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The Influence of European Legal Culture on the Evolution of Lex Olympica *and Olympic Law*

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I. INTRODUCTION

THIS CHAPTER EXPLORES the impact of European laws and legal thinking on the evolution of both *lex Olympica*, a distinct but powerful influencer of *lex sportiva*, and Olympic Law, the legislative product of the indirect law-making capability of the International Olympic Committee (IOC). It does this through an analysis of the IOC and its legal norm-creating powers, focussing specifically upon the IOC's requirement that an Olympic host criminalises the phenomenon of ambush marketing. It illustrates that Europe's impact is substantive, procedural and cultural, and further examines the effect of, and critiques the extent of, the IOC's leverage in creating legal and regulatory frameworks in host cities.

The Olympic Movement, the IOC, and indeed the Olympic Games in general, are being subjected to unprecedented levels of social, political and legal scrutiny and criticism. Of particular interest to lawyers is the interrogation of the normative framework developed by the IOC that enables it to create Olympic Law from its own internal legal norms, the *lex Olympica*. This novel approach to law creation is grounded in highly Eurocentric notions of contract law, intellectual property law, and comparative legal theory. In particular, the interlocking series of contracts that underpins *lex sportiva* is replicated in the key relationships between the IOC, the International Sports Federations (ISFs), the National Olympic Committees (NOCs), the World Anti-Doping Agency (WADA), the

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Court of Arbitration for Sport (CAS), the hosts of the Olympic Games, and the athletes, creating an Olympic-specific *lex sportiva*: the *lex Olympica*. Alongside this internal legal framework, the use of 'forced transplants' has underpinned the creation of national laws in host cities since the Sydney 2000 Games, developing a separate body of Olympic Law.[1]

This chapter will focus on how Euro- and Anglo-centric notions of contract law and intellectual property law, in the context of the protection of a mega sports event's commercial rights strategies, underpins the decision-making process that determines which disputes need litigating and why. The indirect law-making capability of the IOC will be analysed through the evolution of the anti-ambush marketing legislation required of host jurisdictions. This analysis will focus in particular on the step change in the regulation of ambush marketing that was introduced by the United Kingdom Parliament for London 2012, and the ways that this Anglo-European extension of traditional notions of intellectual property law has influenced legislative interventions at subsequent editions of the Olympic Games, through the lens of forced transplants. Before doing so, however, it is important to explore some of the origins of sports governance and the broader influence and impact of European legal cultures on the regulatory frameworks of sport, its internal laws, and their relationship with more traditional forms of law, before exploring the concept of *lex Olympica*.

Broadly speaking, the evolution of many of the world's most popular sports can trace both their regulatory origins, and the formation of their governing bodies, to Europe. Whilst the precise pre-history of association football is somewhat uncertain,[2] the sport's first Laws were formalised in London in 1863, with the (English) Football Association formed later in the same year.[3] As Vamplew notes, rules emerge because of competition,[4] at which point a degree of standardisation is required. These formalised regulatory frameworks usually preceded, or were coterminous with, the formation of governing bodies. As with football, both the Broughton Rules and the Queensbury Rules, which provide the basis for modern professional boxing, predate the formation of the first official governing body of the sport, the Amateur Boxing Association.[5] What is particularly striking is that this process of standardisation and formalisation of

[1] M James and G Osborn, 'The Olympics, Transnational Law and Legal Transplants: The International Olympic Committee, Ambush Marketing and Ticket Touting' (2016) 36(1) *Legal Studies* 93.

[2] There is a voluminous literature on this topic. See, eg, G Curry (ed), *The Early Development of Football. Contemporary Debates* (Routledge, 2019); P Swain, 'The Origins of Football Debate: Football and Cultural Continuity, 1857–1859 (2015) 32(5) *The International Journal of the History of Sport* 631.

[3] Note that in a very self-regarding sense, even today, it is not the *English* FA but merely 'The FA.'

[4] W Vamplew, 'Playing with the Rules: Influences on the Development of Regulation in Sport' (2007) 24(7) *The International Journal of the History of Sport* 843.

[5] See further S Greenfield and G Osborn, 'A Gauntlet for the Glove: The Challenge to English Boxing Contracts' (1995) 5 *Marquette Sports Law Journal* 153. The British Boxing Board of Control was formed in Cardiff in 1929.

laws and governance structures in many modern sports emerged from Europe in the late nineteenth and early twentieth centuries. The influence of the United Kingdom is especially strong, with a number of key governing bodies emerging in London in particular.

The formalisation of sports' rules and/or laws was quickly followed by the creation of national, continental and world governing bodies as the self-appointed guardians of individual sports, related groups of sports, and multi-sport events such as the Olympic Games. Europe's influence in global sporting terms is highly significant. The IOC was founded on 23 June 1894. Its European credentials are marked by its foundational meetings taking place in Paris and its domination by European members. The original IOC comprised 16 members from 13 different nations, and although avowedly international in its outlook, the only representation from outside of Europe in its early membership was from the USA, Australia and Argentina.[6] Similarly, the Fédération Internationale de Football Association (FIFA) was founded in the headquarters of the Union Française de Sports Athlétiques in Paris on 21 May 1904.[7] The founding member associations were all European: Belgium, Denmark, France, Germany, The Netherlands, Spain, Sweden and Switzerland.

These links to Europe have been reinforced by the decision of many ISFs to locate their headquarters in European states, and in particular in Switzerland.[8] Of the 34 members of the Association of Summer Olympic International Federations, 23 are based in Switzerland, with a further eight headquartered elsewhere in Europe;[9] all members of the Association of International Olympic Winter Sports Federations are based in Europe, with four of the seven headquartered in Switzerland.

Europe's influence on the legal and regulatory structures applied to world sport can be seen as being substantive, procedural and cultural. With so many of the world's major ISFs, including the IOC, established, located in, and operating from European jurisdictions, the influence of Europe and its legal cultures is writ large upon the evolution of both *lex sportiva* and *lex Olympica*. This is compounded by several European legal systems having significant influence far beyond their original geographical boundaries; many legal systems, with the notable exception of those in Russia and China, are heavily influenced by the English common law or the civil codes of France and Germany. Within these contexts, a European-influenced model of contractual relationships provides the vehicle, or space, in which the IOC is able to regulate the Olympic Movement and operate as a commercially independent entity. As discussed below in terms

[6] J Krieger and S Wassong, 'The Composition of the IOC' in D Chatziefstathiou, B Garcia and B Seguin (eds), *Routledge Handbook of the Olympic and Paralympic Games* (Routledge, 2021) 204.

[7] IOC history archived at olympics.com/ioc/history.

[8] See J-L Chappelet, 'Switzerland's Century-Long Rise as the Hub of Global Sports Administration' (2021) 38(6) *The International Journal of the History of Sport* 569.

[9] See the list provided by the Association of Summer Olympic International Federations at www.asoif.com/members.

of ambush marketing, European influence on the evolution of intellectual property laws generally is significant, as are the ways that the law has developed to provide a legal means of prohibiting unwanted commercial associations with major sporting events.

The influence of European legal cultures and thinking on the regulation of international sport is marked, particularly insofar as the Olympic Movement and Olympic Charter embrace, or are influenced by, many aspects of European legal traditions including administrative law, criminal law, employment law, and human rights law. In this chapter, we will focus on the impact of European notions of contractual interpretation, intellectual property law, and the use of legal alternative dispute resolution mechanisms. Before returning to the influence of European legal culture more explicitly later, it is important to examine the relationship between *lex sportiva*/sports law and *lex Olympica*/Olympic Law.

