains it, or
 - (f) uses it on business papers or in advertising.

The only exceptions to this are defined in section 4 of OSPA 1995. First, the OAR is not infringed where the controlled representation is made during the course of publishing or broadcasting a report about an Olympic event, or in an advert for such a report, or is included incidentally in a broadcast, or literary or artistic work.⁴⁹ Secondly, there is no infringement where the controlled representation is not likely to suggest an association with the Olympic Movement in general or the Olympic Games in particular. Here, association is defined as a contractual or commercial relationship, a corporate or other structural connection or the provision of financial or other support.⁵⁰ Thus, for example, this article does not infringe the OAR when using the protected words. Thirdly, the OAR is not infringed in circumstances where the use of the protected words or symbol predates its creation by OSPA 1995.⁵¹

In all other cases, the OAR is infringed by a controlled representation and the proprietors have the right to seek damages, injunctions or accounts as is appropriate in the circumstances.⁵² Actions for forfeiture, detention by the Commissioners for Revenue and Customs, erasure and delivery up of

⁴⁹ OSPA 1995, s 4 (1).

⁵⁰ OSPA 1995, s 4 (3).

⁵¹ OSPA 1995, s 4 (11)(13).

⁵² OSPA 1995, s 6.

offending materials are provided for elsewhere within the Act.⁵³ Finally, section 8 of OSPA 1995 creates a variety of offences covering the making of a controlled representation in a commercial setting where the infringer has a view to making a gain for himself or another or making a loss to another without the consent of the proprietor. The result of OSPA 1995 is that the Olympic symbol, motto and protected words receive a degree of protection beyond that which would be provided to similar commercial rights owned by other undertakings under the Trade Marks Act 1994 and Copyright, Designs and Patents Act 1988.

London Olympic and Paralympic Games Act 2006

Whereas OSPA 1995 provides legislative protection for certain of the Olympic Properties, section 33 and schedule 4 of LOPGA 2006 create an almost identical framework of protection for the iconography specifically associated with the London 2012 edition of the Olympic Games. The London Olympics Association Right (LOAR) is created for the exclusive benefit of LOCOG to enable it to exploit as efficiently as possible the commercial goodwill associated with its edition of the Olympic Games. The LOAR is defined significantly more widely than the OAR, and includes *any* representation of *any kind* that is likely to suggest to the public that there is an association between the London Olympics and any goods or services, or any person who provides goods or services.⁵⁴ Thus, it goes much further than preventing the use of the Olympic symbol and a limited number of words, ensuring that an even greater degree of creativity than normal will be required of advertisers who are promoting the goods and services of undertakings who are not official partners of either the IOC or LOCOG if they are to avoid the prohibitions contained in the Act.

Despite both this broad approach and the vagueness of what constitutes making an association with the London Olympics, paragraph 3(1) of schedule 4 of LOPGA 2006 goes on to state that the use of specific combinations of

⁵³ OSPA 1995, ss11, 12A and 7 respectively.

⁵⁴ LOPGA 2006, para 1, sch 4.

words and expressions will in particular be taken into account by a court when determining whether or not an infringement has taken place, giving examples of combinations of words such as 'gold', 'London', '2012' and 'summer'. Although the use of combinations of these words is not automatically unlawful, as is the case with the OAR, when used in a commercial context that is other than reporting on an Olympic event an infringement is almost certain to be found to have occurred. This is an extreme form of protection for words and phrases which are descriptive of an event or undertaking that, even if used without reference to any protected symbols or logos, could result in enforcement and/or punishment under sections 6, 7 and 15 of OSPA 1995, as would be the case following an infringement of the OAR.⁵⁵ Further, following a successful prosecution an infringer can be fined up to a maximum of £20,000 on conviction before the Magistrates Court or could face an unlimited fine if tried on indictment.⁵⁶

The LOAR specifically regulates the use of everyday words and phrases that are a necessary means of communicating advertising information to the public, that is in addition to the extensive copyright and trademark protection already afforded to the iconography of both the IOC in general and the London Olympics in particular. With such additional provisions in place, it is hardly surprising that the marketing teams of companies that are not part of the official partner programmes go to such lengths to circumvent the prohibitions imposed on them by the Olympic laws. The following section, with specific reference to the practice of ambush marketing, details some of the attempts to regulate this commercial and artistic creativity.

