

Autumn 2020
Whitepaper

VIRTUAL ADVERTISING CUTTING THROUGH THE REGULATION.

PROPOSING A WAY FORWARD.



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Introduction

This paper proposes a way forward for entities seeking to implement or take advantage of virtual advertising solutions. It focuses on use of this technology in a sporting context but the principles are as relevant to use of the technology within any live event broadcast.

Although there is a complex legal framework, with differing positions around the world, we believe it is useful to develop some broad principles in this emerging regulatory area to support the development of the Virtual Advertising sector.

Whether you are a sports rights holder, broadcaster, producer, advertiser or technology provider, we hope this paper will clarify the regulatory issues and provide you with a pragmatic way forward which we propose can act as a useful benchmark for the industry and regulators around the world to refer to and adopt.

[vur-choo-uhl]

Adjective

Temporarily simulated or extended by computer software.

[ad-ver-tahy-zing]

Noun

The act or practice of calling public attention to one's product, service, need.

What Do We Mean By 'Virtual Advertising'?

"Virtual advertising is the digital placement / replacement of branding, advertising and other visual promotional messages into audio-visual footage. As such, those watching on TV see commercial references which a live audience would not see. At its most basic, virtual advertising includes on-screen graphics (e.g. timing data which includes the logo of the data provider) and it is very clear that this type of virtual advertising is superimposed specifically for the TV audience. At the other end of the scale, virtual advertising includes advertising which is integrated into the environment being broadcast, such that the audience may not appreciate it is not real."

For example: Virtual perimeter boards replace advertising on perimeter boards that are physically present in real time so that the viewers see alternative digital advertising, without the 'placed' advertisements interfering or distorting the live action being broadcast.

Advancing Technologies

Virtual advertising has been used in various forms for many years. For example, the digital insertion of on-field logos at sporting events has been experimented with for a couple of decades now.

Only recently though has technology advanced to the extent that it is possible to digitally overlay advertising boards which do not impede upon the live action. It is also now possible for multiple broadcast feeds to be distributed to international markets, each displaying different virtual advertisements. As such, a number of rights holders now exploit virtual advertising to allow tailored advertising to be sold on virtual perimeter boards to different territories or regions. This presents opportunities for advertising to be segmented and, for example, allows:

- ✓ Several same-category regional sponsors of an event to secure advertising on the broadcasts, shown in 'their' region only;
- ✓ A global sponsor to be offered the ability to present different messages in different territories to reflect language, cultural, or taste differences;
- ✓ Virtual perimeter boards offered to the general market to be sold to local brands targeting their local markets only.

The result is the ability to increase advertising revenues.

In the not too distant future it will also be possible to tailor virtual advertising within online programming on a personalised basis. In the same way that we are now served tailored ads when browsing the web or using social media, it will be possible for virtual advertising in audio-visual content to reflect an individual user's interests and browsing habits. The ability to click on such advertising to find out more about a product or to purchase it can also be built in. Imagine you are watching a live football match online and you see a perimeter board advert for the new team kit that you'd been considering buying online a couple of days ago – click on the perimeter board and it takes you straight back to the club shop.

The same technology could also be used to enhance the fan experience, rather than for advertising purposes. For example, a fan who subscribes to a league's OTT channel could see "Happy Birthday" messages on the perimeter boards at the start of a game taking place on the date of their birth and be offered a special discount on their favourite team's merchandise.

Regulatory Barriers

While the tech is ready to go, one of the barriers to wide adoption of these new virtual advertising solutions has been concerns about regulatory issues. We are not pretending that this is a simple regulatory landscape. Much of the relevant regulation is old and does not anticipate this type of technology, and when taking a global approach the thought of taking legal advice in dozens of territories is eye-watering. However, by understanding the issues and the objectives of the regulation and taking a sensible and risk-based approach to implementation, we believe a way forward can be found.

Regulation

This paper is not the place for a detailed analysis of the legal and regulatory framework which needs to be considered. However, we have tried to capture succinctly the key issues at play. Please note that this is written from a UK-centric perspective. On a sliding scale of minimum to maximum regulation in the key areas, the UK is toward the top end. We are grateful to contributors from a number of other territories who have assisted us by flagging where regulation is tougher in the 'Global Perspectives' section below.

