Ready plaintiff one

Frank Rittman, Bharat Dube and Vijay Rajkumar of SIPI discuss the possible ramifications of virtual reality technology for intellectual property rights

Once merely an object of science fiction fantasy, virtual reality is finally within reach of the general public and is one of the most important emerging technologies today.

Defined by authors Raney Aronson-Rath, James Milward, Taylor Owen and Fergus Pitt as "an immersive media experience that replicates either a real or imagined environment and allows users to interact with this world in ways that feel as if they are there", the technology surrounding VR dates back more than 50 years and was largely relegated to academic and military research for decades, drawing little attention from mainstream intellectual property practitioners and largely sheltered from the courts.

Today, however, VR is beginning to be take root in the worlds of entertainment, education, scientific research, and journalism, among others, and is predicted to grow to a $70 billion market by 2020, according to market researcher TrendForce.

This will invariably involve the licensed (and in some instances, unlicensed) use of IP rights, including copyright, trademarks, and rights of publicity.

Like any good idea, its commercial development will inevitably be accompanied by civil litigation and evolving jurisprudence as issues emerge and stakes grow higher. But rights owners must gain a better understanding of the extent and circumstances surrounding the use of their works in the VR environment through surveillance and investigation.

Virtual reality dates back to 1962 and cinematographer Mort Heilig's patented Sensorama machine, designed as an arcade-style cabinet that provide the illusion of reality via several sensory experiences. In 1968, computer scientist Ivan Sutherland designed the first 3D head-mounted display (HMD), so heavy that it needed to be suspended from the ceiling. Around the same time, military engineers at the Wright-Patterson Air Force Base near Dayton, Ohio, began working on the Air Force's Super Cockpit program—a flight simulator that projected a 3D virtual space within an HMD that pilots could use for real-time navigation.

These early VR innovations were clunky, slow, low-resolution, and cumbersome to use, but with federal funding the technology found a niche in academic and military research and was thus

ensconced from litigation. Today, the advent of low-cost, smartphone-based systems have ushered in a new era of technology that will soon make VR technology more accessible to ordinary consumers.

Now that VR is becoming more commonplace and commercially oriented, it is likely that we will see more trademarks and copyrighted works, as well as celebrity names and likenesses, popping up in these virtual experiences.

Litigation has already emerged, primarily in the US, concerning the unauthorised use of IP rights in various VR environments as rights owners expend greater resources to enforce those rights, starting by monitoring their use in virtual worlds regularly. Cease and desist communications, abuse reports, and injunctive relief remain the primary means of redress presently available.

But all of that is premised on a thorough and professional forensic analysis by qualified online investigators into the degree and nature of any prospective infringement.

For example, copyright provides creators of original works the exclusive right to reproduce the work, prepare derivatives from the work, and display it publicly. Any unauthorised reproduction, public display, public performance, or distribution of another's creative expression in VR sufficiently constitutes copyright infringement.

A blog by academic Eric Greenbaum discusses a hypothetical scenario in which a Harry Potter fan creates a virtual (and 'substantially similar') Hogwarts environment without the consent of the copyright owner and then posts it in the UnityNinja game development community for download by others—a thoughtful illustration of a likely infringing derivative work.

However, copyright protection is generally not absolute and in the US, for example, it is subject to examination under the fair use doctrine, which, in certain instances, allows use without the copyright owner's permission. As in the real world, determining whether a particular use in VR falls under the fair use exception will necessarily require an extensive analysis of the applicable facts and circumstances in each case.

Greenbaum's blog therefore also explores an arguable fair use defence that such a hypothetical could perhaps be refuted as a non-commercial, research driven transformative use. Due to the relative nascence and corresponding potential for VR technology, it is likely that several such court cases—or possibly legislative amendments to copyright laws—could be needed to develop sound precedent regarding the scope of copyright protection and infringement in VR, according to the law firm Venable.

Trademarks, by contrast, can be any word, name, symbol or device used in commerce to indicate the source of origin for a particular good or service. Other commentators have thus speculated on the likely fallout if a VR creator were to use a real world logo on a t-shirt created for a VR avatar, and the extent to which such use might be considered to have been 'in commerce', thus substantiating a claim of infringement in certain jurisdictions.

In such an instance, it is thought that a VR character merely depicted wearing a t-shirt featuring a known trademark would not likely be actionable. If, however, the VR creator began selling the t-shirt in VR to other VR participants, even if the sale is conducted in virtual currency that can only be used in the VR world with no equivalent value in the real world, it would be harder to argue that such use of the logo was not 'in commerce'.

The first step toward making such determinations is for trademark owners to necessarily investigate, monitor, and analyse the use of their works within VR platforms, through companies such as ours (at the time of writing, the authors are not aware of companies other than SIPI that monitor this space).

Commercial brands face greater liability when sponsoring or providing VR experiences, since any use by a brand of existing IP (or a person's name, likeness, or other manifestation of a person's identity) will be deemed to have been for a commercial purpose. Because brands represent good litigation targets, those using VR for marketing or promotional purposes will thus seek a more controlled VR environment.

Use of third-party IP within a sponsored VR experience, even when driven by an unrelated user, could create a false association between the brand and the third party, which might be actionable under trademark law. Brands themselves must therefore be alert to the unauthorised appearance of IP rights within their own VR platforms, since they too could be held liable for creating an environment that mistakenly uses IP from the real world.

Yet another area of jurisprudence developing within virtual simulation is the right of publicity.

Litigation in the US surrounding Electronic Arts's use of 6,000 former NFL players' likeness as avatars in the Madden NFL video game series determined that the players' likenesses in the video games were not sufficiently different or transformative to confer protection, and that First Amendment assertions cannot overcome the athletes' right of publicity claims related to its simulated virtual reality sports games.

The video game company had already lost dual landmark cases in 2013 in the Court of Appeal for the the Third and Ninth Circuits, which held that First Amendment protection for its use of the virtual likenesses of college football players in its popular NCAA Football line of games was also inapplicable.

Right of publicity lawsuits prompted by video games have also been filed by the likes of Manuel Noriega, Lindsay Lohan, No Doubt, and the estate of General George Patton. The implications of these decisions for video game manufacturers are materially adverse. Yet the broader takeaway is the difficulty in reconciling an ever-evolving right of publicity doctrine with emerging technologies and new media.

The Oculus Rift, Sony's PlayStation VR, and HTC Vive are all expected to be released this year and, with their purpose-built headsets, they will offer a much more immersive experiences than so far experienced As avatars in virtual worlds, we will soon be able to watch a movie in a virtual theater, attend concerts in VR arenas, and view live sports at stadiums with friends who are half-way across the world.

Rights owners will benefit from licensing their copyrighted works, trademarks, and names and likenesses for use in these new consumer applications. But at the same time, rights owners must also remain vigilant against the unauthorised use of these assets in every instance.

It may be that new technology will result in new legislation (and possibly new answers), but until then, practitioners and investigators can only advise and protect clients by analysing and applying today's laws and techniques in the context of continually evolving VR experiences. **IPPro**