

Cybersecurity: Augmented Reality

Article By:

Lynne Boisineau

If you haven't heard about newest gaming craze yet, it's based on what is called "*augmented reality*" (AR) and it could potentially impinge on your home life and workplace as such games allow users to "photograph" imaginary items overlaid with objects existing in the real world. An augmented reality game differs from "virtual reality" in that it mixes elements of the real world with avatars, made up creatures, fanciful landscapes and the like, rather than simply presenting a completely fictional scenario. Whether you play such games yourself or are merely existing in nearby surroundings, here are few things to think about as an active participant, and some tips regarding Intellectual Property and confidentiality issues that arise from others playing the game around you.

Augmented reality games, like Pokemon GO, are typically played on a smartphone app and some of them allow the user to capture images of the player's experience and post it on social media, text it to friends or maintain it on the phone's camera roll. However, special glasses could be used or other vehicles could deliver the augmented reality experience in different contexts—not just gaming. For example, technology in this area is rapidly advancing which will allow users to link up and "experience" things together way beyond what exists in the real world, *i.e.*, in a "mixed world" experience, if you will. These joint holographic experiences are just one facet of the direction that augmented reality is taking.

As always, with new technological advancements, there are some caveats to using AR that you should be aware of.

Trademarks

If a company's trademark is visible in the photo of your AR experience, you need to be mindful that you do not run afoul of trademark laws. For the same reasons that some trademarks are blurred out on TV shows, you should not be publishing such photos in any fashion that might draw negative attention from the trademark owner on social media accounts. Even if you are not selling competing goods, you could potentially be liable for trademark infringement. There is another, more important reason not to post such photos that is discussed below and can lead to a second cause of action against you arising from the same photo—the right of publicity, which is a personal right and is treated in vastly different ways in each state.

Right of Publicity

The Right of Publicity (ROP) protects everyone from misappropriation of his/her name, likeness, voice, image or other recognizable element of personal identity. It is protected by state law and many states vary greatly in their treatment of ROP. For example, some states protect a person's ROP post-mortem, whereas others have no protection whatsoever. Due to the ease with which still or moving images can be reproduced and posted on the Internet, it is critical that you consider your postings from a ROP standpoint before you upload that image to a social media account. For instance, if your photo features your best friend taken in a shared AR experience, she may not object to you posting her photo to one of your social media accounts. However, if a brand name clothing manufacturer reposts it and somehow uses the momentum of the AR craze to show how game players and/or the avatars and creatures within the game are attracted to their brand of clothing, it could result in not just an issue with the game developer, but also your best friend, who may now be the unwitting spokesmodel for that brand of clothing. Basically, the manufacturer would be receiving an unfair free endorsement deal without ever having to negotiate with your best friend. In many states, she would have a ROP cause of action against the clothing manufacturer for commercial use of her image without her permission. This is exponentially dangerous if the best friend is a minor and her parents have not consented to this use of her image. As you can see, the landscape is fraught with potential pitfalls unless you are a news reporting agency or the like and your actions clearly fall under the First Amendment/free speech exception.

Confidential Information

One very important aspect of an AR game is a player's ability to capture a photograph of the scene being explored or the personal experience of the user in a real world setting (e.g., it could show your desk at work, but in an outer space setting, or your car dashboard with the view from the driver's perspective out the windshield showing a fairyland with mythical creatures in the distance). However, in taking these mixed virtual/real world photos, it is essential to be mindful of your surroundings. Doctors, lawyers, mental health professionals, bankers, and others with a much higher level of fiduciary duty to their clients must ensure that if they are taking such photos, no confidential information that would breach such duties is captured in the photos. Whether taken in the app itself or in screenshot form, these photos could prove to be problematic if they are automatically uploaded to the cloud or captured in the app. For example, a judge recently tweeted that defense counsel had been playing an AR game in the courtroom while court was in session. Setting aside the appropriateness of such behavior, query whether such actions violate confidentiality rules.

For all such professionals there are governing rules about the treatment of certain types of confidential information (The Gramm-Leach-Bliley (GLB) Act, The Health Insurance Portability and Accountability Act (HIPAA), etc.). If the game is set to capture images of the AR characters or scenes in the real world then anything within the player's view or in the surrounding area is captured in the photograph with the character. To the extent that confidential personal information or trade secret information is being captured, this is a problem. The quick fix is to set the game to have a fully virtual background, rather than an AR one, a feature that some AR games already have. Although this is arguably less fun, it mitigates the danger of capturing sensitive data on your camera roll, in the cloud, or accidentally posting it, all of which could have very serious consequences.

In summary, the new AR games are wildly popular and likely are here to stay. Given that, it's best to be mindful of your surroundings and make sure that you, and those around you, are playing responsibly.

National Law Review, Volume VI, Number 238

Source URL: <https://natlawreview.com/article/cybersecurity-augmented-reality>