

The London Olympic Games And Paralympic Games Act 2006

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Introduction

On 30 March 2006, the somewhat controversial London Olympic Games and Paralympic Games Act 2006 gained Royal Assent. The swift introduction of the London Olympics Bill (the "Bill") following the 2012 Olympic Games being awarded to London in July of last year was an indication of the importance of the Bill to all those involved with the Olympic movement and the London Games.

However, the Bill's speedy introduction was followed equally rapidly by somewhat provocative media reports on the application of the Bill's provisions. Fuelled partly by these reports, but also as a result of genuine concerns held by the advertising industry, the Bill faced significant opposition despite its importance to the viability of the 2012 Olympic Games.

Opponents of some of the Bill's provisions looked on in horror as reports surfaced of organisations such as Basingstoke 2012, which was set up to promote Basingstoke as a site for an Olympic training team, changing its name to "Basingstoke 2011 plus one" to avoid contravening the rules. Many of the Bill's opponents have now been appeased by the amendments made prior to the Bill's passage into law.

The provisions of the Act are crucial to enable the London Organising Committee for the Olympic Games ("LOCOG") to fight ambush marketing practices which undermine the event's sponsorship programme and also to control advertising, street trading, the sale of tickets and transport around the event. Furthermore, provisions of the sort contained in the Act were to be expected in light of the similar legislation adopted for the Sydney 2000 and Athens 2004 Games and the requirements of the International Olympic Committee.

This article will briefly summarise the main provisions of the Act and explain the few but significant changes that were made to the Bill prior to its passing into law.

The relevant legal framework before 30 March 2006

In the absence of any specific law against ambush marketing in the UK, the Olympic Symbol etc (Protection) Act 1995 (the "OSPA") has, for the last decade, provided the British Olympic Association with an important weapon in its fight to protect sponsorship revenues. The OSPA created an "Olympic association right", a quasi-trade mark right, and protected the 5-ring Olympic symbol, the Olympic motto and the protected words such as Olympics, Olympiad, etc. However, it does not specifically prevent ambush marketing.

Indeed, in the absence of any general law against unfair commercial practices, organisers of sports events in the UK have struggled to combat ambush marketing and have been forced to look to a number of established legal doctrines to protect their events and commercial programmes. These have ranged from copyright and

trade mark law, through to relying on contractual provisions on tickets and close coordination with local Trading Standards Departments. However, practical experience of relying on such legal tools demonstrates that there are limits to their usefulness and, arguably, the existing legal framework before 30 March 2006 in the UK was inadequate to protect the commercial rights to an event the size of the Olympics.

The new law

The London Olympic Association Right

The most debated provision is Schedule 4 of the Act which introduces the London Olympics Association Right ("LOAR"). This confers on the LOCOG the exclusive right to authorise persons to use and exploit any visual or verbal representation (of any kind) which is likely to create, in the public mind, an association between the London Olympics and goods or services (or a person who provides goods or services).

The Act sets out a number of words such as "games", "Two Thousand and Twelve", "2012" and "twenty twelve" which must not be used in combination with any of "gold", "silver", "bronze", "London", "medals", "sponsor" or "summer" in an unauthorised manner which is likely to suggest to the public that there is an association with the London Olympics. There is provision for the list of words to be extended, subject to consultation (see below), and the right is therefore potentially very wide in scope. The Act authorises LOCOG to grant exclusive rights to official sponsors and commercial partners to associate themselves with the Games.

It will be down to the Courts to rule on whether the new intellectual property right, the LOAR, has been infringed by the use of the combinations of words referred to above. Paragraph 3(1) states that, "[f]or the purpose of considering whether a person has infringed the [LOAR] a court may, in particular, take account of his use of a combination of expressions of a kind [noted above]."

A person may therefore be held to infringe the LOAR by making any kind of unauthorised representation in a manner likely to suggest to the public that there is an association (whether through a contractual or commercial relationship or corporate connection) between the London Olympics and that person or the goods or services of that person.

Advertising, Street Trading and Transport

The Act also empowers the Secretary of State to make regulations (subject to consultation as explained below) controlling advertising and street trading in the "vicinity" of Olympic venues, and an "Olympic Transport Plan" to enable LOCOG to fulfil its obligations under its host city contract with the IOC. Unless authorisation has been granted, trading restrictions may apply to activities in public places and on private land to which the public has access. However, the restrictions will not apply to trading in buildings (other than car parks).

Secondary legislation in the run up to 2012 will set out restrictions relating to advertising and street trading and will therefore reflect any changes in IOC policy or the Olympic venues between now and the games.

Ticket Touting

The previous UK law concerning ticket touting would have been insufficient to prevent the proliferation of the black market sale of tickets during the London Olympics. The Act introduces a direct prohibition on the unauthorised sale of Olympic tickets in a public place by an unauthorised person or in the course of business. "Sale" is defined widely and includes offering to sell a ticket, exposing a ticket for sale, advertising the availability of a ticket for purchase and offering or giving a person a ticket in return for goods or services.