THE IMPACT OF THE OLYMPIC LEGISLATION – REGULATING AMBUSH MARKETING AROUND OLYMPIC VENUES

Ambush marketing is a by-product of exclusive sponsorship deals in that the

⁵⁵ Notes 51 and 52 above.

⁵⁶ LOPGA 2006, s 21.

ambush is designed to gain some marketing capital from association with the protected event by brands that are not members of the official sponsorship or partnership programme. The term itself is said to have originated from a marketing executive at American Express during the 1980s⁵⁷ and encapsulates such a wide range of activity that it is difficult to specify precisely what it entails and what its parameters are.

Ambush marketing occurs when a brand owner creates an unauthorised association with an event or an organisation in order to exploit, for commercial advantage, the goodwill associated with it. It is often a highly sophisticated marketing strategy that has been designed to undermine the exclusive arrangements that have been entered into between the primary rights holder, or events organiser, and its official sponsors. However, and not withstanding some examples to the contrary, it is arguable that the ambushing is often against the event rather than the brand competitor.⁵⁸

Where mega-events such as the Olympics are concerned, a key income stream is derived from the maximisation of the commercial value of being associated officially with the Games. Only official partners are able to use the Olympic symbol as part of their marketing campaigns and to associate themselves directly with the Olympic Games, paying a substantial premium for the ability to do so. Therefore, anti-ambush marketing strategies are essential in order to protect the commercial value of a sponsor being associated exclusively with the event from dilution by those who seek to be associated with it for free. Without such protection, it is unlikely that the organising committee of any major sports event, particularly the Olympic

⁵⁷ See P. Johnson, 'Look out! Its an ambush!' (2008) *International Sports Law Review* 24, 24.

⁵⁸ This point is made in D. Shani and D. Sandler, 'Ambush Marketing: Is confusion to blame for the flickering of the flame?' (1998) 15 *Psychology and Marketing* 367, 371. Ambush marketing is also said by Shani and Sandler to have commenced at the LA Games in 1984. See here generally J. Hock and P. Glendall, 'Ambush Marketing: More than just a commercial irritant' (2000) 1 *Entertainment Law* 72, N. Burton, 'Ambush Marketing in Sport: An Assessment of Implications and Management Strategies' (2008) Centre for the International Business of Sport Working Paper Series No 3 at http://www.sports-city.org/reports/summaries/CIBS_ambush_marketing.pdf (last visited 23 February 2011) and C. Lawrence, J. Taylor and O. Weingarten, 'Proprietary rights in Sports Events' in A. Lewis and J. Taylor (eds), *Sport: Law and Practice* (Haywards Heath: Tottel Publishing Ltd, 2008).

Games, would be able to raise sufficient revenue to be in a position to act as host to the standard that has come to be expected.

Whilst sponsorship of sport in some form (*choregia*) is said to date back to the fifth century BC,⁵⁹ as noted above, modern Olympic sponsorship arrangements can be said to have begun in earnest at Los Angeles in 1984. In an attempt to generate more income for the organising committee and create better value for the sponsors, sponsorship of specific categories of products and services was sold to individual companies on an exclusive basis; only these official partners were entitled to be associated with this edition of the Games and to use the Olympic symbols and logos in their advertising. Since then, this strategy has been developed by the IOC through the Olympic Partnership programme, which acts as a worldwide sponsorship arrangement between the IOC and nine category specific partners.⁶⁰ The companies that are members of the programme are entitled to be associated with the Olympic Movement in general, including each edition of the Olympic Games, and to use the protected words and symbols in their advertising campaigns. These arrangements are supplemented by the agreements entered into by the organising committee for each edition of the Olympic Games, for example LOCOG, which has sponsorship and supply arrangements in place with a wide range of nationally and internationally renowned companies.⁶¹ The partner companies in this second group are entitled to associate themselves only with a specific edition of the Olympic Games and to use the protected symbols and words directly associated with it.

These exclusive arrangements could be said to have played no small part in the development of ambush marketing strategies, as those excluded from being able to associate themselves legitimately with the Olympics seek

⁵⁹ P. Kissoudi, 'Closing the Circle: Sponsorship and the Greek Olympic Games from Ancient Times to the Present Day' (2005) 22 *International Journal of the History of Sport* 618, 618.

⁶⁰ See http://www.olympic.org/Document/fact_file_2010.pdf (last visited 8 February 2011).

