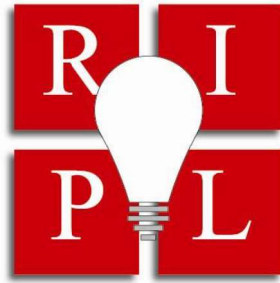


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



GOTTA CATCH . . . A LAWSUIT? A LEGAL INSIGHT INTO THE INTELLECTUAL, CIVIL, AND  
CRIMINAL BATTLEFIELD 'POKÉMON GO' HAS DOWNLOADED ONTO SMARTPHONES AND  
PROPERTIES AROUND THE WORLD

ANDREW L. ROSSOW

## ABSTRACT

Our society, and its millennials, have entered the digital age, whereby almost everything is conducted and perpetuated through electronic devices. Smartphones have dominated the mobile device market and have allowed its users to download mobile applications and games to the device. Pokémon Go, is the latest trend in mobile gaming and the start to a bright future of augmented reality. But what happens when augmented reality meets the physical world? Do our modern-day statutes and laws extend into the cyberspace that it is augmented reality? What happens when a user of an augmented reality game enters onto the property of another and interferes with that individual's fundamental property right of quiet enjoyment and use of the property? Should the mobile game user be held liable under trespassing or nuisance laws? Should the Developers of such a game be held liable under theories of negligence, trespass, and/or nuisance? This article attempts to explore the concept of augmented reality as it pertains to the creation of Pokémon Go by Niantic, Inc., The Pokémon Company, and Nintendo. Pokémon Go is the latest augmented reality game for iPhone and Android, which allows its user to travel in the physical world, while catching Pokémon in the virtual world, depicted through a Google interface overlay.

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I. INTRODUCTION

*A. Why Everyone’s PokéBalls are Being Thrown Across the World and Going Poké-Crazy over Niantic, Inc.’s Newest Mobile Game and the Successful Start to Augmented Reality*

A 2016 April Fool’s joke went “viral” and became a global phenomenon for smart phone users. Niantic, Inc., in partnership with Nintendo, Ltd. and The Pokémon Company, have released the hottest mobile game since *Candy Crush Saga*.<sup>1</sup> *Pokémon Go* is a mobile augmented reality game that encourages users to go out into the real world and use their smartphone to catch Pokémon. Pokémon are animated “pocket monster” creatures that exist in the wild, created by Satoshi Tajiri. Depicted in the market through trading card games, Gameboy games, and approximately 20 seasons of TV series, Pokémon has been one of the most successful franchises in the millennial generation.<sup>2</sup> The goal of the game is to catch the Pokémon, train them, and battle against other Pokémon trainers.

Many wonder what exactly is augmented reality and why it is so popular. Augmented reality is an idea that has been developed and tested, yet has failed to live up to its potential, at least until recently. Augmented reality (“AR”) refers to a view of the physical, real-world environment whose elements are supplemented, or augmented, with computer-generated images and sound via an electronic device.<sup>3</sup> In Nintendo’s case, our streets, our parks, and our world have now been augmented with

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\* Andrew L. Rossow 2017. This article was written for purely educational purposes and is strictly the opinion of its writer. In no way does this article lend itself to give legal advice to its reader(s), or does it intend to attack the Developers or Players. This article is an attempt to inform its readers of the concerning ramifications augmented reality will begin to have on mobile devices, its users, and our legal system. Thank you for taking the time to read this article. Mr. Rossow is a cyberspace and technology attorney in Dayton, Ohio.

<sup>1</sup> Om Malik, *Pokémon Go Will Make You Crave Augmented Reality*, THE NEW YORKER (Jul. 12, 2016), <http://www.newyorker.com/tech/elements/pokemon-go-will-make-you-crave-augmented-reality>; see also Stephanie Lee, *What Is Pokémon Go and Why Is Everyone Talking About It?*, LIFEHACKER (Jul. 11, 2016, 11:00 AM), <http://lifehacker.com/what-is-pokemon-go-and-why-is-everyone-talking-about-it-1783420761>.

<sup>2</sup> <http://www.pokemon.com/us/pokemon-episodes/pokemon-tv-seasons/>.

<sup>3</sup> Keith Lee, *Is PokémonGo Illegal?*, ASSOCIATE’S MIND (July 11, 2016), <http://associatesmind.com/2016/07/11/is-pokemongo-illegal/>; Om Malik, *Pokémon Go Will Make You Crave Augmented Reality*, THE NEW YORKER (July 12, 2016), <http://www.newyorker.com/tech/elements/pokemon-go-will-make-you-crave-augmented-reality>; see also Brian D. Wassom, *Pokémon Go And The Crisis On An Infinitely Augmented Earth*, WOSSOM.COM (July 10, 2016), <http://www.wassom.com/6316.html> (addressing the issues of AR).

a Google Map-type interface, populated with Pokémon, battle gymnasiums, and PokéStops.

A ‘PokéStop’ is an in-game landmark that players can be lured into visiting for in-game items that help them in their journey to catch, train, and evolve their Pokémon.<sup>4</sup> PokéStops are located at places such as libraries, churches, restaurants, private residences, and museums. These PokéStops have already begun luring users into simulated criminal battles. The gyms are places the individual can go to battle other trainers’ Pokémon with your own.

To sum up what *Pokémon Go* actually is, it is a mobile game that puts an augmented layer of Poké-Content on top of a Google Map interface program. This allows players to use their smartphones’ GPS and camera in combination with their Google account to ‘walk’ or ‘run’ through this augmented Poké-World to find Pokémon, catch them, train them, and battle against other players. This game takes players down public streets, into public parks, into restaurants, into museums, and even onto private property such as churches and homes.<sup>5</sup>

As of July 13, 2016, Pokémon Go was the biggest mobile game since *Candy Crush Saga*, with a starting peak of over 28.5 million users (one week after the game launched).<sup>6</sup>

While the fanbase for the game has decreased, as of April 4, 2017, there were approximately 5 million active users still enjoying the virtual Pokémon world.<sup>7</sup> As of today, the game is still being updated with the addition of new Pokémon, where at least 80 new Pokémon were added back in February. Moving forward, the developers have indicated that they intend to release “long-awaited” features like player versus player battling and Pokémon trading, similar to the original Gameboy games.<sup>8</sup>

### *B. Nintendo Has Just Created a large battlefield of Legal Trouble*

This Article will attempt to break down the numerous legal implications Niantic has created in both real life and cyber-space through the success of its AR-centric mobile game. While Niantic, Inc., Nintendo, Ltd., and The Pokémon Company (“Developers”) have created a way for people of all ages to get off their couches and go outside, it has also unintentionally created a legal battlefield of issues spread through cyberspace and the streets and neighborhoods of our daily lives. Lawyers are trained to analyze “actions” versus “consequences.” For every action, there is a consequence

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<sup>4</sup> Kyle Hanson, *Pokémon Go Guide: What Are Pokéstops and How to Use Them*, ATTACK OF THE FANBOY (July 7, 2016), <http://attackofthefanboy.com/guides/pokemon-go-guide-PokéStops-use/>.