II. THE RELATIONSHIP BETWEEN *LEX SPORTIVA*/SPORTS LAW AND *LEX OLYMPICA*/OLYMPIC LAW

For many years, there was a vague acceptance that the actions of organisations associated with the running of sport were, if not above the law, then certainly outwith its normal jurisdiction. However, the expectations of effective and operational good governance, and the requirements of the rules of natural justice, or due process, in ISFs' decision-making processes have ensured that sport is, ultimately, subject to the law. As ISFs have adjusted their behaviours to take account of developments in national, EU and international law, a clear split between '*lex sportiva*' and 'sports law' has evolved. In contradistinction to more traditional forms of law, *lex sportiva* encapsulates the internal rules and regulations of sport, including the various governing statutes and charters, key contracts, and the decisions of the IOC, the ISFs, the WADA and the CAS.[10] On the other hand, sports law incorporates the bodies of national and EU legislation, the jurisprudence of national, EU and international courts, and the international treaties that apply to sport.[11] Whereas sports law is applied to, or imposed on, sport by the appropriate legal jurisdiction governing the dispute in question, the authority and applicability of *lex sportiva* is grounded in a series of interlocking contracts that require adherence to the internal legal norms and regulatory frameworks of specific sports bodies,[12] and is increasingly transnational in its outlook and application.[13]

[10] For a more detailed discussion of the scope and definition of *lex sportiva*, see, eg, A Duval, '*Lex Sportiva*: A Playground for Transnational Law' (2013) 6 *European Law Journal* 822.

[11] See generally M James, *Sports Law*, 3rd edn (Palgrave, 2017) and A Cattaneo and R Parrish, *Sports Law in the European Union* (Kluwer Law International, 2020).

[12] K Foster, '*Lex Sportiva*: Transnational Law in Action' (2012) 3-4 *The International Sports Law Journal* 20.

[13] A Duval, 'Transnational Sports Law: The Living Lex Sportiva' in P Zumbandsen (ed), *The Oxford Handbook of Transnational Law* (Oxford University Press, 2021).

The regulatory frameworks of different sports usually operate alongside each other, as there is a general acceptance that sport should be granted a degree of legal and political autonomy over its own governance. The autonomy of sports organisations from political interference is a requirement of the Olympic Charter,[14] however, their autonomy from legal oversight is only ever conditional.[15] The law retains ultimate regulatory oversight of sport and, unless specific exemptions are granted to it, sport must operate in accordance with the law, and in many cases that law is European in origin.

Despite the growth of interest in the subject, agreement on the definitions of both *lex sportiva* and sports law remain elusive. Foster considers that *lex sportiva* is often defined too narrowly, focussing on either the internal rules of sport, the decisions of the CAS, or a combination of the two. Instead, he prefers the term 'global sports law', which fuses both of these meanings with general principles of law, including global administrative law. This leaves his extended understanding of *lex sportiva*, or global sports law as:

> [An] autonomous transnational legal order established by international sporting federations and those subject to their sporting jurisdiction[s] and which emerges from the statutes and regulations of federations as interpreted by institutions of alternative dispute resolution created by those federations. It is a private regulatory order, which is legitimised by contract and consent, operating transnationally to transcend national variation. The key element of this definition is the notion of autonomy. The ideology embodied within the concept of global sports law is that it is a law without a state and so outside the governance of national laws, that it is immune from state regulation and a legal order in its own right, and that it is legitimated by its subjects. This claim of immunity and autonomy makes global sports law of interest to a wide range of legal theorists, but it also exemplifies a political struggle … between self-regulation and public accountability.[16]

Duval provides a more detailed account of *lex sportiva* that goes beyond the simple contractual framework to embrace a plurality of legal sources that includes: the written constitutions of the ISFs, including in particular the Olympic Charter; and the interpretation of these documents by both the relevant judicial committees of specific sports and the CAS.[17] This results in a more all-encompassing, living definition of *lex sportiva* that captures the many interactions between sport and a wider understanding of what constitutes 'law' in all of its forms. More importantly, perhaps, Duval states explicitly that rather than being a genuinely self-regulating, fully autonomous transnational legal construct, *lex sportiva* operates in reality in intimate connection with the legal

[14] Fundamental Principle 5. Further, Rule 2(5) requires the IOC to promote its political neutrality and to preserve the autonomy of sport, and 27(2.1(6)) requires similar autonomy of NOCs.

[15] S Weatherill, 'Is there such a thing as EU Sports Law' in R Siekmann and J Soek (eds), *Lex Sportiva: What is Sports Law?* (TMC Asser Press, 2012) 305.

[16] K Foster, 'Global Sports Law Revisited' (2019) 17(1) *Entertainment and Sports Law Journal* 4, at www.entsportslawjournal.com/article/id/851/#B11.

[17] Duval (n 13).

and political contexts in which it is grounded. It is this more nuanced understanding of *lex sportiva* that is used here.

The dual legal-regulatory approach of sport through *lex sportiva* and sports law is replicated in the Olympic legal framework by *lex Olympica* and Olympic Law. The importance of *lex Olympica* in particular is that the norms created by the IOC are often incorporated into the *lex sportiva* of ISFs, or at the very least, seen as the legal benchmarks and standards that are aspired to as ideals. Focussing specifically on the Olympic Charter, Duval analyses its importance within a transnational contractual framework, observing that, 'All the members of the [Olympic Movement] commit to abiding by the Olympic Charter, which stands supreme as an overarching constitution of the *lex sportiva*.'[18] He goes on to state that the Olympic Charter exerts a centripetal force over the ISFs, as well as having an emerging constitutional function in respect of the CAS.[19] In that way, the Olympic legal framework is both integral to and a key influencer of *lex sportiva*, both of which are heavily influenced by European legal cultures as a result of the presence of so many ISFs, including the IOC, in European jurisdictions.

III. THE OLYMPIC LEGAL FRAMEWORK

The law-making capability of the IOC remains an underexplored aspect of transnational sports legal scholarship.[20] As the IOC is neither a nation state, nor a transnational body created by nation states through treaty provisions governed by international law, it has no formal legal sovereignty justifying a direct law-making capability. Despite this lack of a formal jurisdiction, if we remain agnostic to the origins of an entity's law-making powers,[21] then the IOC as a transnational organisation is a creator of legal norms, of *lex Olympica*, which provides it with wide-ranging legal powers derived from, and implemented in accordance with, a series of interlocking contracts with the constituents of the Olympic Movement. This *lex Olympica* has much in common with transnational sports law, with *lex sportiva*, in terms of structure and enforceability, whereas Olympic Law is the manifestation of the legal norms underpinned by *lex Olympica* into regional, national, international and transnational laws. The two interrelated sources of law form the basis of the Olympic legal framework, both of which are distinctly European in origin and culture.

[18] ibid 494.

[19] See further, Duval (n 10) and A Duval, 'The Olympic Charter: A Transnational Constitution Without a State?' (2018) 45 *Journal of Law and Society* 245.

[20] Notable exceptions include: A Mestre, *The Law of the Olympic Games* (TMC Asser Press, 2009); F Latty, *La lex sportiva: recherche sur le droit transnational* (Martinus Nijhoff, 2007) and Le Comité International Olympique et le Droit International (Montchrestien, 2001); and M James and G Osborn, *Olympics Laws. Culture, Values, Tensions* (Routledge, 2024).

[21] Duval (n 10) 836.

Founded in France in 1894 and headquartered in Lausanne, Switzerland, since 1915 following its relocation from Paris, the IOC's relationships with its key stakeholders, the ISFs, NOCs, host city organising committees of the Olympic Games (OCOGs), and the athletes are governed by a complex, interlocking contractual framework. At the apex of this framework sits the Olympic Charter.[22] First published in 1908, the Olympic Charter is the founding and governing document, of which each member of the Olympic Movement must be a signatory. The introduction to the Olympic Charter states that it fulfils three purposes:

1. As a basic instrument of a constitutional nature, it defines the Fundamental Principles and essential values of Olympism.
2. To serve as the statutes for the International Olympic Committee.
3. To define the main reciprocal rights and obligations of the three main constituents of the Olympic Movement: the IOC, the ISFs, and the NOCs, as well as the Organising Committees for the Olympic Games, all of which are required to comply with the Olympic Charter.[23]

The Olympic Charter operates as the key document in the contractual framework that defines the rights and responsibilities of all stakeholders in the Olympic Movement. The Olympic Movement, the IOC, and issues relating to the hosting of the Olympic Games are currently being subjected to unprecedented levels of social, political and legal scrutiny and critical appraisal.[24] As with *lex sportiva* and sports law, there is a bifurcation of regulatory mechanisms applicable to the Olympic Movement: *lex Olympica* is the internal legal framework governed by contract and can be seen as an Olympic-specific form of *lex sportiva*; whereas Olympic Law is the corpus of laws that the IOC requires to be enacted for its benefit, and the benefit of its sponsors, as part of the Olympic Host Contract.

