Power of discretion

New research into the regulation of the London 2012 Olympic Games shows that the threat of enforcement can be just as effective as prescriptive legal action.

One of the major criticisms of the modern Olympic movement is that the advertising and trading regulations protecting the International Olympic Committee (IOC) and its sponsors – such as McDonald’s and Coca-Cola – from ambush marketing are implemented at the expense of small, local firms, which do not benefit proportionately from the Games.

The London Games presented regulators with a series of rather contradictory demands posed by the ‘local’ and ‘global corporate’ stakeholders – often simultaneously. Regulators used a mixture of formal and discretionary (informal) practices to fulﬁl the challenging task of managing all parties’ expectations, while enforcing the new regulations.

Recent research into advertising and trading regulations at London 2012 considered these to be the most powerful ever enacted for an Olympics, as they were enshrined in criminal statute, with potentially unlimited ﬁnes for more serious infringements. Thus, previous studies often offer a critical view of the advertising and trading regulations at these Games, describing them as ‘draconian’, non-negotiable and detrimental to local businesses.

It should be noted, however, that these studies were done before the event, using the written legislation – some of which was passed up to six years before the opening ceremony – to inform discussions about the (typically negative) impact the regulations could have on local, small ﬁrms. By contrast, this research has been undertaken after the Games, and draws on qualitative accounts with the Olympic Delivery Authority (ODA – organisers and enforcement ofﬁcers), and other relevant bodies that almost all had a background in, or were seconded from, trading standards.

While the new Olympic advertising and trading regulations led to some formalisation of regulatory practice, the research found that, in reality, they were often enforced in a discretionary manner – typical of the way trading standards enforce regulation every day.

Enforcing the Olympic advertising and trading regulations

The small ﬁrms’ perspective of Olympic advertising and trading regulations is quite charged, driven by an anticipated ‘threat’ of prosecution by the ODA and their belief that fans were funnelled toward official Olympic sites at the expense of local communities. This view has some credence given that – in areas such as Greenwich – local businesses experienced up to a 95 per cent reduction in trade during the Games. One member of the Joint Local Authority Regulatory Service (JLARS) said: ‘It was a bit of a ghost town outside some of the stadiums.’

Most infringements were relatively minor and did not warrant a heavy-handed approach.
Upon granting London the right to stage the 2012 Olympic Games, the IOC required the winning bidder to comply with the Olympic Charter (Chapter 12 of the Charter sets out the IOC’s exclusive ownership of the Games’ key properties: All rights and data relating thereto, in particular, and without limitation, all rights relating to their organisation, exploitation, broadcasting, recording, representation, reproduction, access and dissemination in any form and by any means or mechanisms whatsoever, whether now existing, or developed in the future (International Olympic Committee 2011: 21).

Such ownership included all ‘Olympic Properties’ (Olympic Charter, 2011) – the Olympic symbol (rule 8), the flag (9), the motto (10), the emblems (11), the anthem (12), the flame and the torches (13).

The IOC sells access to – and association with – its Olympic properties to private organisations, which together form The Olympic Partners (TOP) sponsorship programme. To protect the investment of official sponsors, the London Olympic Paralympic Games Act (LOPGA) 2006 – amended in 2011 – was passed. This provided a regulatory framework to facilitate the building of the infrastructure necessary for staging the Games.

It also set out explicit protections for the Olympic commercial rights – protecting the words and symbols that are most commonly associated with the Games. To oversee these purposes, the LOPGA (2006) prescribed the creation of a new public body – the Olympic Delivery Authority (ODA). This had wide-ranging powers and was responsible for delivering the physical infrastructure of the Games (sporting, media, and accommodation facilities), the London transport plan (the movement of officials, athletes, and spectators around London), and the dissemination and enforcement of advertising and street-trading regulations in the vicinity of Olympic venues.

The LOPGA also granted enforcement officers the power to ‘enter land and premises on which they reasonably believe a contravention of regulations is occurring, to remove, destroy, conceal or ease any infringing article…and use, or authorise the use of, reasonable force for the purpose of taking action under this subsection’ (LOPGA, 2011).

Despite the legal powers at their disposal, however, enforcement officers were often instructed by the ODA’s management to enforce the advertising and trading regulations in a ‘proportionate and representative’ way. Such practices were encouraged to prevent officers from being represented in the news media as heavy-handed in their enforcement of the regulations. This was seen as a risk to ‘Brand UK’, which could be negatively affected if the media’s attention shifted from the sporting events to regulators stepping on the interests of local small firms.