<sup>5</sup> Dave Their, *What Is 'Pokémon GO,' And Why Is Everybody Talking About It?*, FORBES (Jul. 11, 2016, 11:44 AM), <http://www.forbes.com/sites/davidthier/2016/07/11/facebook-twitter-social-what-is-pokemon-go-and-why-is-everybody-talking-about-it/#247aa1d221c7>.

<sup>6</sup> Jacob Segal, *Four out of five 'Pokémon Go' users have quit, available at* <http://bgr.com/2017/04/03/pokemon-go-popularity-2016-users/>.

<sup>7</sup> Craig Smith, *80 Incredible Pokémon Go Statistics and Facts (April 2017)*, available at <http://expandedramblings.com/index.php/pokemon-go-statistics/>.

<sup>8</sup> Matt Weinberger, *The fad may be over Pokémon Go still has 65 million monthly active players*, BUSINESS INSIDER (Apr. 4, 2017), <http://www.businessinsider.com/pokemon-go-65-million-monthly-active-players-2017-4>.

(good or bad). An oversight by the developers may have been the allocation of liability the game creates by placing its users in potentially dangerous situations.<sup>9</sup>

## II. INTELLECTUAL PROPERTY

The intellectual property behind the creation of *Pokémon Go* is quite interesting and complex. The result and success of *Pokémon Go* can be traced back to the relationship of the developers. The patents, copyrights, and trademarks utilized in the development by these three companies have helped to revive *Pokémon* and start a modern-day evolution of the original *Pokémon* concept.

### **Niantic, Inc.**

Niantic, Inc., the company behind the previous augmented reality application, *Ingress*, is back at it again. *Ingress* is also a location-based augmented-reality mobile game that focuses on two factions, “The Resistance” and “The Enlightened” rather than the individual players.<sup>10</sup> It is a world in which the Enlightened are trying to create portals around the world that will allow them to control people’s minds and the Resistance is attempting to prevent this.<sup>11</sup> The online activities merge into the real world with businesses and locations opting in to be an “in-game portal.”<sup>12</sup> According to some sources who have researched the intellectual property aspects of the developer’s global craze,<sup>13</sup> Niantic, Inc. owns three patents that protect its “location-based parallel reality games”:

- **U.S. Patent No. 8968099: “System and Method for Transporting Virtual Objects in a Parallel Reality Game”**—this patent protects a computer implemented method of transporting virtual objects in a virtual world having a geography that parallels real-world geography.<sup>14</sup> This system enables players of a parallel reality game, such as *Pokémon Go*, to interact without having to meet in the same place at the same time, which can be inconvenient.<sup>15</sup>
- **U.S. Patent No. 9226106: “Systems and Methods for Filtering Communication Within a Location-Based Game”**—this patent allows for computer-implemented method of filtering communications for a location-based game by receiving communication data for a plurality of players, filtering messages between players based on signals associated with

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<sup>9</sup> Brian D. Wassom, *How Pokémon GO Players Could Run Into Real-Life Legal Problems*, THE HOLLYWOOD REPORTER, (July 11, 2016, 12:36 PM), <http://www.hollywoodreporter.com/thr-esq/how-pok-mon-go-players-909869>.

<sup>10</sup> Game: *Ingress* (2016), <https://www.ingress.com>.

<sup>11</sup> Casey Newton, *Inside Ingress, Google’s new augmented-reality game*, available at <https://www.cnet.com/news/inside-ingress-googles-new-augmented-reality-game/>.

<sup>12</sup> *Id.*

<sup>13</sup> See Susan L. Crockett, <http://www.crockett-crockett.com/blog/2016/07/ip-law-newstop-orange-county-intellectual-property-patent-law-firm.shtml>.

<sup>14</sup> Steve Brachmann, *Pokemon Go developer Niantic owns three patents on location-based gaming*, IPWATCHDOG, <http://www.ipwatchdog.com/2016/08/10/pokemon-go-patents-location-based-gaming/id=71648/>.

<sup>15</sup> *Id.*

each player and adjusting the filtered communication data for each player based on the constraints of each player.<sup>16</sup> While the game does not have “in-game messaging” abilities, this patent will help pave the way for some feature similar to this.

- **U.S. Patent No. 9128789: “Executing Cross-Cutting Concerns for Client-Server Remote Procedure Calls”** –this patent protects a computer-implemented method involving the processing of a source file defining a remote procedure call class specifying a plurality of remote procedure call (RPC) methods and then executing cross-cutting actions specified by decorator annotations contained within the source file in conjunction with executing RPC methods.<sup>17</sup> In short, this allows for the collection of location information.<sup>18</sup>

### **The Pokémon Company**

The Pokémon Company, the creators of the *Pokémon* universe, have copyrighted works and trademarked names that are known all over the world, such as the name *Pokémon* itself, *GameFreak*, and of course the names of the *Pokémon* creatures themselves. Originally launching *Pokémon* in Japan in 1996, The Pokémon Company is responsible for the mass marketing, licensing, brand management, and protection of their pocket monster world.<sup>19</sup>

### **Nintendo Co., Ltd.**

Nintendo filed its trademark applications for *Pokémon Go* back in March 2016.<sup>20</sup> Nintendo will only continue to grow its universe by working in conjunction with Niantic and The *Pokémon Company* to design new characters, graphics, and sounds that play into the patents that Niantic has, with hopes of releasing these into the smartphone cyberspace.

#### *A. Niantic’s Restriction of Copyright Ownership of In-Game Elements*

The freedom of creation also warrants the right to protection. For every creation, there is the potential for infringement. AR allows for the device to display and produce innovative and creative text, images, and sound. Specifically, the world of *Pokémon Go* allows for the continuing creation of more Pokémon, landmarks, items, and worlds as the developers release new updates to the game.

