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Advertising, Media and Brands Global Compliance Challenges

Anti-counterfeiting, Brand Protection Trends and the Top AMB Hot Topics

Strategic Global Legal and Regulatory Issues Facing the Advertising, Media and Brands Industry

Introduction

2021 has provided unique challenges for businesses operating across the advertising, media and brands industry. Aside from the impact of the pandemic, we are seeing a changing and challenging landscape due to increasing economic, consumer, regulatory and compliance pressures.

With increased exposure as a result of these pressures, we present our Global Compliance Challenge to bring you a series of webinars, podcasts and articles to help your business navigate this new complex compliance landscape.

Below, our legal experts summarise the regulatory landscape at present for global anti-counterfeiting, brand protection trends and the top advertising, media and brands hot topics, as well as presenting upcoming challenges and important considerations for businesses. You can watch the full webinar here.

Please note that the information in this document does not constitute legal advice. For legal guidance, please contact one of our legal experts.

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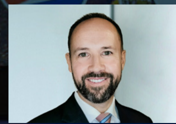

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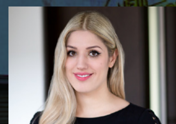

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Anti-counterfeiting and Brand Protection

Is counterfeiting a big issue?

The movement from traditional retail to digital has been accelerated by the COVID-19 pandemic, pushing advertisers and manufactures to increase their use of digital sales channels, and ramp up their sales direct to consumers.

While various consumer protection measures have been implemented by governments across the world, we, nonetheless, see that the production and sale of counterfeit goods remains, and is increasingly, an issue.

From an economic point of view, there is the loss of sales and loss of jobs, but there are also political consequences as the revenues derived from counterfeiting go towards funding organised crime and terrorist organisations.

We have been involved in cases where the targets have been organised in a very professional way, using sophisticated technology and other tools to protect their business. Thus, counterfeiting has grown into a global industry that everyone should be aware of.

Are there any trends in the flow of counterfeit goods? Although we are reluctant to point fingers, are there any particular jurisdictions where the problems are most apparent?

In terms of the main origin of counterfeiting, it is, has always been, and probably will be for the foreseeable future, China. China has an increasing availability of factories that are willing to produce counterfeit products, exacerbating the problem and making it difficult to handle.

We have been working with a number of clients across different industries to monitor the shipping of goods to see where they are being purchased. We have seen a significant increase in imports and exports to the Middle East and Northern Africa (MENA) region, and found that the United Arab Emirates (UAE), in particular, is a huge shipping hub for counterfeit goods to every region of the world. Over the last 12 months, we have seized more than 500,000 counterfeits for different clients in Dubai alone.

We recommend that brands check the registration of their trademarks across these jurisdictions, and be aware of their options to enforce their intellectual property (IP) rights. Although it remains difficult to tackle counterfeit goods at the Chinese border, brands have better options to enforce their IP rights in jurisdictions elsewhere in the world.

The Scale of Counterfeiting

In terms of the scale of the problem of counterfeit sales, the official figures are as follows:

- The UK Intellectual Property Office says counterfeiting and piracy cost the UK economy £9 billion, plus 80,500 job losses, each year
- EUIPO research estimates that counterfeits such as bags, clothing and electrical goods cost the EU €60 billion, as well as 434,000 job losses, each year
- The International Chamber of Commerce says governments across countries miss out on around US$89 billion per year through the loss of sales tax on counterfeit products

As retail transitions into a new digital arena, brands need to be monitoring online activity rather than traditional market stalls. Are there any technological solutions in monitoring the sale of counterfeit goods on websites and social media, and what challenges do brands face in regard to this?

During the pandemic, all of our lives moved online, and this includes the livelihoods of counterfeiters. Digital platforms have made life easier for consumers, as well as counterfeiters. Fortunately, there are monitoring and AI software solutions available to help brands detect counterfeit products in the online ecosphere.

The challenge in tackling counterfeit goods is that an online anti-counterfeiting monitoring programme needs to adopt a multipronged approach. Finding where your products exist on the ecosphere is just one aspect of this multipronged approach.