The DCMS factsheet and opposition to the Bill

On 31 August 2005 the Department of Culture, Media and Sport (the "DCMS") released a factsheet in response to the criticism of the restrictions on the use of Olympic words to "counter some of these myths". The factsheet explained that the purpose of the LOAR is to prevent instances of unfair association with the Games, not the mere use of words such as "games" and "London". The factsheet also explained that that, "It will have to be decided on a case by case basis whether infringement has occurred" and consequently whether, using a common sense approach, civil proceedings will be brought.

Despite circulation of the factsheet, there was still significant opposition to certain of the Bill's provisions, in particular the LOAR and the provisions relating to its infringement. The Advertising Association (a federation of trade bodies and organisations representing the advertising and promotional marketing industries) claimed that IOC requirements would be satisfied by the appropriate enforcement of existing UK law and that the additional protection set out in the Bill limited genuine freedom of commercial expression. Furthermore, it asserted that the LOAR as proposed was not proportionate or equitable, and that it would introduce unreasonable protection for official sponsors and organisers to the detriment of all other businesses.

So what has changed in the Act?

The automatic presumption of infringement

The most fierce opposition to the Bill concerned the proposal for a presumption of infringement when the prescribed words are used in combination. Furthermore, under the Bill as originally drafted the burden of proof rested with the person using the words to show that no association with the London Olympics would be likely to be created in the public mind.

After considerable discussion and months of pressure from the House of Lords and the advertising industry, the Government agreed to amend the proposed restrictions that had been branded by Lord Glentoran as a "draconian constraint". As a result, the Act provides that the Courts will take into account the use of combinations of the specified words in its assessment of whether the LOAR has been infringed. In essence, the amendment changes the effect of paragraph 3(1) of Schedule 4 from being one in which the use of protected words and expressions in certain combinations would constitute an automatic presumption of infringement, to an indication of a possible infringement of Schedule 4.

However, it is likely that the Courts will still frown upon any commercial entity attempting to take advantage of the publicity surrounding the Games for its own ends, in particular where it uses any of the designated words or symbols in any confusing or associative way to imply some sort of connection.

Nonetheless, the removal of the automatic presumption that the law has been broken has appeased the advertising industry. Though arguing that the restrictions have come into force too far in advance of the Games, Andrew Brown (the director general of the Advertising Association) has stated that, "These changes to the Bill go a long way towards addressing the concerns expressed about its provisions by the AA and the Institute of Practitioners in Advertising as well as the wider advertising and media business since July 2005."

Other amendments

Two other notable amendments in the Act also concern the provisions of Schedule 4. First, the Act places a duty on the Government to consult with the advertising industry before adding, removing or varying the list of protected words and expressions. In particular, the Secretary of State must consult "one or more persons who have relevant responsibility for regulating the advertising industry", "one or more persons who represent the interests of the advertising industry" and "such other persons as [s]he thinks appropriate.". The value and impact of this consultation will no doubt be watched closely by the advertising industry.

Secondly, the journalistic reporting defence has been modified. The Act now includes a defence when using the designated phrases in publishing or broadcasting a report of a sporting or other event forming part of, or information about, the London Olympics. Furthermore, the defence extends to the inclusion of the designated phrases in an advertisement for any such publication or broadcast. However, this provision cannot be relied upon in respect of advertising material which is published or broadcast at the same time as, or in connection with, a report or information. This qualification is intended to prevent "wraparound advertising", for example the publication of a sponsored supplement. Incidental inclusion of designated phrases in literary, dramatic or artistic works or a sound recording, film or broadcast will also not infringe the LOAR.

In relation to the provisions concerning the control of advertising and street trading in the "vicinity" of Olympic venues, the Act places a duty on the Government to consult with the industry before introducing restrictions on the physical location of advertising around Olympic venues. In particular, as with the making of regulations extending the list of designated words, amongst those that the Secretary of State is required to consult are "one or more persons who appear to the Secretary of State to represent interests within the advertising industry which are likely to be affected by the regulations."

Conclusion

Of all the major sports events, the Olympics is perhaps most vulnerable to (and therefore in most need of protection from) ambush marketing. This is a direct consequence of the fact that the Olympic Games is a clean event - there is no sponsor branding in the stadia or on competitors clothing. Despite this fairly unique characteristic, the substantial revenue generated by an extensive sponsorship programme built around the Games ensures the economic well-being, and indeed viability, of the event and many of the international sports federations whose events comprise the Games. Thus, official sponsors need a greater degree of protection in order to make their substantial investment in financing the Games worthwhile.

The coming into force of the Act in its revised form evidences the degree of success achieved by the lobbyists in watering down the legislation to remove the presumption of infringement of the LOAR and ease fears that media coverage could trigger proceedings. Nonetheless, businesses should be cautious when referring to the Olympics in any advertising or promotional material from now until 2012. The Act provides strong, and it is submitted crucial, protection against such practices.

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