Sport is a profitable business. Financial reports of the Olympic Delivery Authority and Department for Culture Media and Sport indicate that commercial sponsors of the 2012 Olympics spent some £700m to associate their brands with “the greatest show on earth”.1 Adidas reportedly paid the London Organising Committee of the Olympic and Paralympic Games (“LOCOG”) £40m to become a partner of the Games, while Freshfields Bruckhaus Deringer apparently spent £10m in order to call itself LOCOG’s legal services provider.2

It is perhaps therefore understandable that the International Olympic Committee (“IOC”) and its affiliates pulled out all the stops to protect the rights of Games sponsors, lobbying for the enactment of never-before-seen safe guards for associated brands and clamping down on those that looked to take advantage of the Olympics’ international popularity. However, we must ask, now that the gates of the Olympic Park have closed and the dismantling of temporary venues begun, how effective was this protection and did it prevent ambush marketers from exploiting the Games for commercial gains?

National safeguards

Olympic host cities are required to guarantee that, before the start of their Olympic Games, legislation is passed to reduce the opportunity for ambush marketing as far as possible and to provide effective response mechanisms and the ability to impose appropriate sanctions against those indulging in it. Accordingly, special statutory marketing rights were afforded to LOCOG to protect the commercial value of the 2012 Games, namely the London Olympic Association Right (“LOAR”) and the right to exclude all forms of advertising activity within “Event Zones” surrounding Olympic venues.

(a) London Olympic Association Right

The LOAR, introduced by the London Olympic Games and Paralympic Games Act 2006 (the “2006 Act”), prohibited the creation of an unauthorised association with the 2012 London Olympics or Paralympics by means of any representation in a marketing activity.3 The LOAR was intended to prevent activities which did not infringe existing legal rights (such as those under trade mark legislation) but which did, nevertheless create an “unauthorised association” with the 2012 Games.

The 2006 Act stated that an “association” would include any kind of contractual or commercial relationship, corporate or structural connection and/or the provision of financial or other support for or in connection with the 2012 Games.4

In order to provide clarity of application of the ambush marketing concept, the 2006 Act also specified that a court should take into particular account5 the use in marketing activities of any two of the words/phrases in List A, namely: “Games”, “2012”, “Two Thousand and Twelve”, “Twenty Twelve”; or any one word/phrase in List A plus any one word/phrase from List B, namely: “Gold”, “Silver”, “Bronze”, “London”, “Medals”, “Sponsor”, and “Summer”.

This was, however, not an exclusive list and it was intended that any unauthorised association with the Games would infringe the LOAR, including the depiction of an Olympic-style torch, a combination of the five colours of the Olympic symbol, images of Olympic venues, the depiction of Olympic sports and/or words which captured the essence of the Games (e.g. spirit, endeavour etc.).

(b) Event zones

Unauthorised advertising in any form was also prohibited around Games venues by virtue of the London Olympic Games and Paralympic Games (Advertising and Trading) (England) Regulations 2011 (the “Regulations”). During “Event Periods” (generally, the day before and throughout the duration of a sporting event), all types of advertising activity, including billboards, posters, flyers and costumes were banned in “Event Zones” (generally, a few hundred metres around the venue hosting the event). The location and size of these “Event Zones” were influenced by people flow, camera sight lines and, importantly, areas of potential ambush marketing.

Supranational safeguards

Alongside London-specific legislation, the Olympic movement was also protected in 2012 by existing supranational regulation, including the Olympic Association Right (“OAR”) and Olympic Charter.

(a) Olympic Association Right

The OAR was established by the Olympic Symbol etc. Protection Act 1995 (the “1995 Act”), as amended by the 2006 Act. The OAR conferred exclusive rights on the BOA and the BPA in relation to certain Olympic words and symbols. The OAR generally prohibited6 the use of the following words and symbols in the course of trade without LOCOG/BOA/BPA’s consent:

- the Olympic symbol (the five interlocking rings);
- the Olympic motto (“Citius Altius Fortius”/“Faster Higher Stronger”);
- the words: “Olympic(s)”, “Olympiad(s)”, “Olympian(s)” (or anything similar to them, or translations of them);
- the Paralympic symbol (the three “agitos”);
- the Paralympic motto (“Spirit in Motion”); and
- the words: “Paralympic(s)”, “Paralympiad(s)”, “Paralympian(s)” (or anything similar to them, or translations of them).

