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‘AR MARKET IS ESTIMATED TO GROW BY 40.29% FROM US\$11.14 BILLION IN 2018 TO US\$60.55 BILLION IN 2023 WHILST THE VR PROJECTED GROWTH RATE IS 33.95%, FROM US\$7.90 BILLION IN 2018 TO US\$ 34.08 BILLION IN 2023.’

Globally, the growing trend in immersive media has given rise to research into Virtual and Augmented Reality (VAR) which promotes near-life experience in entertainment - gaming, videos, etc., medicine, health, etc. Leading Technology Companies (TechCos) such as Alphabet, Microsoft, Facebook, Apple, etc. have contributed immensely to the development of various VAR products. After Facebook's acquisition of Oculus for US\$2.1 billion in 2016, the social media giant has proceeded with incremental investment in more than eleven VAR entities.¹ Whilst AR allows digital content to be layered over the real world (for example Pokémon GO!) using special glass; the image is superimposed on the scene to make it seem like the real world.



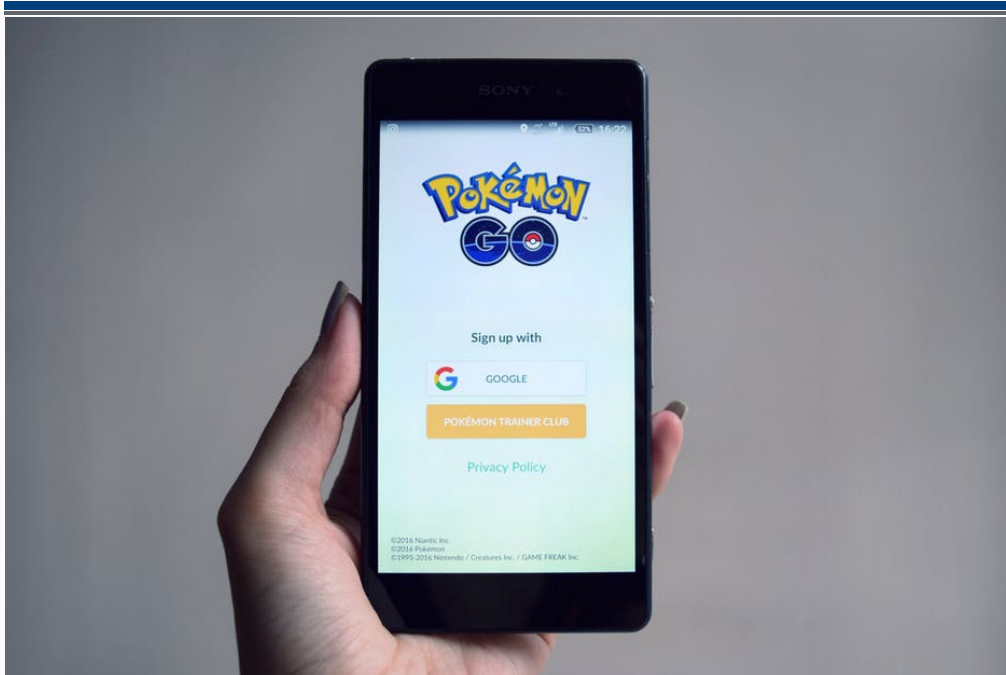
VR replaces the real world with a virtual environment enabling the user to manipulate same as though it were the real world.

According to *MarketsandMarkets' Report 2018*,² AR market is estimated to grow by 40.29% from US\$11.14 billion in 2018 to US\$60.55 billion in 2023 whilst the VR projected growth rate is 33.95%, from US\$7.90 billion in 2018 to US\$ 34.08 billion in 2023. These projections were hinged on increasing demand for AR devices in healthcare, retail and e-commerce, and rising investments in the AR market. More so, head-mounted displays in gaming and entertainment, advancement in technology and digitization including incremental investment are specks of a burgeoning VR space.