Because the ODA was predominantly made up of trading standards officers and/or people with a trading standards background, there was also a concern that damaging ‘Brand UK’ at London 2012 could have negative consequences for the profession in an everyday, non-Olympic context. Reductions in local authority resources were already hitting trading standards hard, with an average 40 per cent fall in individual services’ budgets around the time of the Games.

So the ODA was in a position where it had to show, ostentatiously, that it was doing everything it could to prevent ambush marketing – thus deter potential ambushers and demonstrating to the IOC that it had rigid processes in place – while avoiding heavy-handed treatment of local businesses and street traders.

The outcome of these divergent priorities were highly formalised enforcement practices that apparently left little room for enforcement officers to offer discretion to an infringing business – while, in practice, informal, discretionary enforcement practices were encouraged by management.

Gold/Silver/Bronze command

An example of the formalisation of enforcement practice at London 2012 was the use of the ‘Gold/Silver/Bronze command’ by the ODA. The command structure was used to record and escalate infringements of advertising and trade regulations at London 2012.

Invented by the police services in 1985, Gold/Silver/Bronze command is a system for officers to follow to ensure that a sudden, critical incident is managed appropriately and in a consistent manner, which could stand up to the scrutiny of any subsequent investigation.7 Everyday examples of these incidents include riots, acts of terrorism, severe weather events, and epidemics.

The system worked by ‘Bronze’ command – enforcement officers, on the ground – recording all infringements on tablets, in real time, using photos and videos, and relaying this information up the chain of command to ‘Silver’. Depending on the severity and complexity of the infringement, this could be escalated to ‘Gold’ command – and, in exceptionally complex cases, ‘Gold’ command had access to the ODA’s lawyers.

Informal, discretionary enforcement practices

While the recording of infringements was non-negotiable, ODA managers usually instructed enforcement officers to exercise discretionary practices. This included enforcement officers – under instructions from Gold/Silver command – saying to infringing small firms and street traders: ‘I’m going for a walk and, when I get back in 10 minutes, this stuff needs to be out of here.’ In practice, most infringements that officers dealt with on the ground were relatively minor, and did not warrant a heavy-handed approach:

‘A lot of the offences were for stupid stuff like builders’ vans being parked so they would be on the TV, basically to advertise their companies. We just told them to move along, and they did’ (enforcement officer at London 2012).

Another example involved the owner of a local restaurant, at the West Ham end of the Olympic Park, who put up infringing posters advertising his business. Enforcement officers went to take the posters down, but a member of the restaurant was filming, as a way to get publicity and show enforcement officers restricting local business. Instead of allowing enforcement officers to be seen ripping down posters, Gold command instructed them to leave the posters where they were and walk away – tolerating a small ambush of the Games to avoid much-feared negative publicity.

The style of enforcement used by the ODA was indicative of sociologist Barbara Misztal’s ‘informality span’, the formal – in this case the formalisation of
regulatory practice – occurs simultaneously with the informal, discretionary enforcement practices.

The result was the recording of 896 contraventions of the advertising and trading regulations over the four-week period of the Olympic and Paralympic Games, but no prosecutions.

Conclusions

Even in the most rigid of legislative contexts, set in the most powerful of criminal statutes, regulatory agents – such as managers and enforcement officers – have the power of discretion and interpretation in practice.

In 2012, the ODA did not just reel off enforcement decisions based solely on the prescriptions of written rules derived from previous research on Olympic advertising and trading regulation. Instead its management and enforcement officers adapted their delivery of the Olympic advertising and trading legislation based on ‘mechanisms’. These included the need to demonstrate legitimacy to wider stakeholders – such as the IOC and central government – set against their fears of reputational damage in the Olympic (Brand UK) and non-Olympic (trading standards) contexts.

The outcome of such mechanisms, plus the influence of the Olympic advertising and trading legislation, was the formalisation of some regulatory practices (Gold/Silver/Bronze command). Engagement with local businesses, meanwhile, was informal, resulting in discretionary action that typically relied on the ‘threat’ of prosecution, rather than zealous enforcement.

References

4. Duignan M, Olympic territorialisation, shocks, and event impacts: small businesses and London’s ‘last mile’ spaces, PhD, Anglia Ruskin University, Cambridge, 2017
7. See www.gov.uk/guidance/emergency-response-and-recovery

Lewis Walsh and Dr Michael Duignan, of Lord Ashcroft Business School, Anglia Ruskin University, Cambridge.

In recent years the illegal counterfeit industry has tripled in size. A growing concern demands global action.

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