Broadcast Regulation

Broadcast regulation in respect of commercial references in editorial programming generally has four key aims wherever you look around the world:

- 1 Avoiding over-commercialisation of editorial programming.**
- 2 Ensuring broadcaster's editorial independence and freedom from commercial influence.**
- 3 Ensuring viewers are not misled as to what is advertising and what is not.**
- 4 Protecting viewers (or specific audience groups, e.g. children) from inappropriate and subliminal advertising.**

These aims tend to manifest themselves in rules on commercial references in programmes and 'product placement' rules in the following ways:

Avoiding over-commercialisation; Controls on 'undue prominence' of advertising in programmes. (Note that in-programme advertising does not normally count towards limits on the quantity of advertising minutes that can be shown in a period, but this should be checked on a territory by territory basis as there are anomalies).

Editorial Independence; Rules to ensure that the advertising is appropriate/natural in the context of the programme in question, is not focused/dwelled upon inappropriately, and that producers/broadcasters retain ultimate editorial control;

Ensuring viewers are not misled; Transparency rules, banning 'surreptitious' advertising, and requiring notices to be given at the beginning and end of programmes to highlight that product placement has been included

Protecting viewers; Specific bans on product placement or commercial references in certain types of programming (e.g. news or children's programmes), or in respect of certain types of product (such as alcohol, tobacco/e-cigarettes, 'unhealthy' food and drinks, gambling, and medicines). Subliminal advertising is also generally prohibited.

In the EU (and, for the time being at least, in the UK) the Audio Visual Media Services Directive ("**AVMS**") applies. Recent changes to the AVMS are relaxing the rules on product placement for broadcasters so that they are in line with the rules for on demand services providers ("**ODSP**"), such that product placement will generally be permitted, subject to certain controls along the lines set out above. However, there continues to be a trend to ensure that audiences are protected against 'harmful' advertising content.

It is worth noting that it is normally the broadcaster (whether broadcasting via traditional means or online), or the ODSP for on demand content, rather than the producer of the programme that is subject to the regulations and any relevant penalty for breach. In a sports context, the sports rights owners which implement virtual advertising are not therefore directly subject to these controls (unless they provide scheduled TV-like programming via their own channels, either via traditional means or online). However, broadcasters acquiring content from a sports rights owner will generally require those rights owners to ensure that their content is compliant with the relevant regulation. As such, contractual liability may result if the content such rights owners provide is non-compliant.

The AVMS has been implemented by the UK via the Communications Act 2003 and Ofcom, the regulator of broadcasters and the authority which provides further rules (through the Ofcom Code), and guidance on the application of the rules through various supplementary documents and its enforcement decisions. The 'Way Forward' section below proposes an approach which is consistent with Ofcom's current position.

Advertising Regulation

The content of advertising is controlled globally through a combination of legislative mechanisms and 'self-regulation' via industry codes of practice which are adopted and enforced by advertising industry appointed bodies.

These rules tend to apply to the advertiser and focus on requiring advertising to be honest, decent and truthful, and not misleading. They place controls on advertising for certain types of product, such as ensuring that alcohol or gambling advertising is not targeting inappropriate audiences and does not encourage irresponsible behaviour.

Some countries ban specific types of product advertising, either at all, or at certain times: for example in the UK advertising for prescription-only medicines is banned on TV. In the Middle East, alcohol and betting advertising is banned for cultural reasons. France has implemented the 'Loi Evin' which bans sponsorship of sports events by alcohol brands. In some countries, advertisements which specifically target their citizens also need to be in the local language(s).

Sports-specific Regulation

Most sports will have rules, whether at an international, regional, national, and/or league/competition level, which governs field of play and kit advertising. Some will deal specifically with virtual advertising.

For example, in football the "Laws of the Game" provide that "No form of commercial advertising, whether real or virtual, is permitted on the field of play, on the ground within the area enclosed by the goal nets or the technical area, or on the ground within 1m (1yd) of the boundary lines from the time the teams enter the field of play until they have left it at half-time and from the time the teams re-enter the field of play until the end of the match."