Similar to other smartphone applications that allow for “in-app” or “in-game” purchases, *Pokémon Go* also presents the question of ownership of in-game elements. The question of the extent, if at all, to which a user owns any particular in-game element or item they have purchased with their own real world money continues to

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<sup>16</sup> *Id.*; see also Pramitha K, *What Niantic’s patents reveal about the future of augmented reality*, available at <https://www.virtualreality-news.net/news/2016/nov/17/what-pokemon-go-and-niantics-patents-reveal-about-future-augmented-reality/>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

present itself. The answer to which can be found by looking to the fundamental elements under the Copyright Act: “subject matter”<sup>21</sup> and “ownership”.<sup>22</sup>

*1. Are “In-Game Purchases” Copyrightable Under § 201(a) of the Copyright Act?*

Under § 102(a) of the Copyright Act, original works of authorship that are fixed in a tangible medium of expression are subject to copyright protection.<sup>23</sup> The Act sets out eight enumerated categories of “works of authorship”<sup>24</sup>:

- (a) *Literary Works;*
- (b) *Musical works, including any accompanying words;*
- (c) *Dramatic works, including any accompanying music;*
- (d) *Pantomimes and choreographic works;*
- (e) *Pictorial, graphic, and sculptural works;*
- (f) *Motion pictures and other audiovisual works;*
- (g) *Sound recordings; and*
- (h) *Architectural works.*

It is clear that mobile games such as *Pokémon Go* are copyrightable under the Act. The analysis does not focus on this, but rather on the ownership of the individual elements or items that are purchased within the game.

*2. Do the Users of Pokémon Go Have an Ownership Interest in the “In-Game Elements” they Purchase?*

Copyrights in a protected work are held initially by the creator(s) of the work.<sup>25</sup> Niantic’s Terms of Service expressly states that users and players have a limited, revocable license to all in-game items with no ownership rights. The Terms of Service relating to content ownership can be read below:

“Niantic does not claim any ownership rights in any User Content, and nothing in these Terms will be deemed to restrict any rights that you may have to use and exploit your User Content. Subject to the foregoing, Niantic and its licensors (including TPC and TPCI) exclusively own all right, title, and interest in and to the Services and Content, including all associated intellectual property rights. You acknowledge that the Services and Content are protected by copyright, trademark, and other laws of the United States and foreign countries. You agree not to remove, alter, or obscure any copyright, trademark,

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<sup>21</sup> 17 U.S.C. § 102(a) (2017).

<sup>22</sup> 17 U.S.C. § 201(a) (2017).

<sup>23</sup> 17 U.S.C. § 102(a).

<sup>24</sup> *Id.*

<sup>25</sup> 17 U.S.C. § 201(a).

service mark, or other proprietary rights notices incorporated in or accompanying the Services or Content.”<sup>26</sup>

Yet, the disclaimer presents an issue regarding ownership rights with User Content. What happens is a user decides to use real currency to purchase virtual content through the game. By virtue of copyright law, the individual should now own whatever it is he or she purchase. While the user would argue that by using his or her own money to purchase in-game items, they in fact own the rights to use those items however they see fit, the Developers have a stronger argument that seems to fall under the Copyright Act. By creating the content and elements which help make up the game (*pokéballs and other items*), the Developers have not given up an ownership interest in these elements. They are simply allowing individuals to “rent” its generated content for either limited or indefinite use. Furthermore, the disclaimer that Niantic has answers this question.

*B. An Individual’s Executive Right to use and Possess Their Property Should Transcend Intro Virtual Reality Cyberspace*

Another puzzling matter involves a combination of real property law, intellectual property law, and cyberspace law. Does the placement of an AR element (Pokémon, PokéStop, Poké-gym), within a virtual reality cyberspace, without the property owner’s permission, affect that property owner’s exclusive right to possession in their own property in cyberspace?<sup>27</sup>

Every property owner has a “bundle of sticks” or rights in their property, the most well-known, is the exclusive right to possession. By placing these AR elements and objects onto another’s property without the consent of that property owner, the Developers have now affected property owner’s, exclusive right to possession of their own property as against the world. Indeed, people began entering onto other individual’s private property. What made national news is when individuals would go into areas that were generally open to the public (museums, churches, cemeteries), but would gather to these areas either after they had been closed off to the public for the day or at inappropriate times (funerals).<sup>28</sup> looking for Pokémon to catch or places to gather to catch these creatures. Consequently, this has resulted in concerns regarding what rights individuals have to prevent others from entering onto or accessing ways onto private property simply to play the game.

In response to these concerns, legal experts have begun to argue whether or not owning property in the real world (our physical world), transcends or extends those

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<sup>26</sup> *Id.*

<sup>27</sup> Robert C. Ellickson, *Two Cheers for the Bunds-of-Sticks Metaphor, Three Cheers for Merrill and Smith* (ECON JOURNAL WATCH 8(3) Sept. 2011: 215-222), [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4601&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4601&context=fss_papers); see also Debra Cassens Weiss, *Pokémon Go spurs lawyers to stop and consider legal issues*, ABA JOURNAL (July 13, 2016, 8:00 AM), [http://www.abajournal.com/news/article/pokemon\\_go\\_spurs\\_lawyers\\_to\\_stop\\_and\\_consider\\_legal\\_issues](http://www.abajournal.com/news/article/pokemon_go_spurs_lawyers_to_stop_and_consider_legal_issues).

<sup>28</sup> Allison Grande, *‘Pokémon Go’ Maker Says Players’ Trespass Not Its Problem*, available at <https://www.law360.com/articles/886257/pokemon-go-maker-says-players-trespass-not-its-problem>.



property rights to the AR world along with any associated intellectual property elements that the developers have placed on it?<sup>29</sup> The augmentation of a Poké-World on top of a Google Map overlay, which per the Developers, is an accurate map of our real world and locations, has not forfeited individuals property rights, simply because the individual decides to enter cyberspace through their smartphone or device. Indeed, in order to play the game, the game requires a user to sign in with their Google email account to grant the application access to the GPS-location services of the device, which allows for the game to properly overlay the augmented world on top of the physical GPS coordinates. By granting the application access to the individual's Google account to play the game, it cannot be said that he or she is forfeiting their privacy rights or even property rights because they are told up front what the game is requesting access to. However, there are others who feel that this is not a safe harbor for individual's giving up their rights.