⁶¹ See for example <http://www.london2012.com/about-us/the-people-delivering-the-games/international-and-uk-partners/index.php> (last visited 8 February 2011).

alternative means of doing so. There is very little that a primary rights holder like the IOC or LOCOG can do about cleverly designed campaigns. For example, at the time of the Barcelona Olympics in 1992, American Express ran a campaign based around the slogan, 'You don't need a visa to go to Spain' in opposition to Visa's position as an official Olympic Partner. More recently, at the 2010 Winter Games in Vancouver, Lululemon's range of clothing that was marketed as the 'Cool Sporting Event That Takes Place in British Columbia Between 2009 and 2011 Edition' was a comparatively unsubtle means of evading the restrictions found in section 3 of the Olympic and Paralympic Marks Act 2007,⁶² the Canadian federal legislation that provided the organisers with similar protections to those found in section 33 and schedule 4 of LOPGA 2006.⁶³ The first of these examples is a statement of fact that contains a double meaning; citizens of countries in which the campaign ran did not need a visa to visit Spain, just a valid passport. The second ensures that whilst none of the prohibited words or symbols have been used, so that there is no breach of the Act, a clear link to the Games is being created. Unless it can be proven that the ambusher is passing off their goods and/or services as official, or is using the prohibited words or protected symbols without the permission of the rights holder, or is acting fraudulently by claiming an association with the Games that they are not entitled to do, there is very little scope in English law to prevent successful ambushes like these. However, any inadequacies of the current law are likely to allow only weak or indirect links to be made between an undertaking that is not part of the Official Partner programme and the Games. What the creation of the LOAR does is to close what LOCOG and the IOC perceive as a major loophole by ensuring that where *any* link is made to the London Olympics by any advert, no matter how tenuous, then an infringement will have occurred.

Further, and of particular and unique importance to the IOC, is its requirement that all Olympic venues must be completely 'clean' for the duration of the Games. According to Rule 51(2) of the Olympic Charter, no form of advertising or other publicity and no commercial installations are

⁶² Available at <http://laws.justice.gc.ca/eng/O-9.2/index.html> (last visited 23 February 2011).

⁶³ In a broader sense, there are myriad examples of ambush marketing practice more generally, see the instances provided by Hock and Glendall, n 58 above, and J. Schmitz, 'Ambush Marketing: The Off-field competition at the Olympic Games' (2005) 3 *Northwestern Journal of Technology and Intellectual Property* 203.

allowed in or above the stadia, venues and other competition areas that are part of the Olympic sites.⁶⁴ The purpose of Rule 51(2) is to protect the 'purity' of the Games as being a celebration of sporting talent and competition that is untainted by commercial imperatives and financial reward. This means that all Olympic events must take place in venues that are free from advertising, official or otherwise, and which have not sold their naming rights.⁶⁵ Thus, the IOC and LOCOG need to ensure that advertising opportunities that are not available to the authorised partners and sponsors cannot be exploited by those that have no official link with the Olympic Movement or a specific edition of the Games.

In order to minimise the opportunities for ambushing the Official Partners programme, what the IOC now demands from a host city, following the perceived success of similar legislation at the Sydney Olympics in 2000 and at each subsequent edition of the Games,⁶⁶ is the regulation of advertising in the vicinity of Olympic venues. Under section 19(1) of LOPGA, the Secretary of State or Paymaster General have the power to make regulations concerning all such advertising. According to sections 23(1) and (2) of the Act, these regulations will only need to be released around six months prior to their coming into effect. At this time, the ODA will have to provide the necessary criteria for determining precisely which forms of advertising will be subject to the Act, the places where the regulations will apply and a more detailed definition of what constitutes being 'in the vicinity' of an Olympic venue. This regulatory regime can also be applied to adverts that predate the promulgation of the regulations, under section 20 (1)(g), which could, technically, cause problems to companies who have eponymous buildings

⁶⁴ See *The Olympic Charter* n 4 above.

⁶⁵ On this basis the O2 Area, formerly known as the Millennium Dome and already heavily branded as part of the O2 mobile network, will be known as the North Greenwich Arena 1 during the Games period. See <http://www.london2012.com/games/venues/north-greenwich-arena-1.php> (last visited 11 May 2010).

⁶⁶ After London 2012, the next Summer Games are due to take place in Rio de Janeiro in 2016, see <http://www.olympic.org/en/content/Olympic-Games/All-future-Olympic-Games/Summer/rio-de-janeiro-2016> / (last visited 11 May 2010). The next Winter Games are due to take place in Sochi in 2014.

within the exclusion zone.

