

# Brothers in Law: Augmented Reality



Thomas and Charles Danziger.  
(Keziban Barry)

“There’s an angry mob in the conference room!” our new receptionist, Felicia, exclaimed. The mob turned out to be a troop of shaggy artists led by our old client Simeon, and fortunately they hadn’t come to lynch us but to seek advice on a cutting-edge area of law and art: augmented reality, or AR.

For those readers who are still groping around in the nondigital world, augmented reality is a means of using technology to enhance the real world with graphics, video, sound, or other computer-generated material.

We were familiar with the use of AR by a number of forward-thinking museums. These institutions let visitors look through their video-enabled smartphones, tablets, or other mobile devices to see original artworks overlaid (or “augmented”) with virtual images. The actual artwork is not physically touched in the process.

Simeon and his tribe weren’t interested in using AR for conventional purposes. “What are the legal risks of ‘guerrilla hacking’ a museum using the technology?” he asked.

Simeon’s group had been inspired by several guerrilla hackings at the Museum of Modern Art in New York. In 2010, artists Sander Veenhof and Mark Skwarek encouraged MoMA visitors to use the smartphone app Layar to view virtual works in the museum, including a floating Berlin Wall and an exhibition on the museum’s “new” seventh floor — which doesn’t exist in real life. Then, in 2014, performance artist Adam Weinert used AR to stage a virtual choreographic performance of ghostly dancers inside MoMA.

“Any problem using the museum’s Wi-Fi to stage such a virtual show?” piped up Micky, another artist in the band.

“Possibly,” we explained, “since accessing the Internet through the museum’s computer equipment without permission could be considered trespassing, even if you don’t monkey around with the Wi-Fi operator.”

“We intend to virtually modify a portrait of the museum’s greediest trustee — an investment banker,” chimed in little Davy. “We’ll turn him into a hairy chimp.”

That sounded very familiar. We recalled that the artist BC “Heavy” Biermann had tried something similar in 2011, when he used AR to transform the face of Captain Barbosa, depicted on the poster of the movie

“Pirates of the Caribbean: On Stranger Tides,” into that of another “pirate”: Goldman Sachs CEO Lloyd Blankfein.

We suggested that augmentation of the museum trustee in this fashion could be considered libel and might be legally actionable by the unhappy banker.

“Hey, hey!” protested Peter, the goofiest artist in the group. “We’re no monkeys! We believe this is an act of free speech, protected by the Constitution!”

“Perhaps,” we replied, “but do you want to spend your last nickel defending that position in court?”

“What about creating an AR experience where visitors who view the logo of the trustee’s bank through their iPhones suddenly see King Kong ravaging the planet?” continued Simeon enthusiastically.

We replied that something along those lines had been done in 2010, with the iPhone app *The Leak in Your Home Town*. In that AR experience, as viewers looked at a BP logo through their mobile device, a superimposed image of a broken pipe leaking oil evoked the BP spill in the Gulf.

“What’s the legal risk of augmenting a corporate logo?” asked Davy.

“Trademark dilution,” we replied. “You face a claim that you tarnished or weakened the company’s mark. On the other hand, you might have a good free speech argument here — especially if you were engaging in political speech.”

But again, we asked if the group wanted to risk the expense of testing this theory in court, especially with a well-funded bank on the opposing side.

“And if we sold T-shirts printed with the trustee’s face enhanced through AR?” Simeon continued.

“If you’re profiting from his image, you could be breaching his right of publicity,” we explained. “Thirty-one U.S. states allow people — famous or not — to control commercial use of their identity. But here, again, you might argue that your speech is simply protected by the First Amendment.”

The Supreme Court highlighted the importance of online speech in the 1997 decision *Reno v. ACLU*, which struck down part of the Communications Decency Act of 1996 as infringing free speech rights, reasoning in part that in an online world, any person “can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, mail exploders, and news-groups, the same individual can become a pamphleteer.”

Peter next asked if the group could use AR to virtually modify the background of a particular painting in the museum — for instance, by adding the phrase “THIS PICTURE IS BANANAS!”

Although we thought this was an interesting artistic commentary, we cautioned that this type of modification could run the risk of copyright infringement. Federal law provides that only the copyright holder of an original painting has the right to make a “derivative work,” meaning changes, additions, and variations to the original. This is assuming that the original copyright holder has not sold or given away the copyright and that the copyright has not fallen into the public domain. This would not apply, for example, to Old Master paintings, which are out of copyright.

“So there is no way to modify a contemporary painting without the copyright holder’s permission?” persisted Peter petulantly.

“Perhaps there is,” we replied. The most obvious defense to this type of claim of copyright infringement is an assertion that the augmentation was “fair use,” meaning that the artist had used the copyrighted painting for purposes such as criticism or comment.

“Seems like a pretty vague standard,” Peter pouted.

He was right. The courts have not clearly defined fair use, so relying on it as a defense is as risky as swinging from a vine.

“Would we be infringing on an artist’s copyright if we simply associated the artwork with a virtual image?” asked Simeon.

We thought not, since they would not be reproducing or modifying the original — merely linking it digitally to another image. But we qualified our advice by noting that, since AR is so new and because there is so little case law in the area, it’s hard to predict how copyright law will be applied to it.

We also cautioned Simeon that if his group virtually modified a painting, the original painter could try to make a claim under the Federal statute called the Visual Artists Rights Act of 1990, commonly referred to as VARA. This law permits artists to prevent the intentional distortion, mutilation, or modification of their work.

Davy followed up: “If we virtually augment an artist’s work by adding original images, could we copyright our new virtual content?”

We answered yes — although the claim’s strength would depend on how much originality was involved in creating the new content.

Simeon had one final question. “Does it matter if the sponsor of our exhibition is an oil company that directly competes with the museum trustee’s corporation?”

“Yes,” we said, “because that may give your virtual exhibition a seemingly commercial purpose.” Commercial “speech” (even in the form of artwork) receives less legal protection than other speech.

Peter looked at his watch and jumped up. “We don’t want to miss the last train to Clarksville,” he proclaimed. Felicia looked relieved; she obviously didn’t like having guerrillas in our midst.