*C. Property Owners have the Right to Refuse Permission to the Developers Creation and Placement of AR-Elements on Their Property*

As Developers update the game, these updates are pushed out to the App Store and Android Market. Of course, users will update the game. Part of these updates have included the fixing of bugs, methods to which the Developers track player's movements within the game, and the addition of new Poké-stops and other AR elements. But, what happens when the addition of elements are placed on or near private property without the consent of that property owner? Under property law, wouldn't this affect the property owners' right to use and enjoy their property? Taking this question a step further, do property owners have the right to refuse permission to developers if he or she does not want an AR creature or object placed on his or her property? In the terms of service, Niantic has relieved itself of any liability resulting from the usage of the game, whether it be property damage or personal injury, but should this be a complete blanket to liability when it intentionally puts AR elements on or near private property that is foreseeable to cause other players to come onto said property? Part of property owner's "bundle of sticks" is the right to allow or prohibit others coming onto said property. So, wouldn't there be a similar right to allow or prohibit the placement of AR objects on his or her property in cyberspace?

In response to complaints made over the past year, developers have addressed this by allowing individuals to fill out an online form requesting their property be added and/or removed from the game as a "Poké-stop".<sup>30</sup> But, for those individuals who do not play the game whose property has been automatically added as a "Poké-stop" or gym, should they be given notice? Arguably, they have not consented to this, and it would seem some form of notice would be appropriate. This then shifts the burden back to the Developers.

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<sup>29</sup> *Id.*

<sup>30</sup> Jeff Grub, Pokémon Go: How to request or remove a PokéStop or Gym, available at <https://venturebeat.com/2016/07/14/pokemon-go-how-to-request-or-remove-a-pokestop-or-gym/>; see also Alyssa Newcomb, 'Pokémon Go' Creators Working to Remove Problematic Pokéstops, NBC NEWS, <http://www.nbcnews.com/tech/video-games/pokemon-go-creators-working-remove-problematic-pokestops-n619856>.

At the present time, Developers have taken reasonable steps by providing an “Opt-Out” form online for people to fill out to have their property removed from in-game activity.<sup>31</sup>

*D. Nintendo’s Ability to Monetize its Characters Through Licensing Deals, While Protecting its Trademarks*

Nintendo is most known for its success and leadership in the video game arena. However, its legacy continues to thrive by means of the hundreds of memorable and nostalgic characters it has created that millennials have grown up playing with. Its characters such as the Mario & Luigi, Zelda, Pikachu, and many others have become such an instrumental part of the growth of the video game industry. Nintendo stands to make a lot of money if it chooses to license more of its characters to Niantic and The Pokémon Company for continued use in its games on smartphones, consoles, and other AR-related concepts.

In terms of Nintendo’s trademarks, the continued licensing of its characters, as well as the addition of newer generations of Pokémon, have led some businesses to believe, mistakenly, that Nintendo itself created the game or has a significant ownership stake in the game. The trend over the past year has been businesses utilizing these trademarked characters on signs outside the store to inform people that they are a “Poké-stop”

Despite the continued use of these trademarked characters, the continued licensing of these characters may allow for individuals to claim the protections under the fair use doctrine.<sup>32</sup> To be protected under fair use, there are four factors that must be considered: (1) the purpose and character of the use, (2) the nature of the copyrighted work itself, (3) the proportion of the work used/taken in relation to the whole, and (4) the effect of such use on the potential market for that work, specifically the video game, virtual reality industry. It is possible that fair use could potentially shield individuals and businesses who choose to use these trademarked characters on their business advertisements outside the store. Only time will tell how strong this doctrine still holds in cyberspace.

While the game encourages people to get off the couch and engage in physical activity, there have been concerns in the civil and criminal realms that must be addressed now before similar games, applications, and concepts are created. Civil and Criminal Liability of The Developers and Players

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<sup>31</sup> *Id.*

<sup>32</sup> 17 U.S.C. § 107 (LEXIS through Pub. L. No. 114-219); Harper & Row, Publishers, Inc. v. Nation Enterprises., 471 U.S. 539, 544 (1985).

### *E. The Developers Have Created Liability Under the Attractive Nuisance Doctrine*

Ohio is one of several states that have adopted the attractive nuisance doctrine.<sup>33</sup> Ohio courts have consistently held that children have a special status in tort law and that duties of care owed to children are different from duties owed to adults.<sup>34</sup> Under the doctrine, landowners are required to eliminate dangerous conditions on their land which attract children. The rationale is that children may not appreciate or understand the danger the land or item on the land brings. An individual who fails to correct or eliminate that danger on their property is civilly liable for any injury the child sustains on it, even if the child was trespassing. In conjunction, the *Bennett* case also extended the doctrine to adult rescuers injured or killed while attempting to assist or rescue children endangered by an attractive nuisance.<sup>35</sup>

So, the obvious question that has presented itself is, does placing an augmented object or element on another individual's private property without their permission invoke the attractive nuisance doctrine? Additionally, whom does the doctrine shield or not shield?

#### ***Property Owners***

Should the property owner, whether it be the owner of a business or private residence, be held civilly liable due to their failure to reduce or eliminate the danger that 'lures' these 'trainers' to their property? "Lures" are in-game items that are placed at certain locations by other players, which attract certain Pokémon to the area. This feature adds an additional layer to this puzzle because other users are able to place them, which potentially makes users liable for the trespassing of other users. In response, is it even fair to require property owners to be aware of the augmented reality around them? How far would this duty extend? Should it extend to just Pokémon placed on their property without their consent? What if their property is transformed into a 'lure spot' or a PokéStop without their consent?

The main question this doctrine invokes is whether these property owners will eventually have a duty to warn others that there are Pokémon on their property. If this duty comes to pass, another troubling issue presents itself: How frequently should the property owner check this game to see if new Pokémon have been placed on their property?

#### ***Mobile Users***

For those "millennials" that grew up in the Pokémon era playing the Gameboy games, watching the TV series, and even trading collector cards, Pokémon Go was an

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<sup>33</sup> *Bennett v. Stanlev*, 748 N.E.2d 41 (Ohio 2001); see also RESTATEMENT (SECOND) OF TORTS § 339 (1965); see also *Blackburn v. Broad Street Baptist Church*, 305 N.J. Super. 541 (1997); *Brady v. Chicago & N.W.R. Co.*, 265 Wis. 618, 625-26 (1954).