The control of advertising in the vicinity of Olympic venues will, according to section 19(7) of LOPGA, be undertaken by a 'responsible body'. At present, this body has not been identified, however because of the nature of the powers that it will have, especially under section 20, where it will have the power to disapply and/or modify existing statutory arrangements affecting planning and advertising, it is likely that a public body will be appointed to discharge these powers. The prime candidate for the role would appear to be the ODA; however as it has already been identified in section 22(10) as the body responsible for providing the enforcement officers who will police the regulations, the proposed regulatory framework appears to offend the separation of powers doctrine as the same body will have the ability to define, investigate and prosecute suspected breaches of the regulations. Thus, the normal checks and balances inherent in the criminal justice system are absent when it comes to the protection of the Olympic Properties and infringements of the LOAR.

In order to provide the most wide-ranging protection against ambush marketing, the definition of what will constitute 'advertising' under the Act is both broad and vague. Under section 19(4), advertising of a non-commercial nature and announcements or notices of any kind are specifically identified as being subject to the regulations. The purpose of these provisions appears, however, not only to be a means of giving legislative effect to Rule 51(3) OC, which prohibits any kind of demonstration or political, religious or racial propaganda in any Olympic sites, venues or other areas, but to extend the effect of the Rule to most of London for the duration of the Olympic Games as well as to other cities hosting Olympic events.⁶⁷ Although it is understandable that the IOC and LOCOG want the Games to be seen as a celebration of sport and culture that is free from political gesturing inside the Olympic venues, it is more difficult to justify why such a prohibition should extend beyond them into the surrounding cities.

For example, 'non-commercial advertising' would appear to cover the dissemination of any information about the Games that originates from

⁶⁷ This would extend to events at other venues throughout the UK, such as the archery at Lords and yachting at Weymouth.

unofficial sources or non-media outlets. This would enable the ODA to prevent any adverse comment about the Games that was distributed or displayed within the vicinity of an Olympic venue.⁶⁸ Thus, anyone seeking to protest about their allotments having been compulsorily purchased, or local sports pitches having Olympic venues built on them, or businesses being relocated to build the Olympic park, or a more general complaint about the cost incurred to the country in general and London in particular, will be prevented from doing so in the areas that are most relevant to their cause and which would create the most impact.

In addition to regulating the more obvious forms of advertising, section 19(5) (c) allows regulations to be made in respect of things done with or in relation to material which has, or may have, purposes or uses other than as an advertisement. This would appear to be aimed at preventing people from wearing clothing or using items such as drinks containers or umbrellas sporting the logos of companies other than those of the Official Partners. The zealous enforcement of such a provision could see a similar situation arise to that which occurred at the 2006 FIFA World Cup in Germany where Dutch supporters wearing bright orange shorts emblazoned with the logo of the brewer 'Bavaria' were forced to remove them and watch the game in their underwear as these items of clothing were considered to be an attempt to ambush the tournament's official beer, Budweiser.⁶⁹

To enact specific statutory provisions for the protection of the commercial rights of a major international undertaking is an unusual step for the government to have taken. Although it undoubtedly enables LOCOG to exploit its rights effectively, thereby guaranteeing it a substantial amount of the funding necessary to stage the Games, it is questionable whether it is appropriate for the state to provide statutory protection of this breadth. This concern is reinforced by the power to investigate breaches of this part of the Act being devolved to the ODA,⁷⁰ the level of intrusion which these powers provide⁷¹ and the punishments that can be imposed on conviction.⁷²

68 See Games Monitor, n11 above, and also n 32 and the impact upon peaceful protest.

69 See L. Smith-spark, 'Dutch fans given shorts for match' BBC News Channel 21 June 2006 at <http://news.bbc.co.uk/1/hi/5104252.stm> (last visited 11 May 2010).

Of particular importance here are the powers of entry granted to the police and the ODA's designated enforcement officers where a suspected breach of the advertising regulations in section 19 of LOPGA 2006 has taken place. Reasonable force can be used to enter any premises where a breach of section 19 is suspected in order to remove, destroy, conceal or erase any infringing article. Further, anything used in the production of a breach of section 19, such as a computer or projector, can also be removed and confiscated ensuring that the body with the greatest interest in the enforcement of these provisions has extraordinarily wide powers to ensure compliance with them. As noted above, these potentially wide ranging powers caused considerable disquiet in a number of quarters, as Anita Coles, policy officer for Liberty noted:

This goes much further than protecting the Olympic logo for commercial use. Regulations could ban signs urging boycotts of sponsors with sweat shops. Then private contractors designated by the Olympic authority could enter homes and other premises in the vicinity, seizing or destroying private property.⁷³

CONCLUSION: THE IMPACT OF THE OLYMPIC LEGISLATION

⁷⁰ LOPGA 2006, sections 22(10) and 23.