Clearly, sports rights owners will need to ensure that any use of virtual advertising complies with such rules.

Data Privacy

Looking ahead to the ability to use virtual advertising during online transmissions for targeted in-programme advertising (or viewer-specific non-commercial content), data privacy regulation needs to be carefully considered in addition to those regulations mentioned above.

The digital advertising industry is still grappling with data protection legislation compliance in respect of traditional forms of online advertising (e.g. banner ads and social media ads). Programmatic advertising (which allows digital advertising space to be traded on an individualised, targeted basis in real time) involves complex data transfers and use of technology which can be very challenging to understand. In Europe the GDPR (the General Data Protection Regulation, EU Regulation 2016/679) has shifted the standards and new levels of transparency about how personal data is being used are required.

While this is an incredibly complex area, the good news is that the principles should apply to targeted virtual advertising in exactly the same way as other forms of targeted advertising. Sports rights owners looking to implement targeted virtual advertising to their direct subscribers will need to get specialist advice and be confident that they are providing the right information, seeking required consents, and providing opt-out mechanisms to their fans. This is something they should however already be doing if they are offering targeted advertising on their website etc.

Whose Regulations Apply?

For every additional virtual advertising feed created there is a cost. There can also be practical challenges caused by existing regional distribution structures. As such, most early adopters are using a handful of different feeds to target on a regional, rather than country by country, basis.

To provide an illustration of how virtual advertising can be implemented, and who has control.

Let's consider **an example**:

A domestic football league in Europe appoints an agency to produce and distribute all league matches. The agency, as the 'host' broadcaster, inserts virtual ads into the live feed to create a number of different feeds tailored by region – i.e. one for broadcasters in North America/Mexico, one for the Far East, one for Africa, one for Europe (excluding the domestic market who will see the 'real' in-stadia adverts) etc.

The agency inserts the adverts from its central production centre in Canada. The agency has sold the league broadcast rights to various domestic broadcasters around the world (i.e. NBC in the US). The domestic broadcaster will receive the relevant regional feed and then be able to add their commentary and graphics etc, but the virtual ads have already been inserted and the domestic broadcaster doesn't have direct control over these.

If the domestic rights-holding broadcaster wants any control over the inserted adverts it must do this contractually, i.e. in their deal with the agency the US rights-holding broadcaster may require that all inserted adverts must be compliant with US law.

As regulation is generally country-specific this begs the question, whose laws apply?

- The country where the relevant sports event is taking place?
- The country where the sports rights owner or agency (implementing Virtual Advertising) is based?
- The country of the entity which commissioned the specific virtual feed?
- The country where the virtual feed is first shown?
- The country where the advertiser is based?
- The country where the relevant digital ads are inserted into the broadcast feed?
- The country for which a specific advert or virtual feed is targeted?

This is probably the hardest legal issue to address, particularly given that the answer will vary depending on which of the different types of regulation mentioned above is under consideration, and possibly where the enforcement action is being brought.

The 'country of origin' principle which applies in the EU can be helpful for a pan-European feed. However, there is now a lack of clarity given the ongoing situation surrounding Brexit regarding transmissions which have a UK dimension, and elsewhere around the world the EU's 'country of origin' principle is irrelevant.

As such, it would be a mammoth task to draw up a matrix to address this issue or reach a definitive conclusion on the regulatory position on a territory by territory basis.

This paper therefore proposes an approach which we believe is likely to be compliant in most jurisdictions, such that the question of 'whose regulations apply' becomes secondary.

The Way Forward

Below is a set of principles we would propose the industry could adopt with a view to:

- 1 Minimising regulatory challenges.**
- 2 Paving the way for low risk exploitation of the opportunities presented by virtual advertising.**

Sports rights owners will take a view on the level of risk they are willing to take in each given scenario. This will be influenced by a whole host of factors including PR considerations, likely exposure to contractual liability, the type of advertising, where it will be seen, and relationships with their broadcasters. Getting a view from local broadcasters as to whether they have any concerns about the proposed use of virtual advertising is likely to be very influential.