Of particular interest is the interrogation of the normative framework created by the IOC that enables it to create Olympic Law in host countries through the enactment of its own internal legal norms, the *lex Olympica*. This novel approach to law creation through the use of 'forced transplants' has underpinned the creation of national laws in host cities since the Sydney 2000 Games and is grounded in Eurocentric notions of contract law, the protection

[22] IOC Olympic Charter (2021), available at stillmed.olympics.com/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf?_ga=2.73625490.1287301814.1636013909-728463178.1636013909. This is the edition as of 8 August 2021. Previous iterations are available via olympics.com/ioc/olympic-charter.

[23] ibid. It should be noted that although athletes are not considered to be one of the main constituents of the Olympic Movement, they are subject to the requirements of the Olympic Charter, along with additional rights and responsibilities via the Athletes' Declaration: olympics.com/athlete365/who-we-are/athletes-declaration/#:~:text=The%20Athletes'%20Rights%20and%20Responsibilities,strong%20athlete%20representative%20Steering%20Committee.

[24] See in particular, J Boykoff, *NOlympians* (Fernwood Publishing, 2020) and B Flyvbjerg, A Budzier and D Lunn, 'Regression to the Tail: Why the Olympics Blow' (2021) 53(2) *Environment and Planning A* 233.

of intellectual property and commercial rights, and comparative legal theory.[25] The interlocking series of contracts that underpins *lex sportiva* is replicated in the governance framework for the key relationships between the IOC, the hosts of the Olympic Games, the NOCs, the ISFs and the athletes. Beyond the broader European influence upon sport outlined above, the issue of Europeanisation is in fact more prevalent and important than perhaps has been acknowledged historically. The importance of this Europeanism is developed further below by highlighting Eurocentric approaches in cases such as *Pechstein and Mutu*,[26] and our case study on ambush marketing, stressing the continuing European influence upon Olympism, *lex Olympica* and Olympic Law.

The importance of analysing the Olympic legal framework is its extent and breadth, and the impact that this can have on the operations of ISFs and NOCs worldwide.[27] This in turn facilitates a range of unique possibilities driven by the importance, and enduring legacy, of *lex Olympica* and Olympic Law. Essentially, as part of the procedure to win and host an edition of the Games, the IOC requires the creation of Olympics-specific municipal, and/or national, laws by host nations. These laws are primarily for the benefit of the IOC and its key stakeholders; the OCOGs and members of the official sponsorship programmes.[28] This indirect legislative capability is different in both form and scope from *lex sportiva* and sports law in that the IOC uses its leverage to insist on contractual relationships that force the creation of law into existence where otherwise it would have no such capacity.[29] Although many ISFs request this level of protection for their own events, the vast majority are denied; only the IOC requires contractual guarantees that such legislative protections will be in place as a pre-condition of being awarded the Games, which can result in a breach of contract and the withdrawal of the invitation to host if they are not provided.

This 'Olympic Law' is the wide-ranging body of laws that is created by national, regional and/or city legislatures. It includes the regulations that are put in place to allow specific traffic lanes between key transport interchanges and Olympic venues, no fly zones over venues, advertising and trading regulations, tax provisions for visiting competing athletes and administrators, amongst many other legislative provisions.[30] These are created to ensure the smooth

[25] See further, James and Osborn (n 1) and M James and G Osborn, 'Pliant Bodies: Generic Event Laws and the Normalisation of the Exceptional' (2017–2018) 12(1) *Australian and New Zealand Sports Law Journal* 77.

[26] *Mutu and Pechstein v Switzerland* (2018) App nos 40575/10 & 67474/10 (ECtHR, 2 October 2018).

[27] Latty (n 20) 251–52 describes the Olympic Charter as, 'constitution mondiale du sport'.

[28] See further, James and Osborn (n 1).

[29] K Foster, 'Is there a Global Sports Law?' (2003) 2 *Entertainment Law* 1 and more generally on the various interpretations of *lex sportiva*, R Siekmann and J Soel (eds), *Lex Sportiva: What is Sports Law?* (TMC Asser Press, 2012).

[30] The authors outline many of these within the context of London 2012 in M James and G Osborn, 'London 2012 and the Impact of the UK's Olympic and Paralympic Legislation: Protecting Commerce or Preserving Culture?' (2011) 74(3) *MLR* 410. As detailed there, further legislative

running of each edition of the Olympics from an operational perspective, and the protection of associated commercial rights and revenue streams from unauthorised association with the Games. In both cases, the legislation is enacted at the express requirement of the IOC. A refusal, or failure to provide the required legislative infrastructure can, at least in theory, lead to the removal of the right to host the Olympics by the IOC.[31]

A. Defining, Developing and Deconstructing *Lex Olympica*

Latty states that *lex Olympica* is the *lex sportiva* originating from the IOC and that the Olympic Charter is at the core of *lex Olympica*.[32] The Olympic Charter is the foundational document of *lex Olympica* and stands at the apex of the contractual framework that governs the relationships within the Olympic Movement. Rule 15 Olympic Charter states that the IOC is an international non-governmental, not-for-profit organisation, of unlimited duration, in the form of an association with the status of a legal person. Its corporate mission, as defined in Rule 2 Olympic Charter, is to promote the Fundamental Principles of Olympism (FPOOs) throughout the world and to provide leadership for the Olympic Movement. Key amongst its roles is to ensure the celebration of the Olympic Games in a manner that is consistent with the Charter's requirements in general and the FPOOs in particular.

Membership of the Olympic Movement requires each sporting body to be a signatory of, and act in compliance with, the Olympic Charter. For ISFs, this is essential as without compliance with the Charter, their sports cannot be considered for inclusion in the Olympic Games. For example, International Rugby League has long hoped to gain acceptance as a full member of the Global Association of International Sports Federations so that it can become a signatory of the Olympic Charter and have Rugby League Nines considered for inclusion in the programme for Brisbane 2032.[33] Once an NOC is a signatory,

requirements include: a prohibition on the unauthorised resale of tickets, and the regulation of street trading, London Olympic Games and Paralympic Games Act 2006, ss 19–21 and London Olympic Games and Paralympic Games (Advertising and Trading) (England) Regulations 2011/2898; income tax exemptions for Olympic accredited personnel, London Olympic Games and Paralympic Games Tax Regulations 2010/2913. Under Reg 5, the list of people who were not ordinarily resident in the UK and thereby capable of claiming tax exempt status under the Regulations included: competitors; media workers; representatives of governing bodies and the IOC; service technicians; team officials; technical officials; and the provision of dedicated traffic lanes, Olympic Route Network Designation Order 2009/1573.

[31] Olympic Charter (n 22) Rule 59(1.6) and s 38(2)(b) Olympic Host Contract – Principles: Games of the XXXIII Olympiad in 2024, available at stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Host-City-Elections/XXXIII-Olympiad-2024/Host-City-Contract-2024-Principles.pdf.

[32] Latty (n 20) 173.

[33] See further M Rowbottom, 'Rugby League Unveils Olympic Ambitions after Brisbane Awarded 2032 Games' (*Inside the Games*, 23 July 2021), www.insidethegames.biz/articles/1110609/troy-grant-irl-brisbane-2032-olympics.

failure to comply with the requirements of the Charter can result in suspension, or expulsion, from the Olympic Movement and the inability to send a delegation to the Olympics.

There continues to be significant disagreement about the definition and scope of *lex Olympica*, which is to some extent a replication of the debate about the meaning of *lex sportiva*. On one side is the claim that *lex Olympica* is central to an understanding of the operation of global sports law itself, whilst on the other is an assumption that it is an autonomous and distinct body of private law.[34] Acknowledging both sides of the argument and utilising a more conciliatory approach, it is possible to provide a more specific definition of *lex Olympica* that encompasses both the operation of Olympic-specific sporting-legal norms and their evolution from a transnational legal space.