<sup>34</sup> *Id.*

<sup>35</sup> See Landowner or Tenant Could Be Responsible for Harm to Trespassing Children, Ohio State Bar Association, available at <https://www.ohiobar.org/ForPublic/Resources/LawYouCanUse/Pages/LawYouCanUse-217.aspx>; Kevin Daley, *Lawyer Points Out Pokémon Go Might Be Illegal*, THE DAILY CALLER (July 11, 2016, 3:44 PM), <http://dailycaller.com/2016/07/11/lawyer-points-out-pokemon-go-might-be-illegal/>.

extension of this phenomena.<sup>36</sup> However, for those individuals who did not grow up in that generation or never got into it to begin with, the appeal of Pokémon Go wasn't as predictable or sudden.

Let's first address the potential effect of the doctrine on young children who have smartphones. As of July 2016, on average, children are getting their first smartphones at around age 10.<sup>37</sup> For some, children even as young as 7 get their first smartphone.<sup>38</sup> In today's society, this is frightening because children at these ages cannot fully appreciate the risks associated with having almost unlimited access to information and the internet.

To add to this, there are children who want to explore different games on these phones by downloading fun and exciting adventure games. As it relates to Pokémon Go, kids are able to go out with their friends and catch these creatures. However, there are times where these children going out on their own without parental supervision and may find themselves in places or situations they normally wouldn't be, absent a parent or even a smartphone. While it should not be the Developer's responsibility to "parent" every child in the world who plays these games, there should still be some measures taken to ensure that individuals below a certain age need "parental consent" to join or register to play.<sup>39</sup> For example, there have been reports that some children playing the game have even wandered into potentially hazardous areas such as construction sites.<sup>40</sup>

Lastly, what happens if, regrettably, the child becomes a victim of criminal activity?<sup>41</sup> This type of child engagement invites not only danger, but rescue. Ohio also shields adult rescuers if in the course of rescuing a child, they are injured. As such, the adult is treated as a child and is protected. It is safe to say that perhaps this game provides more of an incentive for parents to monitor their children's activity on smartphones, as it applies to new games.

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<sup>36</sup> Quentin Hardy, *Pokémon Go, Millennials' First Nostalgia Blast*, N.Y. TIMES, July 13, 2016, <https://www.nytimes.com/2016/07/14/technology/pokemon-go-millennials-first-nostalgia-blast.html>; see also Amy Williams, *How Do Smartphones Affect Childhood Psychology*, available at <https://psychcentral.com/lib/how-do-smartphones-affect-childhood-psychology/>.

<sup>37</sup> Brian X. Chen, *What's the Right Age for a Child to Get a Smartphone*, N.Y. TIMES, July 20, 2016, <https://www.nytimes.com/2016/07/21/technology/personaltech/whats-the-right-age-to-give-a-child-a-smartphone.html>.

<sup>38</sup> *Id.*

<sup>39</sup> Maria LaMagna, *Should you let your kids play Pokémon Go?*, available at <http://www.marketwatch.com/story/do-your-kids-play-pokemon-go-what-to-watch-out-for-2016-07-11>; see also Kelsey Sheehy, *Pokémon Go: How to keep your kids and your data safe*, available at <https://www.usatoday.com/story/money/personalfinance/2016/07/23/pokmon-go-how-keep-your-kids-data-safe/87413004/#>.

<sup>40</sup> Scott Anderson, *Kids Are Trying To Play Pokémon GO at a Construction Site in front of the High School – Here's Why*, available at <https://patch.com/wisconsin/oakcreek/kids-are-trying-play-pokemon-go-construction-site-front-high-school-heres-why>.

<sup>41</sup> Kelsey Sheehy, *Pokémon Go: How to keep your kids and your data safe*, available at <https://www.usatoday.com/story/money/personalfinance/2016/07/23/pokmon-go-how-keep-your-kids-data-safe/87413004/#>; see also Steph CockRoft, *Is this the world's most dangerous game? Fears new Pokémon Go app craze could be used by pedophiles to lure unsuspecting young players*, available at <http://www.dailymail.co.uk/news/article-3684228/Is-world-s-dangerous-game-terrifying-Pokemon-app-craze-killed-one-person-make-children-easy-prey-PAEDOPHILES-s-coming-Britain-soon.html>; see also Vanessa Borge, *Police Warn of 'Pokémon Go' Dangers to Players, Kids*, available at <http://miami.cbslocal.com/2016/07/13/police-warn-of-pokemon-go-dangers-to-players-kids/>.

### *The Developers*

Lastly, addressing the creator's potential liability as it relates to the creation of the game, Niantic, Inc., Nintendo, Ltd., and The *Pokémon* Company while creating an innovative and futuristic style of gaming have also created the risk for personal injury and criminal activity associated with augmented reality gaming. Within the first few weeks of its launch, the Developers have created physical hazards on private property, public streets, and in other public places. As it applies to the Developers, should they be held civilly, and potentially, criminally liable for creating what at times can be described as obvious risks that result from the exercise of the free judgment of individuals who play the game? It would seem that this is a bit of a stretch, as the Developers have created a platform to which people choose to use how they see fit. It would almost be a hindrance on creation if the Developers were to be held liable for each and every activity that arises from people exercising poor judgment.

In response to a variety of strange news stories and reports of criminal activity and personal injury people were experiencing from playing the game, Niantic implemented an auto-generated disclaimer that pops up every time the individual opens the *Pokémon Go* game on their phone, warning players "to be aware of their surroundings", "to act in accordance with laws of the city or state you live in", etc. Additionally, users must also agree to the very fine print stating they cannot enter private property without the owner's permission. Furthermore, Niantic, expressly disclaims that it is not liable for any property damage, injuries, or deaths that result while playing. However, does this seem to general and/or too anticipated if this type of disclaimer needs to be stated? Arguably, they should not be held responsible for the poor decisions made by its users, but on the other hand, it seems as if they predicted that behavior of this type would occur.

Unfortunately, it takes a crazy case to be brought before a court for any sort of decision or analysis to proceed any further.