While the principles below express a low risk position, we have provided some commentary in italics to indicate some alternative positions, which those with higher risk appetites may be ready to accept.

Principles of Engagement

1. **Sports-specific rules and regulations** which apply to the event being broadcast should always be fully complied with.
2. **If a broadcast feed is being produced for a specific country, the laws of that country should be complied with.** *(If a feed is not country-specific but the advertising inserted into it is, the risk of regulatory intervention increases. For example if a 'European' feed of an ice hockey match taking place in the USA is received in multiple countries but all of the virtual advertising is targeted to one country, i.e. Russia, and the language used in all of the adverts is Russian, the risk of regulatory intervention in Russia increases. Mitigating factors might include that the feed is received in other Russian-speaking countries, and brands/products advertised are not solely available in Russia but the more 'Russian' the feed, the more likely it is that the Russian regulators will intervene.)*
3. **Data protection laws** should be considered carefully and complied with if you are using personalised advertising in online transmissions.
4. For **multi-jurisdictional feeds**, the following principles are proposed with a view to ensuring compliance with the majority of broadcast and advertising laws and regulations around the world:

<p>Undue prominence, over-commercialisation of editorial programming, and editorial independence and freedom from commercial influence.</p>	<p>The virtually inserted advertising should not be incongruous, i.e. it should appear 'normal' to viewers who are used to advertising appearing in the context shown in the sporting event.</p> <p>The virtually inserted advertising should not be unduly prominent during a programme where there is no editorial justification for this. Take, for example, a virtual ad positioned in various spots around a rally circuit. In more strictly regulated countries, if each time a car passed the ad the camera lingered to give the ad more air time, this may be deemed unduly prominent. However, if an incident, such as a crash, were to happen in front of a virtual advertising board, it is likely to be acceptable to focus on that general area and leave the virtual ad in place while the incident plays out.</p>
<p>Transparency and ensuring viewers are not misled as to what is advertising and what is not.</p>	<p>Notices should be given at the beginning and end of the programme, and between breaks, to state that virtual advertising/product placement is included. <i>(Those happy to accept a higher risk may feel this is not necessary unless there has been a specific ruling in a jurisdiction in which the feed is being received).</i></p>
<p>Protecting viewers (or specific audience groups, e.g. children) from inappropriate advertising</p>	<p>Advertising for cigarettes, tobacco products, e-cigarettes, prescription only medicines, political advertising, weapons, escort agencies, pornography and other types of advertising that are banned and/or likely to bring the event into disrepute if advertised should never be inserted into virtual advertising feeds.</p> <p>Advertising for other highly regulated products and services such as alcohol, betting, fantasy gaming, 'unhealthy' (high fat, salt, sugar) food and drinks, infant formula and highly regulated financial products such as payday loans should be treated with caution. Different territories will take different approaches. For example, in the UK virtual advertising for most of these products is not currently permitted in programmes commissioned by a UK broadcaster or first shown in the UK.</p> <p><i>(Those happy to accept a higher risk may be comfortable with inserting advertising for such products if it is acceptable in some of the countries the feed is being received and/or in the country where the relevant event is taking place. If the inserted adverts are targeted to a specific country where the relevant product-type is banned this will also increase risk.)</i></p>

Third party rights	A virtual ad should only be placed on to land/buildings or other third party property: Where the land/building owner has consented; Where no regulatory consents would be required if the advertising were actually there (or where consent from the relevant regulator has been obtained); and If the virtual advert is replacing physical advertising, where the advertiser has no contractual or other right to object. <i>(Those happy to accept a higher risk may be willing to take a 'wait and see' approach here but must acknowledge that private claims or regulatory action may be brought).</i>
Content of advertising	The content of adverts included in virtual feeds should not be promotional (i.e. not include an active call to action to purchase, or promote sales, offers or consumer promotions), i.e. it should generally only be brand, slogan or product based advertising. A contractual obligation should wherever possible be placed on the advertisers to ensure the adverts they supply otherwise comply with advertising law and regulation in the territories where the ads will be shown.