In Nigeria, there is an increasing demand

¹ Corbin Ball & Co., 'Nine Amazing Meetings Technological Trends to Watch in 2016', <<https://www.corbinball.com/article/29-futurism/112-nine-amazing-meetings-technology-trends-to-watch-in-2016>> (accessed 19 December 2018)

² MarketandMarket's Report, 2018, 'Augmented Reality and Virtual Reality Market by Offering (Hardware & Software), Device Type (HMD, HUD, Handheld Device, Gesture Tracking), Application (Enterprise, Consumer, Commercial, Healthcare, Automotive), and Geography - Global Forecast to 2023' <<https://www.marketsandmarkets.com/PressReleases/augmented-reality-virtual-reality.asp>> (accessed 19 December 2018)



for VAR products and services in the entertainment industry especially in gaming and videos. This has contributed to the growth of tech start-ups such as *Imisi 3D* (VAR Studio), etc. providing VAR on-demand services. These disruptive technologies have led to emerging legal trends that could not have been envisaged under conventional legal discourse. For instance, would VAR operators be liable for any psychological trauma resulting from the use of their products? During the development of VAR products, certain 'protected' marks are modelled to create the 'near life' experience for users. This raises the question: are intellectual property rights (IPRs) extended to VAR 'world'?

This article seeks to examine the legal issues i.e. regulatory compliance, product liability, intellectual property, model etc. pervasive in the set up and operation of a VAR business in Nigeria.

Entry into the VAR Space – Regulatory Compliance

The emergence of VAR as a lucrative entertainment business in Nigeria has attracted potential investors in the space. These investors are rightly positioning themselves for the budding market which is projected to hit US\$2.8 billion by 2021.³ It is pertinent for potential investors in the VAR entertainment business, to consider all regulatory compliance issues and adequately provide a response strategy during the feasibility studies/business planning stage. One of the regulatory agencies that may have a role to play is the National Film and Video Censors Board (NFVCB) established under the **NFVCB Act**⁴ to licence a person to exhibit films and video works; premises for the purpose of exhibiting films and video works; amongst others.

According to **section 28(1), NFVCB Act** “... no person shall distribute or exhibit a film or video work unless it is registered with the Board.”

Similarly, a licence is expected to be obtained in respect of premises where such work is exhibited as required under **section 17 NFVCB Act**. It is therefore pertinent to ask whether VAR falls within the category of 'video work' under the Act. In defining the meaning of video work, **section 64 NFVCB Act** provides that it “... means any series of visual image (with or without work) - a) produced electronically by the use of information contained on any disc or magnetic tape; and shown as a moving picture.” Thus, any form of series of visual image which immersive media (VAR) represents are classified as video work subject to the provisions of the **NFVCB Act**.

However, **sections 53 and 54** seems to put things in the right perspective with regard to regulation of VAR under exempted video or recording. **Section 53(2)** posits that “a video work is for the purpose of this Act an exempted work if taken as a whole it is - a) designed to inform, educate, or instruct; or b) concerned with sports; or c) a video game.” Thus, VAR designed for educational purposes, sports or video games are generally exempted from the requirement of licence under the **NFVCB Act**.

Notwithstanding, it is important to note the

³ PwC's Global Entertainment and Media Outlook 2017 – 2021 Report

⁴ Cap. N40 LFN, 2004



provision of **section 53(3)** which restricts exemption of video works. It provides that: “a video work shall not be classified as an exempted work for the purpose of this section if, to any significant extent, it – a) depicts explicit sexual activities or acts of force or restraint associated with such activities; b) depicts mutilation or torture of, or other acts of gross violence towards humans or animals; c) depicts human genital organs or human urinary or excretory functions;... e) is religious and contravenes ethnic prejudices either by word or action.” Thus, it is submitted that although video games are generally exempted, games with 'adult' or violent content will not fall under exempted work.

Whilst setting up a VAR business, a key consideration should be the nature of content to be produced and disseminated to the public. Where such content falls within the exempted video work, there is no requirement for compliance under the **NFVCB Act**. This provision also applies to the supply of video recordings (defined as any disc or magnetic tape containing information by the use of which the whole or part of a video work may be produced) where same is neither a supply for reward nor a supply in the course or furtherance of a business: **section 54(1)**. In all other instances, the operators of video work or recordings, including VAR are required to comply with the provision of the **NFVCB Act** failing which, convicted defaulters will be liable to sanctions.⁵

Operation of VAR Entertainment Centres – Legal and Commercial Considerations

Upon due consideration of the various regulatory compliance issues, the focal point for potential investors thereafter will be on the content (determinant on whether same will fall within the regulatory purview of

the NFVCB) and obtaining necessary operational license from the Original Equipment Manufacturers (OEMs) - gadgets or VAR software developers – and entertainment content creators. To this end, depending on the viable commercial arrangement, the investor could decide to leverage an existing/popular VAR entertainment brand such as VR World, Scene 75, Avatarico etc. by obtaining a franchise to operate similar brands in Nigeria.