### *F. Pokémon Trainers Around the Country Are Now Trespassing on Private Property*

The *Pokémon Go* craze has people committing crimes (even unintentionally) or being a victim of a crime, ranging from trespass, to robbery, stabbing, and even domestic issues with cheating partners. So, what happens when an individual playing the game, finds themselves on private property or public property that is limited to the general public after certain times (e.g. cemeteries)? People are now wandering into yards, driveways, cemeteries, museums, churches, alleys, and even off-limit sites in search of these Pokémon. This has led to prompt warnings that trespassers could be arrested, or even worse, seriously injured for coming into contact with an armed property owner.<sup>42</sup>

Under Ohio's Revised Code § 2911.21, the crime of trespass is a fourth-degree misdemeanor. An individual commits a trespass when they enter the property of another without permission. The only requirement is that the person physically

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<sup>42</sup> Beatriz Costa-Lima and Mary Hudetz, *The 'Pokémon Go' Files: 10 Tales of Trespass, Robbery, Murder and More*, INSURANCE JOURNAL, (July 15, 2016), <http://www.insurancejournal.com/news/national/2016/07/15/420198.htm>.

intruded upon another's land without permission. In Ohio, liability depends on the individual's status as to when they are on the property. For example, Ohio breaks down an individual into an "invitee", "social guest", "licensee", and "trespasser".<sup>43</sup>

Here, we are concerned with "trespassers", as some can be argued as an "anticipated" trespasser and others "unanticipated". In either situation, businesses or private property owners who welcome individuals on their property playing the game, should take measures to ensure that they are protected while on that property. However, arguably, should property owners even be held to that standard to monitor at all times who is coming onto their property?

### ***Users***

A person or player who enters onto the property of another while playing the game (without consent) is trespassing. In the event a property owner takes issue with this, should there be a defense of "I was playing Pokémon Go" or "I was playing an AR game"? Arguably, no, as the laws of a state are clear and the game should not supersede or act as an exception to laws that are in place and adequately cover situations like this.

### ***Property Owners***

The most troubling issue, of course, is that property owners clearly have not given Developers express consent to digitally placing these creatures on their property, which then gives people the opportunity and ability to then come onto the properties of another. Ownership of property in the real world is evidenced by the recording of deeds and other title instruments. However, in cyberspace, should those documents have the same weight? In a scenario where people are coming onto the physical property of another based off the digital interface and coding of a smartphone game, it is possible that these documents should hold the same weight. To counter, is the property owner "technically" losing an ownership interest in their property by virtue of its use in this type of AR game? No.

A better argument would be that the right to quiet enjoyment and use of the property is being interfered with, and as such, those same rights do extend into cyberspace.

### ***Developers***

While the developers have expressly disclaimed any and all liability in their initial login disclaimers, people are still able to exercise their own judgment that cannot be allocated to the liability of the Developers. People are going to do what they are going to do. To play devil's advocate, is simply downloading the game and agreeing to the Terms of Service a contract or implied consent for the developers to constantly update its Poké-Database, which may include the possibility of creatures and people ending up on your property? But, isn't this the very definition of trespass, or at least cyber-trespass? Some states have enacted cyber-crime statutes, would agree in the affirmative. However, at the end of the day, courts have a new issue before them:

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<sup>43</sup> *Premises liability in Ohio: your rights depend on your status*, COLLEY SHROYER ABRAHAM, available at <http://www.colleyshroyerabraham.com/blog/2015/04/premises-liability-in-ohio-your-rights-depend-on-your-status.shtml>.

Whether augmented reality or cyber-space has caught up to our modern-day laws? While it is still complex, there is no reason why modern-day statutes should also extend into cyberspace.

### *G. Should Pokémon Go Fall Under State Negligence Laws?*

A negligence claim is a civil lawsuit that a person can bring against another individual who has caused harm by failing to take the degree of care that an ordinary careful and reasonable person would take under the same or similar circumstances, those circumstances being a person playing an AR game that allows a person to wander freely and engage with other people and properties.

In Ohio, there are four elements to recover on a negligence claim: (1) Duty, (2) Breach of Duty, (3) Causation, and (4) Damages:<sup>44</sup>

#### **Duty of Care**

First, the individual must prove that the defendant owed a duty of care. In the case of *Pokémon Go*, it is possible the standard is that of a “reasonable player of a mobile game” or “reasonable player of an augmented reality game”. The question presented is dependent on who the victim was and who was allegedly acting negligently.

In the event the player brings a negligence suit against a property owner, it would make sense that they would have to show the property owner owed them a duty of a reasonable property owner, albeit private or public. But, does it really make sense to hold a property owner responsible for the actions taken by an irresponsible or naïve player who fails to use their common sense when trespassing on their property for what purpose? To catch invisible creatures that only exist in a mobile phone game, but not in the real world? Should the property owner have a duty to know that augmented elements such as Pokémon and PokéStops have been placed near or on their property? Should they have a duty to report this to the Developers for removal or to higher authorities, or even placing warning signs on their property?

Unfortunately, this is not a question that will be immediately answered until someone decides to take their case, whatever the facts may be, to the court.

#### **Breach of Duty**

Second, the individual must prove that the defendant breached that duty. A breach occurs when the defendant failed to live up to that standard. Again, what sort of breach should courts look for? How can a mobile game player breach a standard that technically has never been imposed with smartphone games? How can a property owner breach a standard that a property owner technically has never been held to when it comes to people playing a mobile game . . . that involves their property? Does the property owner have a viable defense of assumption of the risk?

#### **Causation**

Third, the breach of that duty must have been both the actual cause and proximate cause of the harm. Actual causation is determined under a “but for”

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<sup>44</sup> Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assocs., 844 N.E.2d 1160 (Ohio 2006).

analysis. “But for” the act or failure to act, the harm would not have occurred. Proximate cause is the foreseeability of that injury in the chain of events.

With *Pokémon Go* players wandering the streets trying to ‘catch’ these creatures, it is foreseeable that people could potentially trespass on another’s property. For example, a gathering in Central Park in New York last year, where hundreds of people gathered in an attempt to catch a rare Pokémon, Vaporeon, which resulted in a stampede.<sup>45</sup>

### Damages

Lastly, there must be damages, whether they be personal injury, property damage, or both. There has been serious injuries and property damage as a result of this games launch and success.

At the end of the day, who can be held liable for the injuries, stupidity, naivety, carelessness, and excitement of these players? It is clear that the players have a duty to be aware of their surroundings at all times, but the line is a bit greyer when it comes to property owners and the developers.