Where transnational law embraces all legal rules, independently of their origin, that exceed the framework of a single national legal order, transnational sports law includes in particular the private rules of the ISFs and the IOC.[35] Emerging from this framework, *lex Olympica* can be seen as a specific driver of transnational sports law that provides the normative framework for the Olympic Movement through a series of interlocking contracts in a similar way to how *lex sportiva* operates to regulate the behaviour of the ISFs. Defined in this way, *lex Olympica* is operationalised by the Olympic Charter and the other documents flowing from it,[36] including in particular the Olympic Host Contract, the athlete participation agreement, the Athletes' Declaration, and the IOC's relationships with WADA and the CAS. Thus, the Olympic Charter is the prime contract underpinning all key relationships within the Olympic Movement, from which all other contractual arrangements flow, and is the foundational source of *lex Olympica*.

The interpretation of the Olympic Charter is governed by Swiss law, as applied in the first instance by the IOC Executive Board, on appeal by the CAS (Rules 59–61 Olympic Charter), and ultimately by the Swiss Federal Tribunal. Similarly, the Olympic Host Contract states that:

> The obligations of the Parties under the Olympic Host Contract shall be defined, first, by the terms of the Olympic Host Contract, second, by the terms of the Olympic Charter (…) and, third, by application of the principles of interpretation of Swiss law.[37]

Further, as the ultimate interpretative body for disputes relating to the Charter,[38] the CAS has reserved for itself the general ability to rely upon a range of 'universal legal principles' to assist its panels in forming their opinions. As Faut explains, the fundamental legal and moral principles acknowledged by Swiss

[34] R Siekmann, 'What is Sports Law? Lex Sportiva and Lex Ludica: A Reassessment of Content and Terminology' (2011) *International Sports Law Journal* 3.
[35] F Latty, 'Transnational Sports Law' (2011) 1-2 *International Sports Law Journal* 34, 35.
[36] Mestre (n 20).
[37] Olympic Host Contract (n 31) cl I-1.2.
[38] Olympic Charter (n 22) Rule 61.

law, and therefore expected as a minimum to be used by the CAS in all sports arbitrations are:

> The scope of principles falling under this definition is broad and contains, inter alia, the rule of *pacta sunt servanda* [agreements must be kept], the prohibition of abuse of rights, the prohibition of discrimination, the prohibition of corruption, spoliation and bribery, the need to act in good faith, the prohibition of expropriation without compensation or the protection of incapables.[39]

Alongside the rules requiring a fair hearing, or natural justice, or due process, it is clear that the CAS is reliant on interpretative norms of statutory interpretation, fairness, and contract derived from Eurocentric understandings of what these mean and how they should be applied. So, Europe's influence is *procedural* as well as substantive and cultural. This in turn demonstrates that the interpretation and enforcement of the requirements of the Olympic Charter, and therefore *lex Olympica*, is heavily influenced by European legal traditions of contractual interpretation and dispute resolution. The IOC's location in Switzerland and the governing law of all of its key relationships being Swiss law, any challenges to the creation, substance and interpretation of *lex Olympica* are dominated by European legal thinking.

This Eurocentric approach was confirmed in the *Pechstein* decision,[40] which requires that the CAS must abide by the procedural requirement to provide a fair trial in accordance with Article 6.1 European Convention on Human Rights (ECHR).[41] The importance of this case is that it created the potential to impose ECHR requirements that go beyond the procedural and into the substantive. It demonstrates that the CAS, as the body identified as the sole arbiter of disputes relating to the Olympic Charter, is bound by the ECHR and in future could be expected to interpret the Charter in accordance with the pan-European norms that it protects. This need for ISFs, and by extension the IOC, to adhere to fundamental human rights was reinforced in the *Semenya* decision,[42] where the ECtHR held that the ability to appeal from the CAS to the Swiss Federal Tribunal creates the necessary nexus between the case and the State of Switzerland, bringing its decisions within the jurisdiction of the ECtHR. Thus, *lex Olympica* is grounded in the European legal tradition of the sanctity of contractual relationships, interpretative norms, and human rights. The importance of the Olympic

[39] F Faut, 'The Prohibition of Political Statements by Athletes and its Consistency with Article 10 of the European Convention on Human Rights: Speech is Silver, Silence is Gold? (2014) 14 *International Sports Law Journal* 253, 256.

[40] See D Goertz, 'Recap of the Pechstein Saga: A Hot Potato in the Hands of the Sports Arbitration Community' (*Kluwer Arbitration Blog*, 1 February 2020), arbitrationblog.kluwerarbitration.com/2020/02/01/recap-of-the-pechstein-saga-a-hot-potato-in-the-hands-of-the-sports-arbitration-community/.

[41] See European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights, Right to a Fair Trial (Civil Limb)* (updated to 31 August 20222), www.echr.coe.int/documents/guide_art_6_eng.pdf.

[42] *Semenya v Switzerland* (2023) App no 10934/21 (ECtHR 11 July 2023). See further J Cooper, 'Protecting Human Rights in Sport: Is the Court of Arbitration for Sport Up to the Task? A Review of the Decision in Semenya v IAAF' (2023) 2 *International Sports Law Journal* 151.

Charter and *lex Olympica* cannot be understated. As all of the major world governing bodies are signatories of the Charter, *lex Olympica* has a much wider impact than on the IOC alone, and is a major influencer of the ongoing evolution of *lex sportiva*, which in turn cements the importance of European legal culture on both *lex Olympica* and *lex sportiva*.

B. The IOC's Indirect Power to Create Olympic Law

Where *lex Olympica* is the internal legal norms governing the IOC's relationships with the wider Olympic Movement, Olympic Law is the manifestation of the associated requirements of *lex Olympica* transplanted into the applicable legal regimes of host cities, regions and countries. This is most evident when the host is required to enact specific legislation for the benefit of the IOC, the OCOGs, and their commercial partners. This process of 'forced law creation' occurs when the law enacted by a previous host is transplanted from that jurisdiction into the law of a successor host. This unique process provides the IOC with an indirect law-making power by enabling it to have its legal norms enacted by dedicated legislation in the host jurisdiction of each edition of the Olympic Games. It is this forced transplantation into the domestic legal system of the host jurisdiction that causes Olympic Law to fall outside of the usual definitions of both sports law and transnational law, and, it is argued, should be considered to be a new category of each.

Olympic Law can therefore be defined as the body of national laws that is forced into existence by a privately constituted transnational organisation, the IOC, which by using its leverage over the host's legal and political institutions, seeks to bring to life its transnational legal norms, the *lex Olympica*, to protect and enhance its commercial and economic interests, and its revenue streams. The IOC is not discharging its duties in cooperation with the host jurisdictions,[43] but is instead compelling them to act on its behalf. The compulsion to enact this Games-specific legislation is made under the threat of the removal of the invitation to host the Olympics.[44] Whereas in traditional contractual terms, the relationship between the IOC, OCOG, host city and NOC is ostensibly consensual, the reality is a 'take it or leave it' position, with an ever-present threat of the invitation to host the Games being withdrawn for non-compliance, and an implicit threat of legal action being taken against the host for breach of contract where requirements are not met or the Games do not go ahead as planned.[45]

[43] S Hobe, 'Global Challenges to Statehood' (1997) 5 *Indiana Journal of Global Legal Studies* 191, 196.

[44] Olympic Charter (n 22) Rule 36(2).

[45] B Kaplan, 'Why Did the Olympics Go Forward? An Examination of the Host City Contract' (*Brooklyn Sports and Entertainment Law Blog*, 28 July 2021), https://sports-entertainment.brooklaw.edu/sports/why-did-the-olympics-go-forward-an-examination-of-the-host-city-contract/.

