

Virtual advertising: now you see me, now you don't

Introduction

Virtual advertising is the use of modern technology to insert virtual adverts into live or pre-recorded television broadcasts and is perhaps best known for its use in connection with live sporting events. As an example, the perimeter boards around a Premier League football pitch can be digitally overlaid so that at any one point in time the fans inside the stadium see a different advert to viewers watching on television. Depending on the number of broadcast feeds distributed to international markets, this can be further carved up so that television viewers in Europe see a different virtual advert to those in the Middle East which, in turn, is different to what viewers see in the Asia and so on.

Benefits of virtual advertising

There are many upsides to utilising virtual advertising in the sporting context, but four key benefits are worthy of note.

Firstly, the ability to show different virtual adverts in different regions (or even individual jurisdictions) vastly increases the amount of available advertising inventory that can be sold by rights' holders. Instead of only being able to sell a particular allocation of advertising time to one brand globally, virtual advertising allows the same allocation to be sold to multiple different brands (including same category brands, which otherwise would not be possible due to exclusivity restrictions) around the world enabling rights' holders to maximise their commercial revenues.

Secondly, advertising in this way is often a more attractive option for brands, particularly regional brands, that can promote their goods and/or services to their target market with region-specific virtual adverts that are less expensive to place than taking the same allocation on a global basis. Whereas international brands wanting to take global rights can tailor their virtual adverts to speak to regional audiences in a more personal way, for example by using local languages and integrating cultural touchpoints.

Thirdly, the increased proliferation of targeted regional adverts visible in the broadcasts feeds of foreign sporting events can lead to a more engaged fan experience, as the presence of familiar branding often makes viewers feel more connected with the event even if it is happening on the other side of the world. This effect is particularly strong where the virtual adverts are run in the relevant local language. Fourthly, the ability to show different adverts in different jurisdictions has been mooted as a potential way for brands to navigate advertising black and grey markets, those markets being where the advertising of certain goods or services are either prohibited or significantly restricted. Only running virtual adverts for goods or services in jurisdictions where they are permitted and replacing them with non-prohibited adverts in jurisdictions where they are not, is certainly an interesting potential solution to an age-old problem that the sports industry has faced. However, ultimately the extent to which this is the workaround that some profess it to be depends on the relevant regulatory landscape.

The Middle East perspective

The Middle East is particularly relevant to this discussion, as an increasing number of world-class sporting events are held in the region and many countries, such as the UAE, have broad prohibitions on the advertising of regulations applies of certain goods and services including alcohol, tobacco (including e-cigarettes) and gambling, as well as other restricted products such as baby formula and certain supplements.

Position under UAE law

In the UAE, there are no specific regulations that apply to virtual advertising. The key issue is whether the content of any virtual advert complies with local laws and regulations concerning prohibited products. The virtual advertisement of a prohibited product inserted within the broadcast of an event will, when shown in the UAE, result in a violation of the relevant regulations. This is regardless of whether the event is taking place within or outside the UAE, and regardless of where the virtual adverts are inserted or at whom they are targeted.

That said, the scope of the relevant regulations applies only to such adverts that are published within the UAE. As such, the virtual placement of an advert for a prohibited product (excluding tobacco, which is discussed below) within the broadcast of an event which is taking place in the UAE, but is only broadcast to viewers outside the UAE, is unlikely to be restricted under the regulations (subject to the point below relating to criminal liability).

Tobacco

The position under UAE law relating to tobacco is much broader in its scope than for other prohibited products. It almost certainly should be read to prohibit the virtual placement of tobacco advertisements within a broadcast of an event taking place in the UAE, whether this is inserted for viewers within or outside the UAE. The relevant regulations prohibit any person or body corporate from being associated, in a sponsorship capacity, with an event conducted in the UAE if it promotes tobacco or tobacco related products. Simultaneously, the regulations also prohibit sports outlets (whether public or private bodies) from advertising, publicising or promoting tobacco-related products. The wording of the regulations is wide enough so that a tobacco producer, or a sports body or broadcaster, that facilitates the advertising of a tobacco product in connection with an event taking place in the UAE, may be liable even where the virtual advertisement of the tobacco product is only televised outside the UAE.

Enforcement and criminal liability

There are potential practical impediments to prosecuting and seeking enforcement of the relevant UAE regulations against entities operating outside of the UAE and with no presence there. However, as the 'publisher' of any virtual advertisement, the local broadcaster in the UAE will normally be in breach of the regulations if they broadcast virtual adverts for prohibited products in the UAE. It is also important to consider the potential penal consequences of running virtual adverts under the UAE's Penal Code. The Code's definition of a crime states that,

“a crime is said to have been perpetrated in the UAE Territory if one of the acts constituting it has been committed therein or if its results have been or were intended to be realised therein.”

It is arguable whether a virtual advertisement of a prohibited product televised outside of the UAE, in connection with an event taking place inside the UAE, creates the “intended result” in its audience of associating the prohibited product with the UAE event. However, it is worthy of consideration in terms of potential liability. This raises the possibility of criminal consequences for entities involved in promoting prohibited products through virtual advertising within broadcasts of events hosted in the UAE, even where the virtual advertisement of their products on the field of play is only broadcast outside of the UAE.

Closing thoughts

It is perhaps unsurprising that there is some confusion as to how the regulatory landscape in different countries interfaces with the advent of virtual advertising technology, given that the relevant legislation was enacted at a time when such technology was not anticipated. As time goes by, it may be the case that the relevant regulations are updated to specifically address the unique nature of virtual advertising. In the meantime, it is of paramount importance for stakeholders to carefully consider all relevant local laws and regulations to avoid any unintended legal consequences arising from the use of this exciting new technology.

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