Generally, franchise arrangements between the franchisor and franchisee are governed by a Franchise Agreement (FA). A typical FA contains clauses such as: territory, fees, intellectual property rights usage, regulation of the business, general standards, amongst others. In Nigeria, FAs between non-resident licensors and Nigerian companies are required to be registered by the National Office for Technology Acquisition and Promotion (NOTAP) pursuant to **section 5(1) NOTAP Act**.⁶ **NOTAP's Revised Guidelines for the Registration and Monitoring of Technology Transfer Agreements in Nigeria, 2011** made pursuant to the **NOTAP Act** prescribed fees chargeable by franchisors, licensors, or other offshore service providers, etc. for their services in Nigeria. Registration of contract which fails to take cognisance of these requirements is denied. More so, repatriation of funds under the contract requires evidence of

⁵ A fine of N2,500 or a term of imprisonment of three months for individuals while directors, managers, or person purporting to act in the capacity in the corporate body will be liable in the case of a company amongst others.

⁶ Cap. N62 LFN, 2004.

NOTAP registration. Alternatively, an entrant may acquire the rights to use the VAR brand for a certain number of years subject to renewals and payment of prescribed fees under a licensing agreement.

Whilst these two potential business arrangements are considered, recourse should also be made to issues associated with further research and development of the existing VAR products under franchise or license. For instance, if upon obtaining a license to operate a particular VAR brand, the licensee further develops the product to suit its peculiar market, who retains the right to the 'new invention'? This position might appear to have been settled by *section 1(1)(b), Patents and Designs Act (PDA)*⁷ which stipulates patentable inventions.⁸ It however behoves on parties to adequately make provision for the ownership of rights on any improvement on the product. The Federal High Court in *James Agbonrofo v. Grain Haulage and Transport Ltd*⁹ granted the plaintiff's application for patent on the ground that his invention was an improvement on the existing invention having met the requirements of the PDA.¹⁰

In the same vein, developing a VAR product entail obtaining relevant license and releases from IP rights holders. For instance, if a VAR studio

intends to model the popular Broad Street in Lagos Island, the studio will have to obtain license from IP rights holders whose mark are visible on the street. This is equally applicable to individuals with personality rights who are randomly captured on the street. Usually, they are required to sign a consent/release form granting the VAR studio the right to use their image for such purposes. Where such consent/release is not obtained, the VAR studio may be liable in breach of right to publicity/personality rights. This also applies to modelling popular celebrities as characters in a VAR environment without their consent.

Breach of personality rights is often classified as passing off under common law. In *Talmax Property Limited v. Telstra Corporation Limited*,¹¹ the unauthorized use of the photograph of Kieren Perkins a distinguished sports personality was held to have diminished, blurred or reduced the opportunity of the personality to exploit his name, image and reputation. Similarly, in *Athens v. Canadian Adventure Camps Ltd et al*¹² where the Plaintiff, a professional water-skier brought an action against the Defendant for unlawful appropriation of his personality. He had made a distinctive photo of

himself which he used commercially. However, the Defendant's advertising agency made a drawing copy of the photo and it was used to promote the Defendant's product. Although the name of the Plaintiff was not mentioned, the Ontario High Court nonetheless held that his personality had been unlawfully appropriated.

One other important consideration for operators in the VAR entertainment sector is the potential exposure to personal injury and product liability claims. The superimposing nature of VAR content has been reported to have side effects such as loss of spatial awareness, dizziness and disorientation, seizure, nausea, and eye soreness¹³ on users. Can an unwary user institute personal injury claims against VAR operators in Nigeria? The answer to this lies in the interpretation and application of operator's culpability under the tort of negligence, particularly the egg-shell theory to ascertain the scope of liability.

For operators to be liable in negligence, it must be established that: there is a duty of care between operators and

⁷ Cap. P2 LFN, 2004

⁸ The provision is to the effect that: "Subject to this section, an invention is patentable – if it constitutes an improvement upon a patented invention and also is new, results from inventive activity and is capable of industrial application."

⁹ (1998) F.H.C 1236

¹⁰ NOTAP also recognises the interest of Nigerian companies in the improvement made on the product in line with Para. 2.2.3.1 (e), NOTAP Guidelines: "all agreements should incorporate research activities to be carried out in-house and in collaboration with the National Innovation Systems..."