The Olympic Host Contract requires the host jurisdiction to guarantee that there are either laws in place already, or that new laws will be enacted, which will provide the required protections and perceived operational necessities associated with hosting the Games. For example, the IOC requires legislative protection for its commercial properties and those of the OCOG from ambush marketing,[46] including in particular the Olympic symbol, emblem, mascots and 'CITY + YEAR' designation (for example, Tokyo 2020).[47] Legislative protection is also required for Rule 50(1) Olympic Charter, which requires that Olympic venues and competition routes, including the surrounding areas and routes to and from key transport interchanges, are 'clean'. Here, 'clean' means that the venues themselves are free from any sponsorship or advertising, and that the surrounding areas are free from all non-official advertising and unlicensed trading. When the need for such legislation was queried in the UK Parliament, the Government's response was simply the truism that the laws had been enacted because the IOC required it as a term of the Host City Contract.[48]

The process by which this forced law creation occurs is through a form of legal diffusion.[49] When normative and legal orders co-exist in the same context of time and space, as is the case with the IOC and the host jurisdiction of an edition of the Olympics, sustained interaction is inevitable. Diffusion of the law takes place when one normative or legal order, system, or tradition influences another in a significant way.[50] Olympic Law is created when the normative framework devised by the IOC requires changes in the domestic law of the host nation. This legal diffusion takes place by means of a legal transplant,[51] by which the norms of the originator jurisdiction, the IOC, are transplanted, either in whole or in part, into that of the new host.

The creation of Olympic Law has two unique elements. First, the diffusion does not involve the wholesale, or partial, transplantation of one country's law to a second jurisdiction.[52] Here, the original normative framework is created at the transnational level by a private, transnational non-state organisation, the IOC, before it becomes state-based law for the first time in the jurisdictions in which the host city is located. Before each subsequent process of diffusion and

[46] London Olympic Games and Paralympic Games Act 2006, s 33 and sch 4.

[47] Olympic Host Contract (n 31) cl 41.

[48] Lord Davies of Oldham, HL Deb, Vol 677, col 249 (11 January 2006). See also the general House of Commons debate at HC Deb, Vol 444, cols 208–213 (21 March 2006), where the scope of, but not the need for, these provisions is discussed. The need for the Olympic-specific legislation is attributed solely to the demands of the IOC as defined in the Host City Contract.

[49] Diffusion is used here as the overarching general term, of which there are many more nuanced variations. For a review of this field of study see in particular, W Twining, 'Diffusion of Law: A Global Perspective' (2004) 49 *Journal of Legal Pluralism* 1 and its sequel, 'Social Science and Diffusion of Law' (2005) 32 *Journal of Law and Society* 203.

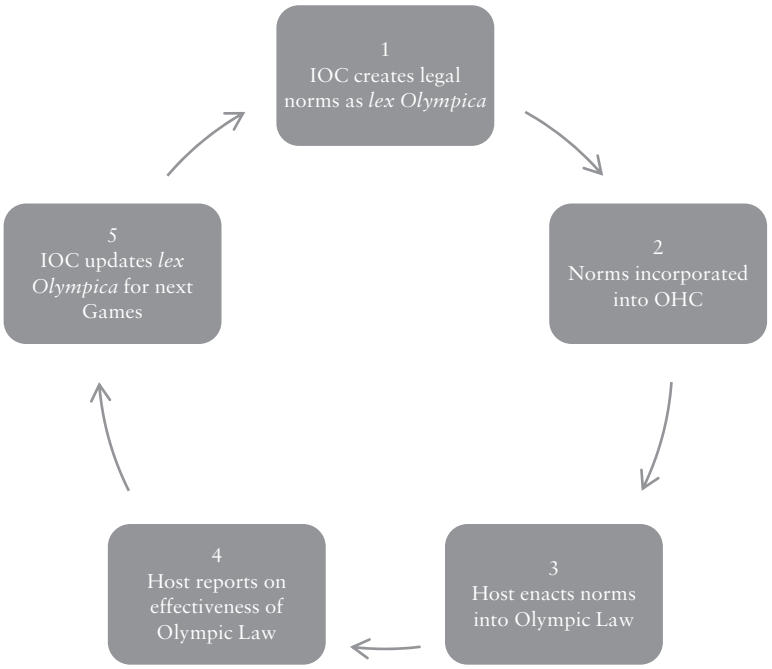
[50] Twining (n 49) 'Diffusion of Law' 14.

[51] Contrast the approaches of O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *MLR* 1 and A Watson, 'Legal Transplants and Law Reform' (1976) 92 *LQR* 79.

[52] Twining (n 49) 'Social Science' 207.

transplantation, the legislation returns to the IOC to be internalised into its own normative framework. The Olympic Law requirements are then updated by the IOC following debriefings provided by the outgoing OCOG, creating new *lex Olympica*, which is then diffused into the Olympic Host Contract before being transplanted into the host jurisdiction of the next edition of the Olympics. Thus, the diffusive effect of this process is a transnationalised phenomenon.

Figure 5.1 The Transnationalised Process of the Creation of Olympic Law from the *Lex Olympica*



Secondly, the host of the transplanted law is forced to enact legislation for the benefit of the IOC and its affiliates, rather than choosing to do so, under threat of having the right to host the Olympics rescinded. This process of forced diffusion and transplantation of the requirements of *lex Olympica* provides the IOC, albeit indirectly or vicariously, with the formal law-making capability that it otherwise lacks and, 'detaches legally the Olympic city from its host country by creating an ephemeral local legal regime, reminiscent of a special economic zone'.[53]

[53] A Duval, 'From Global City to Olympic City: The Transnational Legal Journey of London 2012' in H Aust and J Nijman (eds), *Research Handbook on International Law and Cities* (Edward Elgar, 2021).

IV. THE CONTINUING EUROPEAN INFLUENCE: THE CASE OF AMBUSH MARKETING

In its most recent incarnation, the mission of the IOC includes a specific requirement to oppose any political or commercial abuse of sport and athletes.[54] This opposition to commercial 'abuse' has manifested itself in two distinct ways. First, growing out of the IOC's original requirement that all participants in the Olympics must be amateur, the previous iterations of Rule 40 have attempted to restrict athletes' ability to exploit commercially their participation in the Games.[55] Since the relaxation of the rules governing amateurism in the 1986 version of the Olympic Charter, the restrictions now found in Rule 40 Olympic Charter have morphed into a means of protecting one of IOC's key revenue streams: The Olympic Partnership (TOP) programme. Although there has been some relaxation in the strictures of Rule 40's application following the Deutscher Olympischer Sportbund case,[56] Rule 40 continues to operate, in effect, to restrict athletes from promoting themselves freely in ways that the IOC sees as being in competition with the official sponsorship programmes. In other words, the athletes are prohibited from operating commercially on threat of disqualification and withdrawal of Olympic accreditation, where they are considered to be ambushing the official sponsors of specific editions of the Games and/or diluting the value of the TOP programme.

Secondly, the IOC has shown an increasing determination to protect the TOP sponsors, and the edition-specific sponsors of each Olympic Games, from ambush marketing more generally. Where Rule 50(1) Olympic Charter requires all Olympic venues to be advertising free, specific legislation to guarantee not only clean venues, but a regulated space around those Olympic sites, was introduced at Sydney 2000.[57] The perceived success of the legislation at Sydney 2000, and later editions of the Games, saw more innovative marketing techniques developed by ambushers. This in turn resulted in a step change in the protections offered by the UK Government for London 2012 and the creation of a new intellectual property right, a super-intellectual property right:[58] the association right. This highly unusual level of protection for an event has been developed incrementally by the IOC and implemented unquestioningly by subsequent hosts.

[54] Olympic Charter (n 22) r 2.11.

[55] See further, A Geurin and E McNary, 'Athletes as Ambush Marketers? An Examination of Rule 40 and Athletes' Social Media Use during the 2016 Rio Olympic Games' (2021) 21 *European Sport Management Quarterly* 116 and James and Osborn (n 20).

[56] Bundeskartellamt Commitment Decision (Case B226/17) held that Rule 40 operated as an abuse of a dominant position by the Deutscher Olympischer Sportbund and the IOC. See further, J de Werra, 'Athletes & Social Media: What Constitutes Ambush Marketing in the Digital Age? The Case of Rule 40 of the Olympic Charter' in T Trigo et al, *Vers les sommets du droit: "Liber amicorum" pour Henry Peter* (Schulthess éditions romandes, 2019) 3.