In the last few years, we have seen that anti-counterfeiters online are marketing masters, as they use and employ the same legitimate advertising and marketing techniques that a legitimate business would use. They are well versed in using search engine optimisation tactics, spam, social media and keywords or links to drive consumers to their website, where products look very realistic, but are, in fact, counterfeit goods.

AI software has previously been helpful where it uses price comparison tools to identify counterfeit goods, but it is important for brands to also monitor promotional tools that counterfeiters are using, in order to prevent sales at both promotional and distribution points. Once identified, brands can consider taking legal action against the counterfeiter.

Finding online sales of counterfeits has also become increasingly challenging in recent years because sales channels are more diverse, in turn, requiring sophisticated technological solutions.

We recently had a case involving the online sale of counterfeit watches. We worked with EU enforcement authorities to identify the origin of the website. We found that the website changed the server through which it goes online every six hours, which is four times a day. Moreover, each server was in a different country, which made it impossible to locate where the counterfeit goods were located. This demonstrates how sophisticated counterfeiters have become, and how this problem is ever evolving.

Moreover, we recommend that brands develop tools and gather data in order to link online activities with targets on the ground and connect the dots outside of the online ecosphere.

Top Tips for Brands

- Register your brand trademark in various jurisdictions
- Obtain your .com or .co.uk domain name
- Purchase AI and technology that can help you locate counterfeit products

What help is available to brands that need to enforce their rights?

UK

In the UK, authorities such as the police and trading standards have the power to take action against counterfeiting, but their power and resources are limited to the most large-scale and serious fraud cases, or where the products being sold are demonstrably dangerous to consumers. For that reason, the responsibility falls to individual advertisers to take action against infringers, and taking down an infringer on one channel or website can be somewhat of a "whack-a-mole" game because they quickly pop up again under a new domain.

There have been developments in the UK with block injunctions against ISPs, and this is certainly an area to monitor in the coming months.

US

Over the last year, there has been a lot of debate in Congress and federal courts about the extent to which liability should or could be imposed on online marketplaces. Historically, online marketplaces have not been liable because they are not considered sellers of a specific product, but rather mere facilitators. Nevertheless, the idea of imposing liability on online marketplaces for the sale of counterfeit goods by third parties is an idea that has been gaining traction in the last year.

In addition to the difficulties mentioned above relating to enforcement, brands that try to tackle counterfeiters know that getting a liability against third-party sellers on online marketplaces is difficult. This is not only because counterfeiters are so good at evading detection, but also more fundamentally because they are sheltered from legal accountability in US jurisdictions where they do not reside in the US.

Recently, we have seen a few courts in the US recognising that the online marketplace plays a pivotal role in bringing products to consumers, which is starting to develop a narrow pathway for other courts to start considering third-party liability.

It is a spectrum, with some courts looking at the level of activity in a given online marketplace, and how the marketplace is managed. The more activity and involvement there is, the more likely there is a case and the marketplace will face liability. We reiterate that this legal pathway is only just starting to emerge, so we wait to see what 2022 brings in terms of court rulings on the issue.

EU

Similar to the US, taking legal action against online marketplaces has its challenges in Europe.

France is ahead of most in terms of legislation, where it has an existing process for tackling online counterfeit goods. The process is as follows:

1. Identify very precisely where the counterfeiting goods are sold

2. Send a cease and desist letter

3. If the platform does not act promptly, it is liable and brands can bring an action before the court to get an injunction and obtain damages

Although seemingly straightforward, in practice, this becomes a game of whack-a-mole, because the counterfeiter can sell the same counterfeit goods somewhere else on the internet, and the brand will need to repeat the process again.

What about criminal enforcement against counterfeiters?

On behalf of brand owners, lawyers can cooperate with the authorities or public prosecutors, and this is usually an efficient and successful way to tackle counterfeiters. However, authorities often complain that they do not have the resources to tackle counterfeiters, and it takes a lot of persuasion to convince authorities to investigate on behalf of the brand.