¹¹ (1997) 2 Q.D.R 444

¹² (1977), 80 DLR (3d) 583

¹³ Code Lewis, 'The Negative Side Effect of Virtual Realty', Resource, March 7, 2018, < <http://resource.magonline.com/2018/03/the-negative-side-effects-of-virtual-reality/87052/> > (accessed 23 August 2018)

users (which usage of the product presumes), breach of the duty and damage.¹⁴ In *Duliue v. White*,¹⁵ espousing the 'eggshell skull principle', the Court stated that: “it has for long been the law that if a person is: '[N]egligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have less injury [or no injury at all] if he had not had an unusually thin skull or an unusually weak heart.”

However, the learned authors, Winfield & Jolowicz opined that “... there must be a breach of duty owed to the claimant and if no damage at all could have been foreseen to a person of normal sensitivity and the claimant's abnormal sensitivity was unknown to the defendant, then he is not liable.”¹⁶ Nonetheless, under Nigerian jurisprudence, a defendant is not liable in negligence where the claimant was aware of the risk and failed to take precautions.¹⁷

It is therefore prescient for operators to disclose potential hazards to users. This could be in the form of an exemption clause contained in the tickets issued to users. The general rule here under contract is that such clause must be expressed clearly and without ambiguity or they will be ineffective.¹⁸ This would also give operators the right to claim the defence of **volenti non fit injuria**¹⁹ where users institute any action in negligence against them.

On the commercial side, where an exclusion or exemption clause is included in the tickets issued to users, how can operators manage 'the optics' that such disclosure and exemption would create in the mind of intending users? One way to manage the perception of users is if such provisions is industry standard. As a result, there would not be discriminatory patronage of operators.



In the same vein, where a user sustains an injury as a result of a defective VAR product, it could expose the operator to product liability claims. Except an operator is also the OEM, it will be prescient to have clauses in the product purchase agreement where such liability could be legally passed to the OEM. This is because under certain circumstances, the operator could be liable under common law. In *Langridge v. Levy*,²⁰ it was held that a right of action lay outside contract to any person injured as a result of a defect in a thing not dangerous in itself, where the transferor of the thing knew it to be dangerous but concealed the danger.

The Supreme Court reiterating this position in *Okwejiminor v. Gbekeji*²¹ that: “the absence of privity



¹⁴ See the locus classicus case of *Donoghue v Stevenson* [1932] A.C. 562

¹⁵ [1901] 2 K.B. 669 at 679, *Kennedy J.*

¹⁶ W.E. Peel and J. Goudkamp, 'Winfield & Jolowicz on Tort' (9th ed.) Sweet & Maxwell, 2014 p.189; see also, *Bourhill v. Young* [1943] A.C. 92 at 109; *Cook v. Swinfen* [1967] 1 W.L.R. 457

¹⁷ *The Sierra Leone Development Co. Ltd v. Maria Taylor* [1952] 14 WACA 137

¹⁸ *Ailsa Craig Fishing Co. Ltd v. Malvern Fishing Co. Ltd* [1983] 1 W.L.R. 964, 966, 970

¹⁹ The principle that a defendant will escape liability for the consequence of negligence if the claimant has, expressly or impliedly, agreed to accept the legal risk associated with that negligence

²⁰ (1837) 2 M&W 519

²¹ [2008] 5 NWLR 114 at 222



television program production, distribution, exhibition and photography) as one of those eligible for pioneer status incentive,²² no doubt, this would spur investment in the sector. Whilst the potential for growth in the VAR entertainment sector is high given Nigeria's growing youth population, increasing urbanisation potentially widening middle class with related purchasing power

of contract between a person who suffered injury from the use or consumption of a product and the person who made the product does not preclude an action in tort for the injury; provided the former can prove that he purchased the product made by the latter, and suffered injury from use of consumption of the product.”

Conclusion

With the Federal Government's inclusion of the entertainment industry (motion picture, video and

implications; investment in the sector requires due diligence and strategic considerations by potential investors. It is therefore important to carry out a full scale regulatory compliance scan of the sector as part of the pre-investment appraisal process or entry strategy to nip any potential risk exposure in the bud

‘WHERE A USER SUSTAINS AN INJURY AS A RESULT OF A DEFECTIVE VAR PRODUCT, IT COULD EXPOSE THE OPERATOR TO PRODUCT LIABILITY CLAIMS’



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²² Provided they meet the requirements under the *Industrial Development (Income Tax Relief) Act Cap. 17, LFN, 2004*