[57] James and Osborn (n 25).

[58] M James and G Osborn, 'Guilty by Association: Olympic Law and the IP Effect' (2013) 2 *Intellectual Property Quarterly* 97.

This approach to protecting Olympic revenue streams by means of an association right will be analysed to demonstrate how European and Anglocentric contract law and theories of intellectual property protectionism have shaped the development of both *lex Olympica* and Olympic Law.

Modern intellectual property law is based on theories originating in Europe, and developed further by theorists in the United States of America, in particular, and diffused at the transnational level through the World Intellectual Property Organisation (WIPO).[59] Although intellectual property rights are national, or territorial, in nature, they are informed by global trends and developments. This has enabled protected properties to be moved and traded internationally, and protected transnationally. During the nineteenth century, a number of mainly European countries entered two multinational conventions: the Paris Convention and the Berne Convention.[60] The primary effect of these two Conventions was to offer the same protections across largely European signatory nations. This had the effect of harmonising at an early stage the approaches of the signatories to the protection of intellectual endeavours, whilst leaving individual states to enact their own specific legislative provisions. A variety of international treaties have followed.[61] The theoretical and philosophical underpinnings of these intellectual property laws and approaches are very much of European origin, evolving from and developing the work of theorists such as John Locke and Jeremy Bentham.[62] The role of Europe is further embedded, when its influence is seen in a broader sense, because of the harmonising effects of the international treaties promoted by WIPO, which is itself based in Switzerland.

Following the perceived success of the extended 'clean' areas around Olympic venues at Sydney 2000,[63] the IOC began to require as a matter of course that legislative protection against ambush marketing was provided by the host nation. This resulted in the step change in the scope of the protections offered by the UK Government at London 2012. Whereas previous legislative restrictions had focused on preventing non-official sponsors from advertising around Olympic venues, the London Olympic and Paralympic Games Act 2006 created a novel form of intellectual property, the London Olympic Association Right, which extended traditional notions of intellectual property law. Thus, an Olympic-specific solution was created from Anglo-European traditions on how to protect the goodwill inherent in a sporting mega event that could be incorporated into the *lex Olympica* and transplanted into the national law of host nations.

[59] See generally here works such as L Bently and B Sherman, 6th edn, *Intellectual Property Law* (Oxford University Press, 2022).

[60] The Paris Convention for the Protection of Industrial Property 1883 and the Berne Convention for the Protection of Literary and Artistic works 1886.

[61] See Bently and Sherman (n 59) ch 1, which covers the impacts of WIPO, the General Agreement on Tariffs and Trade (GATT) system, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

[62] See, eg, E Hettinger, 'Justifying Intellectual Property' (1989) 18(1) *Philosophy and Public Affairs* 31.

[63] James and Osborn (n 25).

A. Ambush Marketing – What is it and why is it Problematic?

As the IOC became increasingly aware of the value of its commercial and intellectual property rights, it began to protect them more proactively. The Olympic Partnership sponsorship programme began in 1985, restricting dramatically who could use the Olympic Symbols and associated iconography identified in Rules 7–14 Olympic Charter. Alongside this was the IOC's increasing concern that the value of its commercial and intellectual property rights could be undermined by ambush marketing.

Whereas Rule 50(1) and its predecessors require advertising-free, clean stadiums, little attention had been paid to what might be happening outside of, and along the main transport routes to, Olympic venues. After Atlanta 1996, the IOC took a much more sophisticated approach to protecting its revenue streams, particularly those driven by sponsorship fees, throughout Olympic host cities. As is the case with all ambush marketing, although such practices may be problematic from an economic, sociological and ethical perspective, there is nothing inherently wrong in law with running a rival advertising campaign in public or media spaces, provided that the ambusher does not use any protected intellectual property and is not claiming an official association with the event. In intellectual property law terms, providing that the ambush is not confusing people to think that they are an official sponsor, nor passing off that they are formally associated with the event, then the event organiser has no legal recourse against the ambusher. This lacuna in the protection afforded by intellectual property law would require specific legislation to be implemented to prevent, and ultimately criminalise, ambush marketing.

Initially, the focus of the legislation required by the IOC was to ensure that the Olympic venues and their immediate environs were clean, which had been one of the key problems at Atlanta. In other words, there was a particular need to protect the Games from intrusive ambush marketing, where ambushers access areas where advertising is prohibited or highly regulated, as not even the TOP sponsors are allowed to advertise within an Olympic venue.[64] The legislation required to protect Sydney 2000 prevented unauthorised advertising in designated areas in and around Olympic venues, providing a protected environment of up to 1500m around each.[65] The perceived success of this approach has seen these protections developed incrementally at each edition of the Games since. However, as ambushers became increasingly sophisticated, it became clear that a more robust response was required to protect the official sponsors.

[64] The only branding seen at Olympic events is that on the clothing and equipment used by athletes and officials and, where needed, on the official timing devices. See further Olympic Charter (n 22) r 50 and its byelaws.

[65] Sydney 2000 Games (Indicia and Images) Protection Act 1996 (Cth), State Environmental Planning Policy No 38 – Olympic Games and Related Projects (NSW) cl 11C, and Olympic Arrangements Act 2000 (NSW).

Ambush marketing is seen by many event and competition organisers as a direct challenge to the value of the commercial rights owned by sports bodies by undermining official exclusivity arrangements with official sponsors. These exclusive arrangements create scarcity that ensures (at least a perception of) a high commercial value to the official sponsor, which in turn enables the rights owner to demand high fees to associate with an event. Any dilution of that exclusivity by multiple brands claiming, or appearing to claim, to be associated with the event can lead to a significant diminution of the value of the official right to be associated with an event and its iconic logos and branding.[66]

Essentially, the key to an ambushing marketing strategy is that it offers brands an alternative, and cheaper, way of capitalising on the increased public attention on a specific event, team, athlete or brand. Traditionally it was seen as a detrimental or predatory activity, and often described as parasitical, but the forms and types of ambush have evolved over time. The problem faced by rights owners and event organisers is that unless the ambusher actually uses copyrighted or trademarked materials, or claims to be an official sponsor when they are not, there is in general no legal recourse for a well-thought out marketing campaign that undermines that of the official sponsors. What is striking over recent Olympic cycles is that technological and other societal changes have facilitated multiple new methods for potential infractions of this amorphous right to associate with an event. Discussing the thematic space traditionally reserved for Olympic sponsors, McKelvey, Grady and Moorman note:

> [as] the Olympic marketing and sponsorship landscape has shifted, the exponential growth of 'social media has helped create the perfect storm to fuel ambush marketing at an amplified level' and further enable non-official sponsors to activate marketing campaigns in the Olympic thematic space.[67]

Ambush marketing is a highly contentious term, with little agreement on either its definition or its commercial, legal, ethical, and moral acceptability. Coined as a term in the 1980s,[68] its original conception was fairly narrow and focussed on activity conducted by 'non-sponsors' that impacted on 'official sponsors'. Nufer noted that there were three basic objectives to ambush marketing: *economic* (increased profit and greater brand awareness); *psychological* (generating greater attention on and awareness of a brand); and *competition* (weakening of official sponsors' relationships with the event).[69]

[66] Global Language Monitor, 'Official Ambush Marketing Rankings for the Tokyo 2020 Olympics', https://languagemonitor.com/olympic-games/5584/.

[67] S McKelvey, J Grady and A Moorman, 'Ambush Marketing and Rule 40 for Tokyo 2020: A Shifting Landscape for Olympic Athletes and their Sponsors' (2021) 31 Journal *of Legal Aspects of Sport* 95.

[68] P Johnson, 'Defining the Indefinable: Legislating for "Ambush Marketing"' (2020) 15(5) *Journal of Intellectual Property Law and Practice* 313.

[69] G Nufer, 'Ambush Marketing in Sports: An Attack on Sponsorship or Innovative Marketing?' (2016) 6(4) *Sports, Business and Management: An international Journal* 476, and see generally Geurin and McNary (n 55) 116.

