

## COPYRIGHT COMMITTEE SPECIAL TOPIC REPORT

### PHILIPPINE GROUP

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#### Definition of Virtual Reality

Virtual reality involves the concept of something that is 'near reality'.<sup>1</sup> It refers to the emulation of real-life experience through sensory inputs. It is often presented through a computer-generated environment which challenges our perceptions and presents a "version of reality that isn't really there".<sup>2</sup>

Although usually computer-generated, virtual reality is not the same as the stimuli presented by standard computer programs. The interface presented by virtual reality is more realistic and more natural than those from standard computer programs. Virtual reality applications are "designed to change into different and even new environments with user input".<sup>3</sup>

The author's innovative skill involved in designing and presenting virtual reality makes its copyright protection an important consideration:

"...the computerization of virtual objects, virtual works, and virtual realities provides opportunities for creative extensions to real life objects, works, and realities. Virtual worlds can and often do allow activities which seem real, but are not possible in the real world. For example, virtual worlds can simulate the inner workings of the human body; in this environment, the user could tour the circulatory system as if he or she were a blood cell."<sup>4</sup>

#### ***1. Should a work whose sole existence is in virtual reality be protected by copyright? If so, are the current laws sufficient to provide that protection?***

If the creation of a work involves originality and creativity of the author, such work should generally be copyrightable. Copyright is generally governed by the Intellectual Property Code of the Philippines ("IP Code"). Original works and derivative works are protected by copyright. Under the IP Code, the following are considered original works:

"Sec. 172.1. Literary and **artistic works**, hereinafter referred to as "works", are **original intellectual creations** in the literary and artistic domain **protected from the moment of their creation** and shall include in particular:

- a. Books, pamphlets, articles and other writings;

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<sup>1</sup> What is Virtual Reality?, accessed from <http://www.vrs.org.uk/virtual-reality/what-is-virtual-reality.html>

<sup>2</sup> *Id.*

<sup>3</sup> The Law of Virtual Reality, accessed from <http://www.computerlaw.com/Articles/The-Law-of-Virtual-Reality.shtml#2.5>.

<sup>4</sup> The Law of Virtual Reality, accessed from <http://www.computerlaw.com/Articles/The-Law-of-Virtual-Reality.shtml#2.5>.

- b. Periodicals and newspapers;
- c. Lectures, sermons, addresses, dissertations prepared for oral delivery, whether or not reduced in writing or other material form;
- d. Letters;
- e. Dramatic or dramatico-musical compositions; choreographic works or entertainment in dumb shows;
- f. Musical compositions, with or without words;
- g. Works of drawing, painting, architecture, sculpture, engraving, lithography **or other works of art; models or designs for works of art;**
- h. Original ornamental designs or models for articles of manufacture, whether or not registrable as an industrial design, and other works of applied art;
- i. Illustrations, maps, plans, sketches, charts and three-dimensional works relative to geography, topography, architecture or science;
- j. Drawings or plastic works of a scientific or technical character;
- k. Photographic works including works produced by a process analogous to photography; lantern slides;
- l. Audiovisual works and cinematographic works and works produced by a process analogous to cinematography or any process for making audio-visual recordings;**
- m. Pictorial illustrations and advertisements;
- n. Computer programs; and**
- o. Other literary, scholarly, scientific and artistic works.**

172.2. **Works are protected by the sole fact of their creation, irrespective of their mode or form of expression, as well as of their content, quality and purpose.**  
*[Emphasis supplied]*

Although there is no specific Philippine law catering to the protection of intellectual property rights pertaining directly to virtual reality, **virtual reality may be included in the general provisions on “artistic works”, “other works of art”, “audiovisual works and cinematographic works and works produced by a process analogous to cinematography or any process for making audio-visual recordings”, and “computer programs”.** They are thus to be regarded as “works protected by the sole fact of their creation, irrespective of their mode of expression, as well as of their content, quality and purpose.”

