

Overview of Augmented Reality and Virtual Reality in Canada

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The field of augmented reality and virtual reality is on a roll. After the highly anticipated release of the Oculus Rift headset from the American company Oculus VR and the huge (albeit short-lived) popularity of the augmented reality application Pokémon Go!, several applications using these technologies have been launched on the market.

As a result of the many advances made by these technologies in recent years, this has become a booming field. More and more companies are aiming to jump in, hoping to develop what will be seen as the next great innovative application -- in a field in which innovation necessarily means intellectual property!

Intellectual property and its related rights are an undeniable asset for any designer wishing to capture a share of this market. We will therefore give a brief overview of some of the pitfalls to avoid when developing applications or devices that use these technologies.

Copyright

The most important element when it comes to copyright and applications for augmented reality and virtual reality technologies is undoubtedly the software. This is protected under the *Copyright Act* through its source code, which is the code written in such a way as to be understood by a human being, that the *Act* equates with a literary work.

To facilitate the development of software for use with different platforms, some companies offer software development kits (SDKs) adapted to their products. However, there are many contractual rules governing the use of these kits. It is therefore important that anyone wishing to use them be fully aware of the scope of the rights they confer and, more importantly, be able to determine who is the owner of the copyright in the resulting applications and what the permissible uses are.

Patents

Patent applications related to augmented reality and virtual reality technologies can be put into two broad categories. On the one hand, there are patents for the devices and accessories needed to use these technologies, such as headsets, gloves and smart goggles. These can generally be registered more easily, provided the invention is new, inventive and useful.

On the other hand, there are patent applications for software used in the implementation of an app. These are more problematic because of the state of the law in Canada. Although there is no provision in the *Patent Act* prohibiting the patenting of software, section 27(8) does provide that "no patent shall be granted for any mere scientific principle or abstract theorem." In light of this provision, Canadian courts have long refused to grant patents on what they have considered to be mere mathematical formulas.

Nevertheless, it seems that the wind shifted in 2011 following the decision of the Federal Court of Appeal in the case of [Canada \(Attorney General\) v. Amazon.com, Inc.](#)¹ In its decision, written by Judge Sharlow, the Court confirmed that software could be patentable to the extent that it was not "merely a disembodied idea and meets the criterion requiring a change in the nature or condition of a physical object."²

Despite this small glimmer of hope, software patentability in Canada nevertheless remains a situation that must be assessed on a case-by-case basis to determine whether a physical element is tied to the software invention. A professional's opinion is therefore strongly suggested for anyone wishing to obtain a patent for software in connection with augmented reality and virtual reality technologies.

Trademarks

The situation with regard to trademarks is also tricky. When dealing with trademarks used in connection with augmented reality and virtual reality apps, what should be made of their inclusion in virtual worlds, and what distinctions should be made between a real object and a virtual object?

Can the presence of a registered trademark on a virtual element actually be regarded as a violation of the rights held by the owner of that mark? Furthermore, can the "use" of a third-party's trademark in a virtual world be considered a trademark use within the meaning of section 4 of the *Trademarks Act*? These are issues that Canadian courts have not (yet) had to address. That being said, it is a safe bet that with the growing popularity of augmented reality and virtual reality applications, and given the substantial profits they generate, these issues will not remain outstanding for much longer.

Caution would suggest that anyone wishing to create an app related to augmented reality and virtual reality technologies should ensure they do not include trademarks owned by third parties without prior authorization. As in the world of conventional television

¹ *Canada (Attorney General) v. Amazon.com, Inc.*, [2011 FCA 328](#).

² Louis-Pierre Gravelle & Jean-François Journault, « Protection des jeux vidéo : la propriété intellectuelle en mode multijoueur », *Développements récents en droit de la propriété intellectuelle*, Cowansville, Éditions Yvon Blais, 2012, p. 164, online: <https://edoctrine.caij.qc.ca/developpements-recents/357/368099942/#infos>.

production, designers of games or augmented reality and virtual reality apps will likely use advertising in the next few years to generate revenues for larger projects, rather than risk prosecution for the use of unauthorized marks.

Last word

While augmented reality and virtual reality technologies have experienced dramatic growth in recent years, we are far from reaching the limitations that these technologies can offer. Indeed, some companies are currently developing new applications related to the senses of sight (eye-tracking), voice (voice recognition) and touch (haptic technology).

Assuredly, this field is one that will take off in the years to come. That being said, it remains essential for anyone wishing to develop apps related to these technologies to have an understanding of the various intellectual property involved, if only to ensure that they hold all the rights for the products making up their creations, and also in order to avoid long, and quite possibly costly, legal proceedings