The need to examine the implications of ambush marketing in terms of the power afforded to a private body, the IOC, over elected governments was suggested by Ellis, Scassa and Seguin in their 2011 review, as was the need for further research on this topic.[70] We addressed their concerns in our article for *Legal Studies*,[71] which examined the phenomenon of ambush marketing through the lens of legal transplant, making an initial attempt at a legal definition of the concept. Ambush marketing is, however, a broad and amorphous concept; Zhou noted that a formal definition of ambush marketing is problematic because there is little consensus as to its precise meaning and ambit.[72] Chadwick and Burton initially described ambush marketing as:

> [a] form of associative marketing which is designed by an organisation to capitalize on the awareness, attention, goodwill and other benefits generated by having an association with an event or property, without the organisation having any official or direct connection to that event or property.[73]

They noted that ambush marketing had become an increasingly attractive strategy for non-sponsors as marketers recognised the possibilities, and cost savings, that it afforded. Concomitantly, its increased use and sophistication became a more direct challenge for event organisers and their official sponsors to combat. Chadwick and Burton's original typology identifies three general tropes of ambush marketing, with sub-categories of how each operated in practice: direct ambush activities (including predatory ambushing, coat tail ambushing and property infringement); associative ambush activities (including sponsor self-ambushing, associative ambushing, distractive ambushing, values ambushing, insurgent ambushing and parallel property ambushing); and incidental ambush marketing (unintentional ambushing and saturation ambushing).

They refined their typology further in 2018, when three strategic approaches to ambush marketing were defined: incursion; obtrusion; and association.[74] Incursive ambushing is the deliberate activity of a non-sponsor that is designed to threaten, undermine, or distract attention from an event and/or official sponsors of the event. Obtrusive ambushing is the prominent or undesirably visible (according to the rights holder) marketing activities of non-sponsors that distract from an official event sponsorship. Associative ambushing is the attempt by a brand that has no official or legal right of association with an event to imply or create an allusion that it has an official connection with that event.

[70] See D Ellis, T Scassa and B Seguin, 'Framing Ambush Marketing as a Legal Issue: An Olympic Perspective' (2011) 14 *Sport Management Review* 297.

[71] James and Osborn (n 1).

[72] W Zhou, 'Responses of Chinese Laws to Ambush Marketing' (2018) 9(2) *Asian Journal of Law and Economics* 2017–0015.

[73] S Chadwick and N Burton, 'The Evolving Sophistication of Ambush Marketing: A Typology of Strategies' 53(6) *Thunderbird International Business Review* 709, 714.

[74] N Burton and S Chadwick, 'Ambush Marketing is Dead, Long Live Ambush Marketing' (2018) 58(3) *Journal of Advertising Research* 282, 289 et seq.

From a legal and regulatory perspective, the key distinction is between intrusive ambushing (incursive or obtrusive), where the ambusher is impinging on the spaces reserved for the event and/or its official sponsors, and associative ambush marketing, where the ambusher is suggesting a formal link with the event. Whichever aspect of ambush marketing is in focus, the key is that rights holders, or event organisers, see the rights linked to their events being eroded or diminished by the ambush and want these protected.

In terms of how ambush marketing has been combatted, Burton and Bradish present an important distinction between reactive and proactive measures.[75] Reactive measures include naming and shaming, a somewhat ineffective tactic, and emphasising enforcing events' intellectual property rights and associated legal remedies. As they put it:

> Ultimately, the reactive tactics employed by rights holders have offered little protection from ambush marketers. Given the short timeframes during which most sporting events take place, and the often quick, timely campaigns utilised by ambushers to maximise their association with an event, lengthy legal proceedings and *ex post facto* public relations campaigns provide little protection for sponsors.[76]

Accordingly, more proactive measures have been sought by the mega sporting events that have sufficient leverage to demand additional protections from ambush marketing. These have included creating specified spatial and temporal event zones that are regulated by event specific, anti-ambush marketing legislation. The key problem associated with such proactive measures is the need to provide a formal and legally robust definition of ambush marketing. For example, section 12(4) UEFA European Championship (Scotland) Act 2020 defines ambush marketing as, '[an] act or a series of acts intended specifically to advertise within an event zone at a prohibited time – (a) a good or service, or (b) a person who provides a good or service'. Similar definitions can be found in the UK legislation developed for the Glasgow 2014 and Birmingham 2022 editions of the Commonwealth Games,[77] all of which have evolved from the London 2012 legislation examined below.

Additional proactive approaches can be found in event tickets' terms and conditions. For example, the Ticket Terms and Conditions for entry to any event at the Birmingham 2022 Commonwealth Games adopted the following definition:

> 'Ambush Marketing' means any activity by which a person purports to take advantage of the benefits, goodwill or footfall associated with and generated by the Games, including without limitation the unauthorised use of a Ticket as a prize or gift or in a lottery, raffle, sweepstake, fundraiser or competition or for any other promotional,

[75] N Burton and C Bradish, 'Commercial Rights Management in Post-Legislative Olympic Sponsorship' (2019) 9(2) *Sport, Business and Management: An International Journal* 201.

[76] ibid 204.

[77] Glasgow Commonwealth Games Act 2008 (Games Association Right) Order 2009/1969 and Birmingham Commonwealth Games Act 2020 ss 3–9.

> advertising or commercial purpose and/or any other activity by a person not authorised by Birmingham 2022 which: (a) associates the person with the Games; or (b) exploits the publicity or goodwill of the Games; or (c) has the effect (in the reasonable opinion of Birmingham 2022) of conferring the status of a Commercial Partner on a person who is not a Commercial Partner or otherwise diminishing the status of any Commercial Partner.[78]

Thus, a variety of approaches have been adopted in an attempt to mitigate the effects of ambush marketing on official sponsors and, ultimately, on the value of these association rights. In terms of legislative responses, as Johnson notes, whilst it may be the case that laws are required, this extension of law should not be undertaken blindly.[79] Not only is ambush marketing difficult to define in a way that is clear and understandable to non-sponsors and event attendees, it also runs the risk of being interpreted by its enforcers in a disproportionately restrictive manner.

By London 2012 it had become much more difficult to ambush an event by intrusion, requiring increasingly subtle and nuanced advertising campaigns if an association with the Games was going to be attempted. Sections 19-31E and schedules 3 and 4 of the London Olympic Games and Paralympic Games Act 2006 (LOGPGA 2006) were enacted in an attempt to prohibit all unauthorised associations with London 2012 by means of ambush marketing and street trading. Where American Express' infamous 1994 campaign that claimed that, 'You don't need a visa to go to Norway …' is the paradigm associative ambush pre-London, as the law came in, the ground rules were set for what could, and what could not, be lawful ambush marketing.

B. London Olympic Games and Paralympic Games Act 2006: A Step Change against Ambush Marketing

Much of the Olympic iconography is protected in the UK by the Olympic Symbol etc (Protection) Act 1995 (OSPA 1995). Section 1 OSPA 1995 creates the Olympic Association Right (OAR). In its original form, the OAR conferred on the British Olympic Association (BOA) the exclusive right to use the Olympic symbol, the Olympic motto or any of the following protected words: Olympiad, Olympian, Olympic and their plurals.[80] Infringement of the OAR, as defined in section 3 OSPA 1995, occurred where an ambusher either (a) used a representation of the Olympic symbol, the Olympic motto or a protected word, or (b) used 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*.[81] It is

[78] See 'Notices and Policies' at www.birmingham2022.com/terms-and-conditions/ticketing/.
[79] Johnson (n 68).
[80] OSPA 1995, ss 3 and 18(2)(a).
[81] ibid s 3(1).

this concept of association, rather than use of a protected symbol, or the creation of confusion in the minds on the public, that creates the novel extension of intellectual property law.

Under section 6 OSPA 1995, infringement of the OAR is actionable by the BOA, which can seek relief by way of damages, injunctions, accounts or any other remedy that is available in respect of the infringement of a property right. Where the OAR is infringed with a view to making a gain to the infringer or another, and/or a loss to another in commercial circumstances, then a criminal offence can be committed under section 8 OSPA 1995.