Here are some interesting headlines from the past year:<sup>46</sup>

- *Pokémon GO: Rare Pokémon Appearance Causes Stampede in Central Park* <sup>47</sup>
- *‘Pokémon Go’ Craze Raises Safety Issues* <sup>48</sup>
- *Death By Pokémon? Public Safety Fears Mount As ‘Pokémon Go’ Craze Continues* <sup>49</sup>
- *NYPD Shares Pokémon Go Safety Tips* <sup>50</sup>

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<sup>45</sup> Joyce Chen, *Pokémon Go: Crowd Stampedes Through Central Park After Rare Vaporeon Sighting*, US WEEKLY (July 16, 2016, 3:24 PM), <http://www.usmagazine.com/celebrity-news/news/pokemon-go-crowd-stampedes-after-spotting-rare-pokemon-w429525>; *see also* Bryan Menegus, *Watch a Stampede of Pokémon Go Players Descend on Central Park*, GIZMODO (July 15, 2016, 4:29 PM), [http://gizmodo.com/watch-a-stampede-of-pokemon-go-players-descend-on-centr-1783752094?utm\\_campaign=socialflow\\_gizmodo\\_facebook&utm\\_source=gizmodo\\_facebook&utm\\_medium=socialflow](http://gizmodo.com/watch-a-stampede-of-pokemon-go-players-descend-on-centr-1783752094?utm_campaign=socialflow_gizmodo_facebook&utm_source=gizmodo_facebook&utm_medium=socialflow).

<sup>46</sup> Dan Claredndon, *25 Craziest Pokémon Go News Stories—Woman Claims Pokémon Character Raped Her*, WETPAINT (Aug. 12, 2016), <http://www.wetpaint.com/pokemon-go-crazy-news-1506550/>.

<sup>47</sup> Riley Little, *Pokémon GO: Rare Pokémon Appearance Causes Stampede in Central Park*, GAMERANT, <http://gamerant.com/pokemon-go-vaporeon-central-park/>.

<sup>48</sup> Sarah E. Needleman, *‘Pokémon Go’ Craze Raises Safety Issues*, THE WALL STREET JOURNAL (July 13, 2016), <http://www.wsj.com/articles/pokemon-go-craze-raises-safety-issues-1468365058>.

<sup>49</sup> James Rogers, *Death by Pokémon? Public safety fears mount as ‘Pokémon GO’ craze continues*, FOX NEWS TECH (July 14, 2016), <http://www.foxnews.com/tech/2016/07/14/death-by-pokemon-public-safety-fears-mount-as-pokemon-go-craze-continues.html>; *see also* Maria Vultaggio, *Is ‘Pokémon Go’ Safe? ‘Death By Pokémon’ Is Coming, Law Professor Warns*, INTERNATIONAL BUSINESS TIMES (July 15, 2016, 12:34 PM), <http://www.ibtimes.com/pokemon-go-safe-death-pokemon-coming-law-professor-warns-2392014>.

<sup>50</sup> Evan Slead, *NYPD shares Pokémon Go safety tips*, ENTERTAINMENT WEEKLY (July 13, 2016, 12:00 PM), <http://www.ew.com/article/2016/07/13/nypd-acts-officer-jenny-sharing-pokemon-go-safety-tips>.



- *Four NYPD Cops Are Under Investigation for Apparently Playing Pokémon Go On-Duty*<sup>51</sup>
- *Man Opens Fire On Two ‘Pokémon Go’ Players In Florida*<sup>52</sup>
- *‘Pokémon Go’ Players Find Corpse in San Diego Park*<sup>53</sup>
- *Men Fall From Cliff Playing Pokémon Go*<sup>54</sup>
- *Man Stabbed While Playing ‘Pokémon Go’ But Continues Playing*<sup>55</sup>
- *This Bakery Is Charging Different Prices Depending On What ‘Pokémon Go’ Team You’re On*<sup>56</sup>
- *Police: Someone Threw Fireworks at ‘Pokémon Go’ Players*<sup>57</sup>
- *Trio Gets Locked in Cemetery While Playing Pokémon Go*<sup>58</sup>
- *Daughter Hit By Car While Playing Pokémon Go*<sup>59</sup>
- *Cheating Boyfriend Says His Girlfriend Caught Him Through Pokémon Go*<sup>60</sup>
- *Woman Discovers Body While Playing ‘Pokémon Go’*<sup>61</sup>
- *Holocaust Museum to Visitors: Please Stop Catching Pokémon Here*<sup>62</sup>

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<sup>51</sup> Andy Cush, *Four NYPD Cops Are Under Investigation for Apparently Playing Pokémon Go On-Duty*, GAWKER (Jul. 15, 2016, 10:40 AM), <http://gawker.com/two-nypd-cops-are-under-investigation-for-apparently-pl-1783733181>.

<sup>52</sup> Lee Moran, *Man Opens Fire On Two ‘Pokémon Go’ Players In Florida*, THE HUFFINGTON POST (Jul. 17, 2016, 9:14 AM), [http://www.huffingtonpost.com/entry/shots-pokemon-go-florida\\_us\\_578b6de5e4b03fc3ee512f13](http://www.huffingtonpost.com/entry/shots-pokemon-go-florida_us_578b6de5e4b03fc3ee512f13).

<sup>53</sup> Veronica Rocha, *‘Pokémon Go’ Players Find Corpse in San Diego Park*, LOS ANGELES TIMES (Jul. 15, 2016, 11:45 AM), <http://www.latimes.com/local/lanow/la-me-ln-san-diego-dead-body-pokemon-go-20160715-snap-story.html>.

<sup>54</sup> Janissa Delzo, *Men fall from cliff playing Pokémon Go*, CNN (July 16, 2016, 9:43 AM), <http://www.cnn.com/2016/07/15/health/pokemon-go-players-fall-down-cliff/>.

<sup>55</sup> *Man Stabbed While Playing ‘Pokémon Go,’ But Continues Playing*, ABC 7 (July 15, 2016), <http://abc7.com/news/pokemon-go-player-stabbed-keeps-playing/1428184/>; Richard Thompson, *‘Pokémon Go’ fan stabbed while playing game, continues mission to ‘catch ‘em all’ after attack*, WHIO (July 13, 2016, 3:15 AM), [http://www.whio.com/news/news/national/pokemon-go-fan-stabbed-while-playing-game-continue/nrxbyY?ecmp=whiotv\\_social\\_facebook\\_2014\\_sfp](http://www.whio.com/news/news/national/pokemon-go-fan-stabbed-while-playing-game-continue/nrxbyY?ecmp=whiotv_social_facebook_2014_sfp).