Examples

Subject to the overarching principles above, the following are examples of how virtual advertising can be adopted depending on your risk appetite:

Low Risk

Virtual advertising which replaces advertising physically in situ (e.g. digitally replaced advertising boards or advertising which is digitally imposed onto jumbotrons or other big screens within the venue).

Low Risk In Most Countries

Virtual advertising in places where viewers are accustomed to seeing advertising, even if there is no equivalent physical advertising in situ.

For example:

- Static virtual advertising which looks like it is painted onto a rugby pitch or ice-hockey surface;
- Perimeter boards around a race track (even though the physical boards are only actually placed at the start and finishing straight);
- Static advertising which looks like it is painted onto the bottom of a swimming pool;
- Advertising boards placed along a rally or cross country circuit.
- *However, higher risk would be virtual advertising placed in the sky above a stadium on wide shots, or projected onto a famous landmark which doesn't normally carry advertising. This would not normally be acceptable.*

Where there is no physical advertising in situ it would be sensible to document why virtual advertising is being used with a view to being able to justify this and demonstrate that it is being used as a practical alternative to replace physical advertising which would otherwise be used – the justification may include environmental considerations, health & safety reasons, or other practical considerations like paint rubbing off onto the shirts of players.

Low To Moderate Risk

Virtual animated/dynamic advertising where physical animated/dynamic advertising is normally used.

For example:

- On a jumbotron or perimeter boards in sports which normally allow animated or scrolling adverts on digital boards should be acceptable provided it is not too distracting. (Note that in some countries, animated ads may also count towards limits on the number of advertising minutes which can be included in any one hour. This is not the case in the UK.)
- *Animated/dynamic adverts placed in positions where they are not the norm will be higher risk. For example, if inserted onto the playing surface, where consumers are only used to seeing static 'mats' painted onto the surface/field, this is unlikely to be acceptable in many countries, but may be an option in countries with lighter regulation.*

Global Perspectives

United States of America

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Virtual advertising has been used very widely for a long time in the USA. However, there are, perhaps surprisingly, no specific laws or regulations that address virtual advertising. All the usual rules and regulations that relate to advertising, whether to the content of the advertising or, for example, requiring advertising to be clearly identified as such, will be relevant. For example, to comply with transparency rules in the USA it is standard for a broadcaster to include a statement in the closing credits of a programme that promotional consideration from applicable brands (including for virtual advertising) was included during the programme.

In addition to all brands' adherence to standard advertising laws, regulations, and codes, there are several specially regulated categories in the USA. For example: sports betting is regulated on a state by state basis and, in those states that allow sports betting, the rules relating to its advertising is still evolving but is similar to other regulated industries (such as alcohol); broadcast advertising for tobacco products is banned (and e-cigarettes may soon fall under the same ban); and broadcast advertising of alcohol is highly regulated (with spirits having many more restrictions than beer, but each of which have certain prohibitions from networks and certain restrictions from their industry self-regulations).

If the virtual advertising feed originates outside of the USA and there is a breach of federal or state law, network guidelines, or industry codes, the factors set out in Point 2 of "Principles of Engagement" in italics above are likely to be relevant when assessing the risk of regulatory action being taken in the USA. Whether the advertiser or entity inserting the advertising has a presence in the USA, or relevant state, will also be relevant.

While the USA has seen a number of disputes relating to the use of virtual advertising, these normally involve contractual issues (for example, relating to who has the right to exploit certain inventory, or whether a sponsor has a right to prevent its physical advertising being replaced with virtual advertising) rather than specific violations of advertising law or rules. Cases have also been pursued on the basis of a trespass to chattels claim where virtual advertising is placed onto the physical property of another (such as a billboard or a building) without the latter's permission. As such, given the litigious culture in the USA, in addition to regulatory issues, potential private claims also need to be carefully considered before using virtual advertising.

