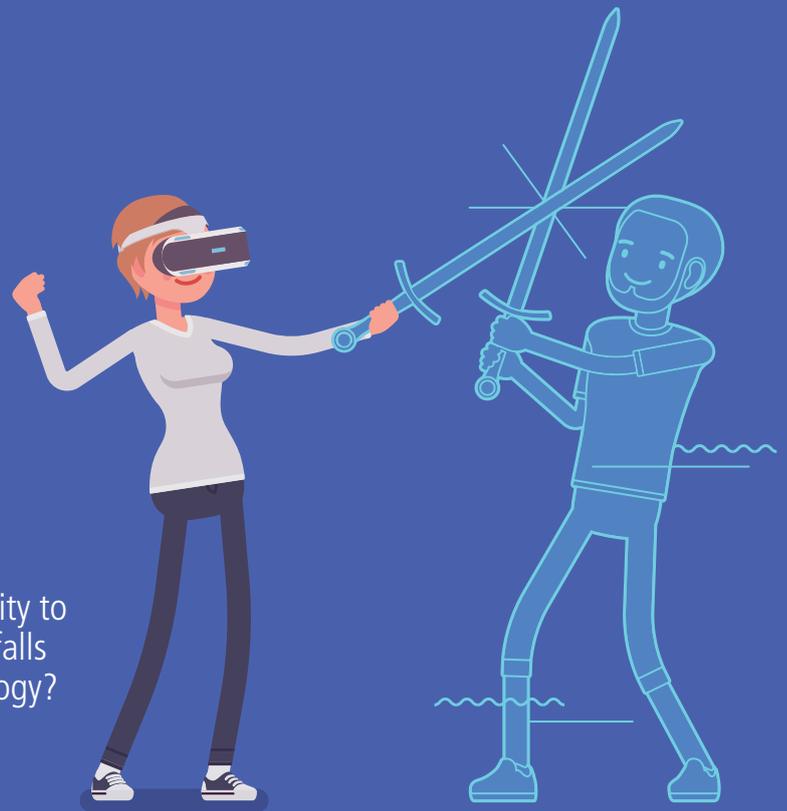


# Inflection point for VR?

Is the time right for virtual and augmented reality to enter the mainstream? And what are the IP pitfalls to avoid when embracing this evolving technology?



**Despite predictions over the last several years that virtual reality (VR) and augmented reality (AR) were going to dominate consumer technology, adoption and sales have been slower than many had forecasted.** However, with the recent announcements regarding the iPhone 8 and iPhone x, Apple's VR support in Metal 2 in macOS High Sierra, and Apple's inclusion of an ARKit API in iOS 11 that enables developers to create AR-based apps and games, we may soon reach an inflection point with AR, VR, and mixed reality (MR).

On the VR front, there already are several competing headsets offered by industry titans. For example, Facebook/Oculus offers the Rift; Microsoft has the HoloLens, which handles VR, AR, and MR; Samsung sells the Gear; HTC has the Vive; and Google owns Cardboard and Daydream and is on schedule to deliver a non-tethered, stand-alone (no phone required) device, which it is building with HTC. And, there are thousands of VR apps/games available for download, ranging from medical students training on virtual patients to virtual board meetings to first-person shooter games.

For companies involved in VR, AR, or MR, there are myriad intellectual property issues. Before delving into them, we should distinguish between the three technologies, which although similar, have different applications. At the most fundamental level, VR offers a fully-immersive experience in a virtual world. AR, on the other hand, refers to a modified (ie, augmented) view of the real world. And, MR is a hybrid of the two.

For example, IKEA recently announced its first ARKit app, IKEA Places, which, when launched, will allow customers to see on their phones furniture as it would appear in their homes. The app modifies one's view of the real world (ie, the actual home) by allowing consumers to see virtual furniture. By contrast, there are numerous VR apps that allow users to take virtual trips to distant cities without leaving the comfort of their home. MR will allow users to overlay augmented holographic digital content into their real-time space.

## Case study

We will discuss some of the intellectual property issues that we have had to address for one of our clients, Boulevard, as these issues are a microcosm of the issues faced by the larger VR, AR, and MR community.

Boulevard is a leading arts and culture VR app available on a number of platforms that works with the world's most recognized museums and cultural sites to deliver fully-immersive, user-controlled art, architectural, and cultural experiences. In advising Boulevard, we have addressed many of the same intellectual property and privacy issues that we handle for non-VR clients. For example, because Boulevard has innovative technology and a unique trade name and logo, we counseled the company on potential patents and trademarks. When the company used third parties to assist it in creating any materials (eg, its platform, website, logo, or experiences), we advised the company on development agreements and work-for-hire issues. Since the company and its distribution partners have the ability to collect certain data from its end users, we analysed legal issues surrounding the collection, processing, storage, use, and sharing of information.

