Is this the real life?

With emerging technologies, such as VR, breaking into the mainstream, already antique laws must rise to the occasion. Alan Behr of Philips Nizer explains more

Barney Dixon reports

What areas of intellectual property will Congress focus on in the upcoming 'reality caucus' on virtual, augmented and mixed realities?

Right now, we have policymakers talking about new issues such as virtual reality (VR) and augmented reality, which is to say that Congress is on a learning curve. It has a lot of catching up to do to understand even what it is the members are discussing. So when we hear that caucuses are in their planning stages, we can believe that. We really can't be sure that anything will get beyond that point until we see it happening.

What are some of the key IP issues in virtual and augmented reality?

The first problem is that under the US Copyright Act, you must have fixation in order for expression to be amenable to protection by copyright. The expression must be original, but it must be fixed "in a tangible medium of expression," which could be anything from paint on canvas to code on a hard drive to a haiku written on a grain of rice. That creates the first problem: how do you fix something that is virtual? As with any software, you can register code, visual and aural elements and screens, but the experience as played out will be different each time, which is similar to the problems experienced in defining what is protectable in a videogame only perhaps a bit more complex.

For example, if a celebrity should talk aloud while experiencing VR, and there is reason to seek to protect what the celebrity says, someone is going to have to be sure that the sound is captured and that the recording is registered—even if the actual VR software is not configured to do that. Otherwise, whatever the person says will not be fixed.

The US has quite robust fair use laws, how does fair use play into VR?

Fair use is one of the biggest questions in copyright since the widespread digitisation of content. Even a few years back, commentators were asking, "whatever happened to fair use?". In the copyright sphere as it existed then, the copying and exploitation of content was largely a B2B matter, and courts were increasingly willing to prevent the use by other commercial enterprises of even relatively small amounts of content owned by others. In the music business, the saying was that the 'ten-second rule' (meaning you would likely get away with the use of 10 seconds of a song owned by someone else without hearing from his lawyers) has been replaced with the

five-second rule, then the three-second rule, and so on. The law follows custom and usage. Just look what has happened with single-sex marriage and the legalisation of marijuana.

Once it became possible for even a child with access to a computer, tablet or smartphone to make perfect copies of professional content—and once federal judges realised that they ran the risk of holding that their children and grandchildren were infringers—things began to change, quickly. The basic rule of the consumer is this: "I paid for the device, I am paying monthly for connectivity; anything I can get over the device should be free."

Before infringement of professional content became a consumer pastime, the public had some idea that they had to pay the content owner to hear a song, see a movie or read a magazine. They are still paying, but device makers and telephone services providers do not revenue share with artists, musicians, poets and filmmakers, and that is the problem facing the creative community today.

Whatever happens with the advance of VR technology and consumer acceptance, and whatever Congress may brew up about it, you are going to see a continued pressure to open up what has been considered fair use to allow people to continue to do what they believe they have an entitlement to do with the technology.

The burden is always on the shoulders of rights holder to enforce. What has changed is that, 40 or 50 years ago, you could broadcast a programme with someone playing or singing a few bars of a pop song and not get a cease and desist letter. That was presumptive fair use. Then it got to the point where I would caution clients about using even a single recognisable chord—such as the opening to A Hard Day's Night by the Beatles. Then came digital, and with that came sampling and mashups. In the visual arts, scanning led to all sorts of appropriation techniques, for which copyright owners often claim are tools of misappropriation.

Congress has made several attempts to account for new technologies in our copyright law, which was enacted in 1976. That was when records were sold on vinyl; to copy them, you had to use your cassette recorder—and give up on hearing anything over 17,000 kHz, especially if you engaged the Dolby feature in order to cut out tape hiss. Just under a year before President Ford signed the Copyright Act into law, Sony released into the US market a curiosity called Betamax—the first home recording device to capture televised content. The copyright law was not built to handle what came next, and Congress has been chasing the mad dog of change down a country lane ever since, with no end in sight until the law is completely rewritten.

What could happen if the US government over-regulates IP for the technology before it becomes widely used?

I don't think there is any impetus to overregulate technology. There may be some action on privacy and on data security, but that should not have an effect on the problems of rights holders, who are in the soup right now. Climbing out of that soup bowl is going to take a small miracle. Counterfeits are everywhere, and there is no current will to regulate the enabling technology in a way that would cut down that flow significantly.

As far as I know, going back to 1787, when UY Constitution was signed, Congress has not stifled any new technology, apart from the testing and proliferation of nuclear weapons—and that was met with universal approval. Unless there is some possible criminal use of VR, my expectation is that Congress will let it proceed through further development unhindered.

Could laws governing VR end up similar to laws governing video games?

I was general counsel of the parent company of the winner in the important 1998 case of Micro Star v. FormGen, which affirmed that the owners of the code for a videogame may control by contract who makes derivative works from the use of that code and in what form those derivatives may be exploited. When you consider VR, it may be more important to understand who may be permitted to own and to register the experiential aspects (if recorded on a fixed medium of expression). There might be an analogy to performance art, and it may come down to being able to make a video of the experience, both inside the 'world' seen by the user and outside. What will happen when multiple VR users get to communicate with each other within the virtual worlds they experience is a question for another day. **IPPro**

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