People's Republic of China

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In China virtual advertising is used quite widely, especially in sports broadcasts. However there are no specific laws or regulation addressing virtual advertising in the PRC. The content of virtual advertising will however need to comply with local laws. Of particular relevance is that betting is illegal in the PRC and the advertisement of all illegal products and activities is prohibited. As such, virtual advertising for gambling is high risk, especially where targeted at a Chinese audience. Alcohol advertising and advertising for medicines, medical devices, healthcare food and foods intended for special medical purposes are highly regulated in the PRC, but not completely banned. Tobacco advertising is prohibited and there is also a prohibition on the advertisement of infant formula or milk products that claim to be full or partial substitutes for breast milk. It is also worth noting that in the PRC there is also a prohibition on advertising in mass media targeted at minors for medical treatments, medicines, healthcare food, medical devices, cosmetics, alcohol, beauty products, and online games that could be deemed 'detrimental to the physical and mental health of the minors'.

There are currently no restrictions on advertising unhealthy (high fat, salt, sugar) food and drinks, but e-cigarettes are coming under increasing scrutiny – they are not regulated under tobacco-related rules for now, but there are new prohibitions on the advertising of e-cigarettes to minors.

If the virtual advertising feed originates outside of China and there is a breach of local laws and regulations, the factors set out in Point 2 of "Principles of Engagement" in italics above are likely to be relevant when assessing the risk of regulatory action being taken in the PRC. Whether the advertiser or entity inserting the advertising has a presence in the PRC will also be relevant.

India

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There is no specific regulation addressing virtual advertising in India. The content of virtual advertising will however need to comply with Indian laws and codes of practice (Advertising Standards Council of India, Information Technology Act, etc.), at least to the extent it is under the control of the Indian broadcaster and/or another stakeholder. If the virtual feed originates outside of India, and is not under the control of an Indian broadcaster, the legal position is currently unclear. However it will not automatically exempt advertisers and broadcasters from compliance, especially in cases wherein features like geo-blockers can be installed.

The advertisement of gambling, alcohol, cigarettes and e-cigarettes is completely prohibited in India. In some Indian states, that do not differentiate between games of skill and those of chance when played for stakes, the targeting of advertisement of fantasy games in such states (Orissa, Assam, Telnagana, Sikkim and Nagaland) is also prohibited. Further, the All India Football Federation's Code of Ethics forbids all those bound by the Code to associate with or own a part or whole (actively or passively) in companies that promote or conduct betting, gambling or lotteries in relation to football events, except with a valid license.

'Surrogate' advertising is also carefully regulated – surrogate advertising is advertising for products for which advertising is not prohibited, where the relevant brand is also known for producing products or services for which advertising is banned (for example a whiskey brand which also sells a non-alcoholic tonic). Unlike the UK, there are currently no restrictions on advertising of 'unhealthy' (high fat, salt, sugar) food and drinks.

Final Thoughts

While the regulation of virtual advertising is far from straight-forward, we hope this paper has simplified the landscape for you and provided a better understanding of the legal landscape, an awareness of the rationale of the law, and an ability to assess and mitigate the risks. Armed with this knowledge, we hope the industry will feel a greater confidence in adopting this rapidly developing, and potentially very lucrative, technology.

Given how fast the technology is evolving and being adopted we will no doubt need to revisit this paper periodically. The regulatory approach in certain jurisdictions may become clearer. There may be trends for stricter or more relaxed enforcement which need to be reflected in the risk assessments. We will endeavour to update the paper to reflect such shifts, so if you're not sure if you're looking at the most recent version, please do get in touch.

Likewise, if you have any thoughts or observations on this paper, or can provide an expert view from a jurisdiction not covered, please let us know. We're keen to make ensure this document is as useful as possible to the industry.

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As well as having a rich understanding of the business of sport, and being skilled in drafting and negotiating complex commercial agreements, Alex benefits from strong IP credentials and regularly helps clients protect and enforce their IP assets. Alex is also a leading global expert on ambush marketing and the special legislation that sports rights holders implement in relation to major events. Alex is a joint head of Lewis Silkin's sports business sector group.

The Global Perspectives have been contributed by leading advertising and sports lawyers around the world and we would like to thank them for their time and knowledge.

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Peoples Republic of China

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Disclaimer: This paper provides general guidance only and does not provide legal advice. Expert advice should be sought in relation to particular circumstances.



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