Copyright protection is not limited to original works. Derivative works are also protected by copyright under the IP Code:

“Sec. 173. Derivative Works. — 173.1. The following derivative works shall also be protected by copyright:

a. Dramatizations, translations, adaptations, abridgments, arrangements, and other **alterations of literary or artistic works**; and

b. Collections of literary, scholarly or artistic works, and compilations of data and other materials which are original by reason of the selection or coordination or arrangement of their contents." [Emphasis supplied]

Current Philippine laws may cover virtual reality as one of a group of works that are considered to be copyrightable, although there is no direct reference to virtual reality *per se*. There is as yet no distinction between the various types of artistic works as opposed to virtual reality, nor is there distinction between computer programs and virtual reality.

**2. *Some copyright works may involve the use of virtual reality creation tools (e.g. virtual paintbrushes or virtual sculpture tools). If the expression of the copyright work is at least partially determined by the tools used to create that work, to what extent do the author of the tools have rights in the products created by it? Should they?***

Currently, there are no laws governing this particular scenario. However, it can be considered as similar to the publication of a book the copyright of which belongs to the writer, or a musical piece which belongs to the composer, or a computer program which belongs to the developer, *unless otherwise agreed upon*. Thus, the copyright of a virtual reality composition should still belong to the author of that virtual reality composition and not to the author of the tools that were used to create the virtual reality.

However, the ownership and copyright of the program and tools *per se* which were used to create the virtual reality, should still belong to the creator of the program and the tools used.

**3. *Should the creation in the real world of a substantial reproduction of a purely virtual creation be copyright infringement? If so, what constitutes "substantial reproduction" to be considered as an infringement? (Virtual Creation → Real World);***

**4. *Should the creation in virtual reality a substantial reproduction of a real world work be copyright infringement? (Real World → Virtual Creation)***

The creation in the real world of a substantial reproduction of a purely virtual creation should be considered a form of copyright infringement, *if* the virtual creation is considered to be protected by copyright.

[We note that **not every virtual creation is protected by copyright**. The work will need to pass the requirements for copyrightable works. This can also be applied to the corollary situation wherein a virtual creation is obtained or copied from real world work. It should be remembered that **not every real world work may be protected by copyright.**]

A real world creation is protected by copyright for as long as it can be classified as either an original work or derivative work and if it does not fall under the ambit of what is not protected by copyright [e.g., limitations on copyright and fair use].

Virtual work may be considered as a derivative work. The author of a virtual creation may not be liable for copyright infringement of the preexisting material if the author of the virtual work is able to add new original copyrightable material to the underlying work. However, It bears noting that the creation of a derivative work without the permission of the original author may constitute copyright infringement, pursuant to the moral and economic rights of the original author. Note that Secs. 177.1 and 177.2 of the Philippine IP Code provides the exclusive right of the author to carry out, authorize, or prevent the “reproduction of the work or a substantial portion of the work”, and the “arrangement or other transformation of the work”.

Derivative works are generally creations based on one or more preexisting material. Derivative works enumerated in Secs. 173.1 (a) and (b) of the Philippine IP Code are “dramatizations, translations, adaptations, abridgments, arrangements, and other alterations of literary or artistic works” and “collections of literary, scholarly or artistic works, and compilations of data and other materials which are original by reason of the selection or coordination or arrangement of their contents”. To be copyrightable, a derivative work must incorporate some or all of a preexisting “work” and add new original copyrightable authorship to that work.<sup>5</sup> According to the Philippine IP Code, derivative works are also protected under the copyright law:

“SEC. 173. Derivative Works. — 173.1. The following derivative works shall also be protected by copyright:

- (a) Dramatizations, translations, adaptations, abridgments, arrangements, and other alterations of literary or artistic works; and
- (b) Collections of literary, scholarly or artistic works, and compilations of data and other materials which are original by reason of the selection or coordination or arrangement of their contents. (Sec. 2, (P) and (Q), P.D. No. 49)

