

Kluwer Copyright Blog

Virtual Reality & Copyright: To boldly go where no man has gone before

Alexander Schnider (Geistwert) · Monday, May 2nd, 2016

When a new [disruptive innovation](#) comes around, the question always arises as to whether the current legal regimes can provide answers to all potential legal questions arising out of such new technologies and their business cases. The process for obtaining legal certainty may take some time, especially with regard to computer related technology: e.g., whilst the Internet has had a permanent worldwide [influence on culture and commerce since 1995](#), the German Supreme Court (*Bundesgerichtshof*, “BGH”) decided to ask the European Court of Justice whether IP addresses qualify as “personal data” under the European Data Protection Laws only in 2014 and this key question has yet to be answered (BGH, 28 October 2014, VI ZR 135/13; ECJ, C-582/14 – [Patrick Breyer v Federal Republic of Germany](#)).

Nowadays, Virtual Reality (“VR”) is getting off the starting blocks via the gaming industry. At the Game Developers Conference in March 2016, VR was certainly in the limelight, especially since consumer VR equipment, such as the HTC Vive, the Oculus Rift and Sony’s Playstation VR, was soon to be released (and has subsequently been released). The excitement about VR is easily comprehensible: with [stereoscopic graphics, accurate head- \(and sometimes body-\) tracking](#), VR provides a one of a kind immersion into virtual worlds providing consumers with a technology which comes as close as possible to the [holodeck featured on the popular TV series Star Trek: The Next Generation](#). Whilst, at least at first glance, the copyright related questions seem to be straightforward and easy to answer in relation to the gaming industry (where the game developer own the copyright in the virtual worlds they create), there will certainly be more difficult questions to answer once this new VR technology spreads to other industry sectors.

For example, it will not be too long before tourism associations offer [VR tours through cities and their sights](#). Equally, museums will likely offer virtual museum visits sooner rather than later and real estate agents already ramp up the VR technology to show luxury estate to potential customers. In the automotive industry, [renowned car manufacturers have already teamed up with \(former\) game developers](#) in order to provide their customers with [virtual car configurators and showrooms](#).

In such use/business cases, the accurate – photo realistic – virtualization of the outsides and insides (including any paintings, sculptures and furniture) of real life buildings and products is clearly paramount to ensuring that customers see the “real deal” as closely as possible. Here, the question remains as to whether such virtual use is permissible or whether the VR experience provider requires the authors’ prior consent for virtualizing their works. This is where the so-called “Freedom of Panorama” comes into play: pursuant to Article 5 para 3 lit h) of [Directive](#)

2001/29/EC, EU Member States may provide for a freedom of panorama clause in their national copyright laws limiting or entirely excluding the authors' rights. However, there is no requirement to do so. Hence, a VR provider faces different national "panorama regulations" across the EU. Furthermore, there may even be special laws governing specific buildings: e.g., the developers of *Assassin's Creed Unity*, a major PC and console game that sold millions of copies, were not allowed to exactly replicate one of the most recognisable Paris sights, Notre Dame, due to French copyright law. In contrast, this would have been possible under Austrian copyright law: Section 54 para 1 fig.5 of the Austrian Copyright Act (*Urheberrechtsgesetz*, "UrhG") governing the freedom of panorama is not limited to exterior views of any publicly accessible building (see, e.g., Dittrich, *UrhR*⁶ (2012), E 14 ad § 54). The Austrian freedom of panorama may not only also apply to the interior parts, such as staircases, atriums, single halls and rooms, as well as portals and other doors, but also to any interior architecture in general which *inter alia* comprises the choice of material, the choice of colours, the lighting and the furniture (see, e.g., Austrian Supreme Court, 4 Ob 106/89 – Adolf Loos I). However, section 54 para 1 fig. 5 UrhG does not allow for a virtualization based upon any blueprints or other construction documents. For a virtualization based on such documents, the author's prior consent would therefore be required (see, e.g., Dittrich, *UrhR*⁶ (2012), E 22 ad § 54; Vienna Appellate Court, 5 R 154/88 – Haus am Michaelerplatz = MR 1989, 58). Hence, without the author's prior consent, any virtualization must be prepared on-site. Moreover, proper virtualization equipment should be used, since any virtualization relying on the freedom of panorama must be as accurate as possible because this freedom does not grant any right to alter any work whatsoever (see, e.g., Austrian Supreme Court, 4 Ob 51/94 – Hundertwasserhaus I).

In light of the above, and taking into account that the freedom of panorama rights (if any) under the national law of the Member State apply where the to-be-virtualized building is located, anyone who offers virtual city tours should seek local advice as to whether any specific buildings may be virtualized without the author's prior consent. With regard to virtual product show rooms, however, it is clear that the freedom of panorama does not apply to the products as such. Therefore, for virtual car configurators and showrooms, it is clear that the right owners must be consulted. This applies all the more when taking into account that the design in the vehicle's body and other parts (such as rims) will frequently be covered by registered or unregistered design rights (see, e.g., EU Regulation 6/2002 on Community Designs) and/or trademark rights (see, e.g., EU Regulation 40/94 on the Community Trademark as amended by Regulations 2015/2424 and 207/2009).

In any event, and as with any disruptive technology, only time will tell how far VR will go in letting us explore strange new (and old) worlds and which legal challenges must be overcome in order to do so.

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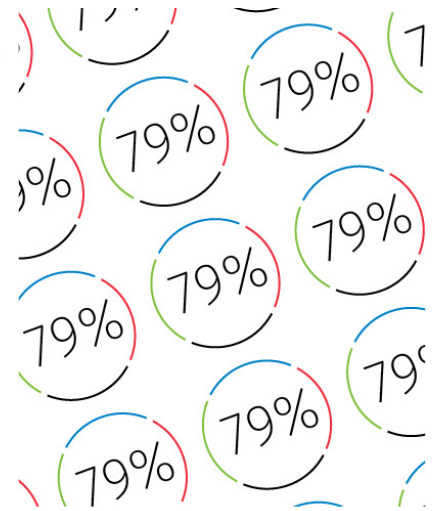
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