⁷¹ LOPGA 2006, s 22.

⁷² An unlimited fine following conviction on indictment or a fine of up to £20,000 following a summary conviction, LOPGA 2006, s 21.

⁷³ See Dodd, n 32 above.

The provisions of the London Olympic and Paralympic Games Act 2006 that have been discussed here were not enacted on the basis of proactive Parliamentary intervention to an acknowledged problem, or as a response to a moral panic; they have reached the statute book only because it is a requirement of the Host City Contract to introduce protections of this kind.⁷⁴ However, it was Parliament's decision to extend the scope of the protections granted so widely, and beyond what is required in the Candidate Procedure document, rather than their being a specific IOC requirement. Thus, these interventions lack a coherent jurisprudential justification and are instead grounded in a political expediency that was driven by a desire to host the Olympic Games. A similar response can be seen to the IOC's requirement that ticket touting be criminalised; not only did the government pass legislation regulating an activity simply because the IOC demanded it, but it utilised a model based on the control of ticket touting at football matches, legislation that was introduced with the specific aim of preventing a public disorder not to protect the image of the event being touted.⁷⁵

The provisions analysed above illustrate that the restrictions imposed on advertisers, and the use of specific words and symbols, have gone far beyond what is necessary to protect the commercial interests vested in the Olympic Games and far beyond that which has been granted to any other event or commercial undertaking. The specific statutory protection that is already in place for the Olympic Symbols and the extensive copyright and trademark registrations that protect the reproductions of the symbols, mascots, posters, medals and merchandising associated with the London Olympic Games should be more than adequate to protect the commercial interests of the IOC and LOCOG, as they are for other commercial undertakings. The restriction on the use of the everyday words contained in Schedule 4 paragraph 3(1) of

⁷⁴ The 2012 Candidature Procedure and Questionnaire (IOC, May 2004) at http://multimedia.olympic.org/pdf/en_report_810.pdf (last visited 25 January 2011) details the minimum requirements required for host cities. Under theme 3 (Legal aspects) candidate cities are required to obtain guarantees including 'documentation indicating that appropriate measures have been taken to protect the word mark "[city] 2012" within the host territory' (Q3.4) and a 'declaration from the government of your country stipulating that all necessary legal measures will be taken to facilitate the protection of Olympic marks' (Q3.5), see IOC, 2004, 77_260.

⁷⁵ See M. James and G. Osborn, n30 above, and Freedom of Information Act Request, CMS 106119 n 7 above.

LOPGA 2006, restrictions that will be investigated and enforced by a public body with a vested interest in their vigorous enforcement, appears to be a step too far.

The broader issues of over-zealous security and surveillance that comes with this has previously been examined as regards Athens in 2004 and will no doubt be a feature of London 2012.⁷⁶ This recurrence of similar issues at consecutive and subsequent editions of the Olympics has ensured that the protections afforded to one organising committee are used as a justification for the enactment of similar legislation at subsequent Games. This is a neat illustration of horizontal creep, where a review of the previous edition of the Games leads subsequent Games organisers to adopt a similar, though incrementally more extensive, legislative palette.⁷⁷

At the outset we noted that the Olympics are not only a global brand, but also emblematic of something important in terms of a broader notion of values and an ethos, or spirit, of Olympism:

This philosophy has as its focus of interest not just the elite athlete, but everyone; not just a short truce period, but the whole of life; not just competition and winning, but also the values of participation and co-operation; not just sport as an activity but also as a formative and development influence contributing to desirable characteristics of individual personality and social life.⁷⁸

⁷⁶ See M. Samatas, 'Security and Surveillance in the Athens 2004 Olympics' (2007) 17 *International Criminal Justice Review* 220. Samatas looks particularly at the 'superpanopticon' technology utilised in the post 9/11 environment of the Athens Games.

⁷⁷ We do not deal with the issue of horizontal creep in any depth here, nor do we tackle a further offshoot of vertical creep, where subsequent events in one country or area have mirrored the legislative practice of the former. This can already be seen in the Glasgow Commonwealth Games 2014 legislation. See further here Johnson, n 57 above, 27. This is an area we intend to tackle in subsequent work.