Criminal procedure laws have been changed in recent years. Now, as a brand owner, you can be awarded damages in the criminal courts and although this has been the case for a few years, it is only recently that courts have started using this option.

Advertising, Media and Brands Hot Topics

Non Fungible Tokens

Primarily, Non Fungible Tokens (NFTs) are unique tokens based on blockchain technology. Unlike cryptocurrency (such as Bitcoin), they are digitally unique, which means they provide an indisputable record of ownership that is cemented on the blockchain. The second component of an NFT is the visual asset element, so it comes in the form of virtual goods, such as a form of media, GIF, sound byte, etc. The virtual artwork is not necessarily unique or original, but the token is always original.

One key point that consumers need to be aware of is that the purchase of an NFT does bestow ownership of the token, but not usually ownership of the underlying IP of the digital asset.

How are NFTs being used?

Many powerhouse brands are using NFTs to build hype in order to drive growth and engage new customers. There are already a number of success stories, including:

MBA Top Shot

Adidas Into The Metaverse Collection

Stella Artois and ZED RUN

Nike's virtual sneakers

Many see NFTs as the key to the virtual economy in the Metaverse, where the possibilities are endless. Hence, many brands are already capitalising on this, including Gucci, Vans and Fortnite, to name a few, by creating virtual collections for use in the Metaverse. Although NFTs are a relatively new concept, they are not going anywhere soon.

What are the legal risks associated with NFTs?

NFTs are rife with risks. First, the use of a company's IP assets or a third party's IP assets presents the same or similar risks as traditional tangible or digital goods, but there are some unique aspects and nuances to NFT risks:

- Companies need to ensure that if they are using third-party IP or celebrity likeness, they have a sufficient licence, as traditional licences may not apply.
- NFT deals largely depend on a number of third parties, such as developers, artists, agencies and marketplaces that are established to sell NFTs, etc. Hence, formal legal contracts are required to address associated risks. In order to do so, businesses will need to understand the factual and technical issues that are associated with NFTs.
- Smart contracts, the latest buzzword associated with NFTs, are not legal contracts. They are programmes stored on a blockchain that run when pre-determined conditions are met. They are more like a software code than a legally binding contract.
- There are a number of NFT cases that walk the line of securities laws. As NFTs continue to grow in popularity, we expect regulation will be developed and implemented in the near future, although the US Securities and Exchange Commissioner is yet to comment on NFTs.
- Many organisations that are planning an NFT release spend a significant amount of time and resources promoting them on social media. Some would argue that this is conditioning the market and could, therefore, be in line with activity regulated by the SCC (at least in the US).
- People are starting to fractionalise NFTs and sell the pieces to investors. This activity toes the line of securities laws, but regulators have not yet spoken on these issues.

A Cookieless Future

What is the role of a cookie in advertising?

A cookie is a small file that a company places on consumer devices to monitor browsing behaviour and record browsing activity in order to improve website service. There are different types of cookies:

- First-party cookies are used by a company to monitor visitor behaviour on its website. These are considered the less harmful version.
- Third-party cookies collect information about website visitor activity, but the information is provided to third parties (advertisers, ad agencies or analytics systems) instead of the website owner. These are considered a greater risk due to the level of information that is obtained about a single individual.

Nevertheless, cookies remain an important tool in the advertising industry in order to efficiently target the correct audience, and cater to the needs of said audience.

Why is a cookieless future a possibility?

EU

The EU Privacy directive says that when you use cookies, you have to obtain the consent of the user. GDPR adds an additional layer of complexity to this by stating that the consent of users needs to be explicit. This has been problematic in the advertising industry and has given rise to large fines for big brands. In the last few weeks (31 December 2021), two big industry players received fines of US$150 million and US$60 million for making the process of rejecting cookies more difficult than accepting cookies.

There are talks of moving away from cookies towards new technologies that collect less personal information. However, despite the growing number of consumer complaints about the use of cookies, we do not anticipate cookies being eliminated any time soon due to the value they provide to the advertising industry – although regulatory bodies may get stricter in the meantime.