173.2. The works referred to in paragraphs (a) and (b) of Subsection 173.1 shall be protected as new works: Provided, however, That such new work shall not affect the force of any subsisting copyright upon the original works employed or any part thereof, or be construed to imply any right to such use of the original works, or to secure or extend copyright in such original works. (Sec. 8, P.D. 49; Art. 10, TRIPS)”<sup>6</sup>

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<sup>5</sup> Copyright in Derivative Works and Compilations, United States Copyright Office, accessed from <http://www.copyright.gov/circs/circ14.pdf>.

<sup>6</sup> Intellectual Property Code of the Philippines, Sec. 173.

Virtual work can be classified as derivative work if they are based on preexisting copyrighted works in the real world. Under Rule 2 of the Philippine Copyright Safeguards and Regulations, “Work refers to any original work, derivative work, performance of producers, sound recording, or recording of broadcasting organizations. Derivative work is work that is derived from another work.”<sup>7</sup> [Emphasis supplied] For a virtual work to be considered a derivative work, the work must also add a original copyrightable material to that work.<sup>8</sup> It must be noted, however, that the protection accorded the author of a derivative work does not imply any right to the use of the preexisting material.<sup>9</sup>

### ***Copyright Infringement by a Derivative Work***

A derivative work may be considered an infringement if it is made without the original copyright owner’s permission. In granting permission to make a derivative work, the original copyright owner can impose conditions<sup>10</sup> based on the author’s economic rights pertaining to “reproduction of the work or substantial portion of the work” and its “dramatization, translation, adaptation, abridgment, arrangement or other transformation” as provided by Secs. 177.1 and 177.2 of the Philippine IP Code.

Philippine jurisprudence has not tackled the question of infringement by a derivative work, much less the issue of whether virtual work infringes on real world work and vice versa. However, as Philippine intellectual property laws borrow heavily from US laws, US jurisprudence on the matter of whether derivative works may be considered as infringing the original copyrighted material may be considered as instructive.

In the United States case *Stewart v. Abend, 495 U.S. 207 (1990)*, it was ruled that distribution and publication of a derivative work “infringes the rights of the owner of the preexisting work where the author of that work agreed to assign the rights in the renewal term to the derivative work’s owner, but died before the commencement of the renewal period, and the statutory successor does not assign the right to use the preexisting work to the owner of the derivative work.”

According to the case of *Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992)*, in order to establish copyright infringement, the plaintiff must show proof of copyright ownership and that the copying was without authorization from the copyright owner.<sup>11</sup> This case involves a derivative work from a photograph to a sculpture. The Court ruled that the copying was so deliberate and thus exceeded a permissible level of copying even under the fair use doctrine.<sup>12</sup>

### ***5. How are the answers to the above questions affected, if any, by whether the reproduction involves a change in dimension (3D to 2D or vice versa)?***

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<sup>7</sup> Philippine Copyright Safeguards and Regulations.

<sup>8</sup> Copyright in Derivative Works and Compilations, United States Copyright Office, accessed from <http://www.copyright.gov/circs/circ14.pdf>.

<sup>9</sup> Copyright Law of the United States of America, Sec. 103.

<sup>10</sup> San Francisco’s Owen, Wickersham & Erickson (“OWE”), accessed from <http://www.owe.com/resources/legalities/28-copyright-ownership-collaborative-projects/>.

<sup>11</sup> *Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992)*.

<sup>12</sup> *Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992)*.

A change in dimension is not material in determining whether or not there is copyright infringement. What is important is that there is substantial reproduction of the material being copied.

Note that Sec. 173 of the IP Code provides for the protection of derivative works:

“Sec. 173. Derivative Works. – 173.1. The following derivative works shall also be protected by copyright:

(a) Dramatizations, translations, adaptations, abridgements, **and other alterations of literary or artistic works** ...” [Emphasis supplied]

Hence, mere alteration of dimension, if the reproduction is considered as substantial, may still be considered as infringing.