(b) Rule 40 of the Olympic Charter

Rule 40 of the Olympic Charter, which was revised for the London Olympics,7 is a restriction specifically designed to protect against ambush marketing and prevent unauthorised commercialisation of the Olympic Games. In particular, Rule 40 prevents athletes competing in the Olympics (as well as coaches, trainers and officials) from appearing in advertising shortly before, during and after the Games:

Both the OAR and LOAR created civil rights actionable by LOCOG, the British Olympic Association (“BOA”) and the British Paralympic Association (“BPA”).6 These were analogous to other private intellectual property rights with remedies for infringement including damages, an account of profits and injunctions. However, unlike the event-specific South African legislation surrounding the 2010 World Cup (for example, section 15A, Merchandise Marks Act 1941) an infringement of the LOAR did not give rise to criminal liability; only an infringement of the Olympic Association Right (see below) through the use of a protected word/symbol on goods packaging or advertising constituted a criminal offence.7

London 2012: An analysis of LOCOG’s approach to ambush marketing

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Over 400 Olympic athletes reportedly wore the shoe, including 68 running shoe a signature neon green hue. T ermed “Volt”, Nike branded flags to spectators, which ultimately had a greater visual Nike Village alongside the athlete’s village. Nike also handed out the proportion of the billboard space around the venues and built a ing in the 1996 Athens Olympics, the brand bought up a significant when it comes to international sporting events. For instance, dur- Nike has long been known for its creative marketing strategies (a) Nike

In order to enforce LOCOG’s legislative powers, 300 “brand police” were charged with the task of monitoring advertising around the UK in the lead-up to and during the Games. The event was notable in that this enforcement strategy was largely successful. Nonetheless, brands and agencies remained imaginative in their advertising methods and managed to gain a degree of publicity during the Olympics despite the legislative restrictions outlined above. Noteworthy efforts included:

- Union Jack–branded headphones being delivered by “Beats by Dre” to Team GB athletes, including diver Tom Daley, who was seen wearing the headphones on television prior to his 10m platform final;
- wine merchants Oddbins decorating its windows with posters explaining how it was censored from talking about the Games: “We can’t mention the event, we can’t mention the city, we can’t even mention the year … At least they can’t stop us telling you about the Rococo Rose”;
- tea brand Yorkshire Tea releasing adverts with the strap line “Yorkshire Gold, after gold, after gold (…) There must be something in the water” after Team GB athletes hailing from Yorkshire won their fifth Olympic gold medal; and
- sports–brand Puma creating a popular “Yard” in the East end of London, which hosted sets from popular musicians from rap artist Professional Green to electronica group Groove Armada.

However, the widely publicised and therefore effective campaigns seem to have been Nike’s “Volt” running shoe and “Find Your Greatness” series of ads and Paddy Power’s “Official Sponsor” billboards. Rule 40 of the Olympic Charter was also tested by US swimmer Michael Phelps and Jamaican sprinter Yohan Blake.

(a) Nike

Nike has long been known for its creative marketing strategies when it comes to international sporting events. For instance, during the 1996 Athens Olympics, the brand bought up a significant proportion of the billboard space around the venues and built a Nike Village alongside the athlete’s village. Nike also handed out branded flags to spectators, which ultimately had a greater visual impact than the footwear of official sponsor Reebok.

At the 2012 Games, Nike took the decision to colour its Flyknit running shoe a signature neon green hue. Termed “Volt”, Nike claimed that this was the colour most visible to the human eye. Over 400 Olympic athletes reportedly wore the shoe, including 68 medal winners, with it soon becoming an internet sensation and the talk of London Town. Nike also ran an advertising campaign in the lead up to, during and after the Games. The campaign, entitled “Find Your Greatness”, focused not on sponsored sports stars but “everyday athletes” in various foreign towns and cities called “London”, including London, Ohio and London, Canada.

(b) Paddy Power

Like Nike, Irish bookmaker Paddy Power has a history of inventive marketing. Previous efforts have included sponsoring Tongan rugby player Epi Taione to change his name to Paddy Power for the 2007 Rugby World Cup, setting up a Hollywood-style sign spelling out “Paddy Power” on a hill overlooking the 2010 Ryder Cup golf course and the footballer Nicklas Bendtner flashing Paddy Power branded underpants during the UEFA 2012 Finals.

During the London Games, Paddy Power unveiled several billboards in a number of London public places bearing the caption: “Official sponsor of the largest athletics event in London this year! There you go, we said it (ahem, London France that is)”. The ad was referring to an egg-and-spoon race held in the French region of Burgundy. LOCOG subsequently ordered ad space provider JC Decaux to remove the billboards, but was forced to back down when Paddy Power threatened to seek a court order blocking the withdrawal. Before the court application was made, LOCOG informed Paddy Power that it would not insist on the adverts being removed. Paddy Power later confirmed on its blog that it intended to seek to recoup its legal costs and these would then be donated to grassroots sports initiatives.