⁷⁸ J. Parry, n35 above, 94.

This approach was recently enshrined in the European White Paper on Sport,⁷⁹ which focused on the importance of sport and its wider societal function.⁸⁰ However, whilst the White Paper seeks to preserve some of the important non-economic functions of sport, and the Olympic spirit is ‘ostensibly non-materialist’, the Fundamental Principles of Olympism have undoubtedly come under attack by the outward march of commercialisation. Similar arguments concerning whether sport is a business that should be subjected to EU regulation or is an inherent part of the broader culture of the EU are at the heart of European sports law jurisprudence from *Bosman*⁸¹ to *MOTOE*⁸² and now enshrined in Article 165 of the Treaty on the Functioning of the European Union, where the ‘specificity of sport’ has, on occasion, justified sport’s differential treatment under EU law.

Perhaps a great part of the problem stems from the way in which the Olympics is conceptualised. Much of the rhetoric surrounding the framing of a bid, and justifying the accompanying expenditure, centres upon issues of legacy and is usually examined using a cost benefit analysis; resorting to such an analysis in the first place arguably merely affirms the continuing commodification of the Olympics. Macrury and Poynter offer an interesting counterpoint to this. They argue that on the one hand, the IOC rhetoric and approach adopts the language of the ‘gift economy’. This gift mode

79 COM (2007) 39 Final.

80 See also J. Anderson, ‘The Societal Role of Sport’ (2008) *International Sports Law Journal* 85.

81 Case C-415/93 *Union Royal Belge des Societe de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921.

82 Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOW) v Eilliniko Dimosio* [2008] ECR I-4863.

embraces the language, ethos and cultural discourses of Olympism:

The 'gift-mode' describes a conception of the nature and impact of an Olympic economy embedded in socio-cultural life and relations – notably in the various accumulations and effects corralled under the term 'legacy' – a term which owes its semantic potency to socially embedded (familial) economies.⁸³

However, they argue that there has been a subordination of the gift to the notion of commodity. Whilst the IOC evoke a narrative of Olympism, they are merely creating '... a *simulation* of the gift economy within the context of a highly commercialised or commodified form; simulation is now represented in the form of the Olympic "brand"'.⁸⁴ As such the brand, including the rights to the logos, symbols and other properties become commodities, bought by sponsors, transferred and utilised for their commercial means, making it increasingly difficult to operate a 'commodity Olympics' in the space of a 'gift Olympics', and the related tension between legacy and profit. As the 'real' Olympic movement itself becomes commoditised as part of the Olympic brand, the Fundamental Principles of Olympism become sub-ordinate to the commercial reality of staging the Games:

The Olympics has a fascinating claim to speak for international ideals, for the value of transcending difference in friendly competition. But it is *as a commodity* that the scale of the media and market penetration, and extraordinary longevity and sustained profile of the phenomenon, must be understood.⁸⁵

83 Macrury and Poynter, n11 above, 2073.

84 *Ibid*, 2081.

85 A. Tomlinson, n2 above, 195-196.

It is arguable, therefore, that the ways in which the Olympics is viewed need to change and that this change needs to come from the IOC itself as the supreme authority of the Olympic Movement rather than as a result of the imposition of domestic legislation enacted for each specific edition of the Games. Critics of the Olympics, especially those who see the unfettered economic imperatives that currently dictate the Olympic agenda and the consequent values this enshrines, consider this to be part of a broader problematic of globalisation. Milton-Smith for one argues that a reorientation of the Olympics is needed if we are to be able to recapture the essence of the Games.⁸⁶ There is of course a general assumption that the Olympic Games are 'a good thing' on many levels. As we have noted above, hosting the Games can have many positive benefits, although as we have also noted, the Games are not without their critics. That there are these polarities of views is to be expected in events on this scale. However, perhaps because of the general view that they are beneficial to the host city, region and state, the overprotection of many of the rights afforded to the IOC and the organising committees has gone unquestioned, or at least remained under the radar. Whilst the first appearance may be of a benign network of rights and protective measures, its impacts are potentially austere, both in terms of the possible side effects on non-intended targets outside of the original purview of the legislation, and more importantly, distances even further the Games from the cultural and ethical underpinnings of the Olympic Movement and its traditional values.

86 J. Milton-Smith, 'Ethics, the Olympics and the Search for Global Values' (2002) 35 *Journal of Business Ethics* 131.