#### **6. *What jurisdiction governs virtual reality?***

Jurisdiction governing virtual reality is currently an ongoing question because of the difficulty of determining where copyright infringement was actually committed. It can be akin to a continuing crime wherein jurisdiction may fall in any place that any element of copyright infringement is committed. To give an example, if the creation or infringement of virtual reality takes logging in to the cyberspace for multiple times as an ongoing process, it is suggested that jurisdiction may be vested in any place where any element of copyright infringement is committed.

#### **7. *What liability should be imposed on the developers of the VR platform and what should be the basis for that liability be?***

Liability of the developers of the VR platform for copyright infringement should be both criminal and civil liability. Under Section 216 of the IP Code, any person infringing a copyright is liable:

“(a) To an injunction restraining such infringement. The court may also order the defendant to desist from an infringement, among others, to prevent the entry into the channels of commerce of imported goods that involve an infringement, immediately after customs clearance of such goods.

(b) Pay to the copyright proprietor or his assigns or heirs such actual damages, including legal costs and other expenses, as he may have incurred due to the infringement as well as the profits the infringer may have made due to such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or, in lieu of actual damages and profits, such damages which to the court shall appear to be just and shall not be regarded as penalty.

(c) Deliver under oath, for impounding during the pendency of the action, upon such terms and conditions as the court may prescribe, sales invoices and other documents evidencing sales, all articles and their packaging alleged to infringe a copyright and implements for making them.

(d) Deliver under oath for destruction without any compensation all infringing copies or devices, as well as all plates, molds, or other means for making such infringing copies as the court may order.

(e) Such other terms and conditions, including the payment of moral and exemplary damages, which the court may deem proper, wise and equitable and the destruction of infringing copies of the work even in the event of acquittal in a criminal case.”

Criminal penalties are also provided under Section 217 of the IP Code, as follows:

**“Sec. 217.—217.1.** Any person **infringing** any right secured by provisions of Part IV of this Act **or aiding or abetting** such infringement shall be guilty of a crime punishable by:

(a) Imprisonment of one (1) year to three (3) years plus a fine ranging from fifty thousand pesos (P50,000) to one hundred and fifty thousand pesos (P150,000) for the first offense.

(b) Imprisonment of three (3) years and one (1) day to six (6) years plus a fine ranging from one hundred and fifty thousand pesos (P150,000) to five hundred thousand pesos (P500,000) for the second offense.

(c) Imprisonment of six (6) years and one (1) day to nine (9) years plus a fine ranging from five hundred thousand pesos (P500,000) to one million five hundred thousand pesos (P1,500,000) for the third and subsequent offenses.

(d) In all cases, subsidiary imprisonment in cases of insolvency.

217.2. In determining the number of years of imprisonment and the amount of fine, the court shall consider the value of the infringing materials that the defendant has produced or manufactured and the damage that the copyright owner has suffered by reason of the infringement.

217.3. Any person who at the time when copyright subsists in a work has in his possession an article which he knows, or ought to know, to be an infringing copy of the work for the purpose of:

(a) Selling, letting for hire, or by way of trade, offering or exposing for sale, or hire, the article;

(b) Distributing the article for purpose of trade or for any other purpose to an extent that will prejudice the rights of the copyright owner in the work; or

(c) Trade exhibit of the article in public, shall be guilty of an offense and shall be liable on conviction to imprisonment and fine as above mentioned. (Sec. 29, P.D. No. 49a)” *[Emphasis supplied]*

As a general rule, the developer of the VR platform should not be criminally or civilly liable in the same manner as the principal infringer who uses the application to copy an original work. Only if the developer of the VR platform actively participates in the infringement, or aids or abets the same, will the developer be liable.