**“For companies involved in VR, AR, or MR, there are myriad intellectual property issues.”**

And, like other companies that create content, such as film producers and game developers, we have addressed numerous rights and clearance issues. In many ways, these clearance issues did not vary much from non-VR companies. For example, playing copyrighted music

in the background of a VR app is not fundamentally different in terms of rights clearances than that required for a 2D video game. Similarly, obtaining the right to voiceover and narration talent is virtually identical to other media.

Clearing rights to display a piece of art or depict a trademark in a virtual experience is similar to more traditional media as well. In these situations, the usual intellectual property and contract issues typically apply:

- Is the work of art you are seeking to clear still under copyright? Boulevard's experiences often include works from long-deceased artists, so the works are frequently in the public domain.
- As with other content licences, determining who owns the rights necessary to clear is often a challenge. Living artists often retain ownership rights, in which case Boulevard will clear the rights directly from the artist. However, many artists assign their rights to agencies, foundations, galleries, or museums; for deceased artists, there could be estate and intestacy issues; and some licensors are not responsive to licensing inquiries. In such cases, determining the proper licensor may take some detective work.
- Once you identify what needs to be cleared and who owns the rights, you then need to negotiate a licence. In drafting the licence, customary business and legal terms must be considered, such as the term of the licence, the scope of the grant (more on this below), approval rights with respect to the final version of the experience, the territory, any licence fees, representations, warranties, indemnities, and choice of law.
- Are you able to use the artist's name, image, and likeness to market and promote the experience? The app? The company? Does the artist or his or her agency/estate wish to exert any approval rights over the use of his or her persona? Publicity, persona, and image issues are often complicated and a deep discussion of the topic is beyond the scope of this article. However, in the US, there is no federal law governing persona and publicity issues. Rather, the right of publicity is a creation of state law, as some states recognise the right by statute, by common law, or both, while some do not recognise the right at all. Image rights, as they are often called in Europe and elsewhere, vary widely between the various countries. And, issues regarding choice of law, postmortem rights (whether they exist and for how long), and the scope of protection (ie, what elements of a persona, such as name, image, likeness, voice, and biographical details, are protectable) are handled very differently across the various US states and foreign countries. Clearing publicity and image rights is a complicated process regardless of the medium.
- Many of these same issues apply when negotiating with the museums. In addition, because museums' names and other trademarks are often integrated into the virtual experiences, Boulevard needs to license various trademarks, which involve other considerations, such as approval rights, the application of trademark guidelines, and attribution/credit obligations.

There are, however, several intellectual property and licensing considerations that are exacerbated by these virtual experiences. And, although many of the leading museums and cultural institutions have sophisticated in-house counsel, not all of them – even ones with digital media specialists – fully understand or appreciate VR/AR/MR or the unique legal issues that flow from the technologies.

One such issue involves the scope of the trademark and copyright licences. In a VR world, the content creator can design the experience so end users can not only view Leonardo da Vinci's *Last Supper* exactly how he painted it, but also step right into the mural and interact with the masterpiece's subjects or perhaps even rotate the view and see what is on the other side of the table! While copyright licences often

grant the licensee the right to reproduce, publicly display, and create derivative works of the subject work, grants in VR agreements often include additional language not found in 17 US Code § 106, which enumerates the exclusive rights in copyrighted works. For example, Boulevard often wants the rights to use, copy, encode, store, archive, distribute, transmit, translate, record, publicly-display, publicly-perform, animate, modify, and create derivative works of the artwork. In certain cases, there is an element of "gamification" to the virtual experiences.

All of the wonderful, creative things that VR/AR/MR developers can achieve – whether in art, education, culture, tourism, and the like – have the capacity to recast or transform original works in ways that the original creator did not intend. One potential problem, particularly if the original creator is from Europe, concerns a violation of the artist's moral rights or *droit moral*. Moral rights are certain rights of creators of copyrighted works, including the right of attribution (ie., credit for the work), the right to have a work published anonymously or pseudonymously, and the right to the integrity (ie, non-mutilation) of the work. Although recognised only narrowly in the US (see the Visual Artists Right Act, codified at 17 US Code § 106A), moral rights are widely accepted and applied in foreign jurisdictions. In light of this, VR/AR/MR developers who wish to transform, recast, modify, or create derivative works of copyrighted works are well advised to address moral rights in their agreements with their licensors, which is typically achieved by obtaining a waiver of moral rights.

**“Although there have been several false starts over the years, a confluence of events and technologies are in place for VR, AR, and MR to explode in the near future.”**

### Next stage

Although there have been several false starts over the years, a confluence of events and technologies are in place for VR, AR, and MR to explode in the near future. Computing power is faster and cheaper than ever; there are headsets, glasses, hardware, and software that are geared primarily to the technologies; and the consuming public seems ready for the next big thing.

As these technologies and applications continue to evolve, so too will the legal issues. And, although many of these legal issues, particularly the intellectual property ones, are similar to the ones experienced in the "real world", there are important differences and nuances that must be identified, analysed, and addressed.

### Authors



Matthew Savare is a partner and Leah Satlin is an associate at Lowenstein Sandler, where they practise intellectual property, media, digital advertising, technology, and privacy law.