The LOGPGA 2006 made three specific changes to the framework of protections available for the symbols and words most closely associated with the Olympic Movement in general and London 2012 in particular. First, for the period of its existence, the London Organising Committee of the Olympic Games (LOCOG) was granted proprietor status in respect of the OAR. Secondly, the scope of the OAR was increased significantly by extending it to cover '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 the Olympic Games or the Olympic movement'.[82] Thirdly, there was the creation of a London 2012-specific association right: the London Olympic Association Right (LOAR).[83]

The LOAR, for which the LOCOG was granted the exclusive power to grant authorisations, was created by section 33 LOPGA 2006 and defined in schedule 4 of the Act. Going much further than the OAR, infringement of the LOAR is defined in schedule 4, paragraph 2 as when, in the course of a trade or business, *any representation of any kind* is made in a manner that is likely to suggest to the public that there is an association between the business and London 2012. When determining whether an association with London 2012 was being made, account could be taken of the use of the following specific words or phrases: Group A – games, Two Thousand and Twelve, 2012, and twenty twelve; Group B – gold, silver, bronze, London, medals, sponsor, and summer. If a word or phrase in Group A was used in combination with either another word or phrase in Group A, or with a word in Group B, then this would be indicative of an attempt at making an unlawful association with London 2012.[84] The same civil actions and remedies were available for infringement of the LOAR as are for the OAR.

The creation of these association rights is highly contentious. Writing before the Games, Harris et al analysed this development with some trepidation, particularly its extraordinarily wide-ranging scope, and that it appeared

[82] ibid s 3(1)(b).

[83] For more detail on this, see V Horsey, R Montagnon and J Smith, 'The London Olympics 2012 – Restrictions, Restrictions, Restrictions' (2012) 7(10) *Journal of Intellectual Property Law and Practice* 715.

[84] LOPGA 2006, sch 4, para 3.

to monopolise anything that attempted to make any connection with London 2012:

> The protection of a blanket 'association' right strikes fear into brand owners and lawyers alike. This is because, in the absence of definable boundaries, there is no way of saying what will, or will not, fall within the legislation. That is, until we see how the wording of the 2006 Act will be interpreted by the courts. Certainly, it seems likely that High Court judges may see fit to fetter the broad protection currently offered by the legislation.[85]

The creation of the LOAR, and the amendments to the OAR, evidence a further development of traditional protections offered by intellectual property law. Instead of simply prohibiting the use of the specific symbols, words and phrases most obviously connected to the Olympics, the LOAR and amended OAR extend significantly the situations in which an ambusher can be held to have made an unlawful association with the Games. By extending the protections offered by traditional concepts of copyright and trademark to merely creating a perception of association with London 2012, the Olympic Games and/or the Olympic Movement, the LOAR and OAR can be seen as a new category of intellectual property, or super-IP.[86] There is no need to prove intent to infringe, or to create confusion in the minds of the public. Instead, the LOAR is infringed on the suggestion of an unlawful association, and the OAR where it is 'likely' to create in the public mind a commercial, structural or contractual 'association' with the Games.

Chavanat and Desbordes provide a useful review of the ambushes that occurred at London 2012,[87] noting that the restrictions were the most rigorous and far reaching in Olympic history, at least up to that point. The instances of ambushing that they identify demonstrate a very high degree of sophistication, providing examples of each of incursive, obtrusive and associative ambushing that was able to subvert the spirit, if not the letter of the law. Although no legal actions for infringement of either the OAR or LOAR were pursued, a heavy-handed cease and desist approach was taken in respect of anyone perceived to be making any kind of an association with the Games without the appropriate consent.[88]

The UK's approach to preventing ambush marketing at London 2012 was considered a success, with subsequent editions of the Games building on it as part of their own anti-ambushing strategies that underpin the legal guarantees

[85] P Harris, S Schmitz and R O'Hare, 'Ambush Marketing and London 2012: A Golden Opportunity for Advertising, or Not?' (2009) 20(3) *Entertainment Law Review* 74, 75–76. See also James and Osborn (n 30).

[86] James and Osborn (n 58).

[87] N Chavanat and M Desbordes, 'Towards the Regulation and Restriction of Ambush Marketing? The First Truly Social and Digital Mega Sports Event: Olympic Games, London 2012' (2014) 15(3) *International Journal of Sports Marketing and Sponsorship* 2.

[88] BBC News, 'Sausages Exploit Olympic Logo' (31 August 2007), news.bbc.co.uk/1/hi/england/dorset/6972224.stm.

provided for in the OHC. To date, no challenges to any of the anti-ambush marketing provisions have been recorded. The IOC does not want to risk the legislation being struck out for being too vague, or an infringement of commercial free speech.[89] The ambushers do not want to establish that the restrictions are lawful and are instead prepared to continue to push the boundaries of the definitions provided in the legislation, with the result that the UK's novel approach to anti-ambush marketing legislation has influenced significantly the development of subsequent versions of both *lex Olympica* and Olympic Law.

V. CONCLUSION

This chapter has explored the influence of European legal culture upon a specific aspect of *lex Olympica* and Olympic Law, and further illustrated that the European influence is not only substantive, but procedural and cultural. Both *lex Olympica* and Olympic Law are clearly influenced by Anglo-European legal thinking and creative legislative developments, in this case intellectual property law, contract law, and alternative dispute mechanisms, and the ways that they have been used to develop a framework of protection for the IOC's revenue streams.[90] The creation and operationalisation of the association right is an extension of Anglo-European notions of intellectual property law that has resulted in the creation of a new form of intellectual property right that extends much more widely than traditional copyright and trademark law, and goes beyond the protections offered by the action in passing off.

Further, we have illustrated that the leverage that the IOC is able to utilise can force the creation of legal and regulatory provisions that operate to the benefit of itself, local organising committees and their sponsors. We have previously argued that this leverage is often unchecked and that the cyclical process of Olympic Law creation is in need of rethinking or recalibration. Further to this this we would add that the IOC has missed an opportunity by its insistence on a rigid and all-encompassing approach to regulating the exploitation of its commercial rights. If the IOC was instead to take a more nuanced and relational approach, then a genuinely novel, transnational framework could be developed that is more inclusive of non-European approaches. More broadly, it ensures that both *lex Olympica* and Olympic Law continue to be defined and influenced by euro legal principles, theories and laws at the expense of developing a genuinely novel, transnational approach.

[89] K de Beer, 'Let the Games Begin – Ambush Marketing and Freedom of Speech' (2012) 6 *Human Rights and International Legal Discourse* 284.

[90] For the operation of the law at recent Games see: A Epstein, 'The Ambush at Rio' (2017) 16 *John Marshall Review of Intellectual Property Law* 350 and D Fields and A Muller, 'Running Rings around Ambush Marketing: How the Tokyo Games Propose to Prevent Misuse of the Olympic and Paralympic Brands' (2020) 31(7) *Entertainment Law Review* 237.

Lex Olympica continues to operate as a major influencer of *lex sportiva*. Where the Olympic Movement leads, other ISFs and event organisers seek to follow. This in turn creates an event legacy that remains unacknowledged by scholars of mega sporting events.[91] The legal legacy can be seen in three specific manifestations. First, through the mechanism of Olympic-specific forced transplants. Secondly, through the recycling and updating of Olympic-specific legislation in former hosts, as has occurred in particular in the UK in respect of the Commonwealth Games. Thirdly, by similar protections being demanded by, though usually denied to, other ISFs. The distinction between the responses of governments to the IOC and to other ISFs demanding similar protections is one of leverage; the IOC is (currently) able to exert its leverage over governments wanting to host the Games by insisting on these legislative changes being a term of the Olympic Host Contract, whereas other ISFs rarely have the same level of leverage and must either accept the refusal or move the event elsewhere. With the next two editions of the Olympics located in Europe, in Paris in 2024 and Milan-Cortina in 2026, the power and influence of European and Anglo-European legal cultures on the ongoing evolution of *lex Olympica* and *lex sportiva* will continue to shape the sporting-legal system for the foreseeable future.

[91] J Grix (ed), *Leveraging Mega-Event Legacies* (Routledge, 2018).