(c) Michael Phelps and Yohan Blake

The US swimmer Michael Phelps was accused of being in breach of Rule 40 in relation to an advertising campaign with Louis Vuitton. The campaign, which featured photographs by Annie Leibovitz, was due to be launched on 16 August 2012, the day after the Rule 40 blackout period. However, on 13 August 2012 two photos of Phelps appeared on the social media site Twitter. One featured Phelps posing in an antique bathtub, wearing a swimsuit, goggles on his head, with a Louis Vuitton bag to the side, and the other depicted Phelps wearing a three-piece suit and sitting on a couch with former Soviet gymnast Larisa Latynina. Although the campaign itself did not breach any Olympic rules, the fact that it was leaked prior to August 15 was potentially regarded as a breach of Rule 40. Phelps and his representatives argued that the images had been leaked without his authorisation, while Louis Vuitton declared that the photographs were unofficial images, stolen from the company.

Meanwhile, the Jamaican sprinter, Yohan Blake, also came to the attention of the IOC after he wore a US$500,000 Richard Mille customised watch during competition. If athletes use a piece of equipment that is not strictly clothing, they are required to use only products of an official sponsor of the Olympics. In this case, Blake should have worn an Omega timepiece.

Analysis

It is obvious, but still worth stating, that Nike’s production of the Volt shoe did and could not have infringed the OAR, LOAR, the Regulations or Rule 40. After all, there is no restriction on the use of eye-catching sports-equipment at sponsored sporting events. As such, we may expect to see increasingly colourful and attention-grabbing kit at future meets to the extent that such kit does not constitute a blatant advertisement of the manufacturing brand.

Nike’s “Find Your Greatness” campaign, on the other hand, was riskier. Commentators have suggested that LOCOG did not bring a claim against Nike on the basis that its ads did not specifically
refer to the London Olympics and on a reading of the relevant legislation the authors would agree. However, on a purposive interpretation of the LOAR, one could see how it might be argued that Nike's campaign did suggest that the brand was associated with the Games. Indeed, not only did the campaign make repeated use of the word “London” (and even a reference to SW19, the post code district in which Olympic tennis was played) in conjunction with images of Olympic disciplines, but Nike's encouragement to find and pursue athletic “greatness” might well be considered to have “captured the essence of the Games”.

Coupled with Nike's prominence at individual events through the brand's push of the Volt shoe and their support of over 100 federations and 3,000 athletes, the overall impression created in the mind of a reasonable person seeing the campaign might well have been that Nike was linked with London 2012. Nike is plainly a sophisticated brand, well experienced in creating marketing campaigns which stay the right side of the law and regulation applicable to a particular event. It seems that LOCOG agreed that they had done so again in relation to the London 2012 Olympic Games.

In light of this strict interpretation of the LOAR, it was perhaps surprising to then see LOCOG try and bend the scope of its advertising restrictions when dealing with Paddy Power's tongue-in-cheek jibe. After all, the bookmaker's sarcastic expression clearly failed to satisfy the LOAR's “List A and List B” requirements and it is difficult to see how one would argue that the billboards suggested there was an association between Paddy Power and London 2012.

Possible reasons for LOCOG's response might include:

1. the ad was overly provocative and LOCOG simply wanted to put Paddy Power “in its place”;
2. LOCOG considered it unacceptable that Paddy Power was gaining publicity off the back of the Games and, worse still, off the back of the LOAR;
3. LOCOG believed it was necessary to show it was taking its enforcement duties seriously; and/or
4. LOCOG was looking to discourage other brands from testing the limits of the LOAR and OAR.

Despite these motivations, however, it is the authors' opinion that LOCOG had no legal grounds on which to demand the ad's removal and the dispute that arose following its reaction to the campaign only resulted in negative publicity for enforcement authorities.

While the activities of Michael Phelps and Yohan Blake may have been regarded as a clear breach of Rule 40, the authors are not aware of any action having been brought against either of them. Given that several high profile athletes have, and continue to, campaign for the relaxing of Rule 40, the IOC may have concluded that in order to avoid antagonising the opposition further, such activities did not merit a fine or disqualification. Nonetheless, it must be noted that the IOC regards Rule 40 as essential to protecting the financial investment afforded to the Olympics by its commercial partners and therefore has said it has no intention of bowing to pressure to relax the rule.

Going forward, organisers are well aware of the risk of ambush marketing and know the steps to take to protect their events. While these steps will undoubtedly be more difficult in relation to competitions that do not benefit from the same legislative protection and accompanying investment for enforcement as the 2012 Games, the majority of brands are respectful of marketing restrictions and appreciate the value and integrity of official sponsorship. However, what is interesting is how a small number of brands, such as Nike and Paddy Power, are still able to create marketing campaigns that achieve prominence despite increasingly restrictive event-specific laws and regulations.

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This article originally appeared in Sports Law Administration & Practice October 2012 (Vol. 19, No. 5), on page 10.