US

The US is in a similar position. Google is removing third-party cookies from its browser, and Apple has made moves to comply globally with its app tracking transparency in the latest IOS 14 update, for which the opt-in rates are only 20% to 25% globally. These decisions by big tech are making it harder worldwide for businesses to reach their audience and collect data. In turn, alternative technologies are emerging that have privacy compliance and operational impact. Companies are accelerating their first-party data collections programmes, such as loyalty programmes, buyer incentives, etc. We expect regulatory development in this area in the near future.

Influencers

Influencers are people, typically celebrities (but not necessarily when we are talking about micro-influencers), who promote a brand's goods or services, typically with social media postings on platforms like TikTok and Instagram.

There are a huge number of influencers, and using an influencer to promote a brand's products or services is a prevalent form of marketing. It is not new, but it has grown exponentially in the last five years.

How are influencers regulated?

In terms of the UK regulatory regime, when a brand makes a payment to an influencer (monetary, but also including freebies, among other incentives), any resulting posts that promote the brand will become subject to regulation. This includes, among others, consumer protection from unfair trading regulation that is enforced by the Competition and Markets Authority (CMA). Where the brand has also had some form of editorial control, the Advertising Standards Authority's Committee of Advertising (CAP) code will apply.

The overarching requirement for advertisers and influencers under the CAP code is that all advertising must be obviously identifiable as such. Essentially, this means that when a consumer sees an advert, it should be apparent to them that what they are looking at is an advert. It is also important that the advertisement is not misleading.

The ASA and the CMA have published various guidance, including a joint guide on influencer marketing and endorsements. This is intended to help both brands and influencers comply with the rules. The guidance contains a lot of useful information, and it is recommended that brands looking to engage in influencer marketing familiarise themselves with the guidelines beforehand. The resources are freely available online.

How are the ASA and CMA cracking down on influencers, and are there any examples of influencers breeching the rules?

Both the ASA and CMA are getting stricter with influencer marketing rules. The ASA is now challenging adverts of its own accord, without a third-party complaint being made. It is also monitoring and reporting on compliance of the rules.

In March 2021, the ASA published its Influencer Monitoring Report. In order to collate the report, it analysed more than 24,000 social media posts by more than 100 UK-based influencers. The conclusions of the report were that (a) there has been inconsistent disclosure of advertised content and (b) even where that content had been labelled as an advert, those labels were often difficult to spot.

Subsequent to the report, the ASA launched a dedicated page on its website where it names and shames influencers who are repeatedly failing to disclose where their post is an advert. The consequence of being on the list is that their name will remain there for three months and they will be subject to an enhanced period of monitoring and spot-checks from the ASA.

Similarly, the CMA has been paying close attention to social media endorsements. Its investigation focused on greater transparency of disclosures relating to paid-for endorsements. On the back of this investigation, a group of high-profile influencers, including Ellie Goulding, Rita Ora, Michelle Keegan, Millie Macintosh and Megan McKenna, gave voluntary undertakings that they would clearly disclose any paid-for or incentivised endorsements in their posts.

As you can see, it is an area that the regulators are paying close attention to and will likely do so for the foreseeable future.

US

The Federal Trade Commission (FTC) is taking action against big names in the US in regard to influencers. What is the current position in the US and what should brands do as a result?

The FTC recently sent out notice letters to hundreds of well-known brand name companies about fake reviews and other misleading endorsements. It is flexing its penalty power by imposing penalties on companies that use endorsements that the FTC deems to be deceptive, and has said it will hold brands responsible using every tool at its disposal.

Frustratingly, the letters that went out did not specify what the FTC specifically found to be offensive or fake, but in the same press release, the FTC said that it considers the violations so obvious that ongoing violations must be knowing and entitle the FTC to seek full penalties for the violations.

It is, therefore, recommended that companies undertake a comprehensive review of their general advertising practices, including any endorsement testimonials with urgency, to prevent falling short of the FTC standards. Through these letters, that FTC has shown that it will be a lot more active under this administration, and that it will be seeking monetary compensation from companies that run afoul of its rules.

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