<sup>56</sup> Dave Walsh, *This Bakery Is Charging Difference Prices Depending On What ‘Pokémon Go’ Team You’re On*, UPROXX (July 14, 2016), <http://uproxx.com/life/bakery-pokemon-go-prices-teams/>.

<sup>57</sup> Associated Press, *WFTV 9 ABC* (July 13, 2016), <http://www.wftv.com/news/local/police-someone-threw-fireworks-at-pokmon-go-players/399294124>.

<sup>58</sup> *Police: Someone threw fireworks at ‘Pokémon Go’ players*, NBC 10 (July 13, 2016, 4:41 PM), <http://www.nbcphiladelphia.com/news/local/Pokemon-Go-Cemetery-Police-Technology-Smartphone-Weird-News-386678101.html>.

<sup>59</sup> *Woman: Daughter Hit By Car While Playing ‘Pokemon Go’*, ABC 13, <http://abc13.com/news/woman-daughter-hit-by-car-while-playing-pokemon-go/1425666/>.

<sup>60</sup> David Moye, *Cheating Boyfriend Says His Girlfriend Caught Him Through Pokémon Go*, THE HUFFINGTON POST (July 14, 2016, 1:25 PM), [http://www.huffingtonpost.com/entry/man-caught-cheating-pokemon-go\\_us\\_5787b9a1e4b0867123e01e5c](http://www.huffingtonpost.com/entry/man-caught-cheating-pokemon-go_us_5787b9a1e4b0867123e01e5c).

<sup>61</sup> Mary Bowerman, *Woman discovers body while playing ‘Pokémon Go’*, USA TODAY (July 11, 2016), <http://www.usatoday.com/story/tech/nation-now/2016/07/11/woman-playing-pokemon-go-discovers-dead-body-river-playing-game/86939056/>.

<sup>62</sup> Andrea Peterson, *Holocaust Museum to visitors: Please stop catching Pokémon here*, THE WASHINGTON POST (July 12, 2016), <https://www.washingtonpost.com/news/the-switch/wp/2016/07/12/holocaust-museum-to-visitors-please-stop-catching-pokemon-here/> (*Pokémon Go* players visit Holocaust Museum to catch *Pokémon*); see also Neal Augenstein, *Who thought it was a good idea to put ‘Pokémon Go’ in the Holocaust Museum?*, WTOP (July 15, 2016, 10:17 AM),

- *Pokémon Go Wants to Be the Exercise App That Actually Works*<sup>63</sup>

#### *H. What Crazy, Future Battles Can We Expect to See in the Augmented Reality Arena?*

After the success of *Pokémon Go*, will we start to see more developers trying to compete and create their own AR applications, games, and devices? It seems that the global success of this game will spur inventors to play catch up. It will continue to create, present, and entangle multiple areas of law, specifically the boundaries of cyberspace law, intellectual property law, real property law, and civil and criminal liability.

Yet, the same issues will remain until it forces legislators and courts to continue addressing the grey areas, in that our laws have not yet caught up to cyberspace, or in this case, AR. Our streets, homes, businesses, and public places will continue to be a hub for criminal activity and injuries.

This will hopefully force legislators and Courts to face the reality that our laws must adapt to the digital age. So the question is, how do we expand our statutes and laws into the ever-growing realm of cyber-space? Do we need to create new statutes specifically targeted at AR and cyber-crimes such as playing *Pokémon Go* to target potential victims/players? I believe our statutes need to be amended or inclusive of cyberspace and augmented reality moving forward.

Time will tell.

#### *I. What does the Battlefield of Augmented Reality Look Like Moving Forward?*

##### *1. Class-Action Lawsuit: In Re Pokémon Go Nuisance Litigation*

Since the release of the game, three Plaintiffs have come forward: *Jeffrey Marder* of New Jersey, *Scot Dodich and Jayme Gotts-Dodich* of Michigan, and the *Villas of Positano Condominium Association, Inc.* out of Florida (collectively “Plaintiffs”). These have since been consolidated<sup>64</sup> into a class-action diversity lawsuit against Niantic,

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<http://wtop.com/mobile/2016/07/who-thought-it-was-a-good-idea-to-put-pokemon-go-in-the-holocaust-museum/>; *'Pokémon Go': 10 Strangest Pokéstop Locations*, ROLLING STONE (July 13, 2016), <http://www.rollingstone.com/culture/pictures/pokemon-go-10-worst-PokéStop-locations-20160713>; *Pokémon Go: Churches encouraged to welcome visiting players*, BBC (July 19, 2016), <http://www.bbc.com/news/uk-36806795> (Church of England signs up to be a PokéStop, hoping to encourage players to come through its doors); Melissa Chan, *Pokémon Go Players Anger 9/11 Memorial Visitors: 'It's a Hallowed Place'*, TIME (July 12, 2016), <http://time.com/4403516/pokemon-go-911-memorial-holocaust-museum/> (players flocked to the 9/11 Memorial in New York City).

<sup>63</sup> Julia Belluz, *Pokémon Go wants to be the exercise app that actually works*, VOX (July 14, 2016, 2:21 PM), <http://www.vox.com/2016/7/12/12159198/pokemon-go-exercise-increase>.

<sup>64</sup> As of November 23<sup>rd</sup>, 2017, all three individual lawsuits brought by the Plaintiffs have been consolidated into the current case, *In Re Pokémon Go Nuisance Litigation*, No. 16-cv-04300, 2016 WL 6126786 (N.D. Cal. Sept. 23, 2016).

Inc., The Pokémon Company, and Nintendo Co. LTD, (collectively “Defendants”) pending before the U.S. District Court of the Northern District of California.

The class action, *In Re Pokémon Go Nuisance Litigation*,<sup>65</sup> was filed on July 29<sup>th</sup>, 2016 by the initial Plaintiff, Jeffrey Marder, individually and on behalf of all others similarly situated. It is worth noting that amount in controversy exceeds \$5,000,000.00 and there is diversity between at least one Plaintiff and a Defendant pursuant to CAFTA’s diversity requirement.<sup>66</sup> An Amended Complaint was filed on November 25<sup>th</sup>, 2016 against the Defendants.<sup>67</sup>

## A. Who are the Plaintiffs to the Class Action?

### 1. Plaintiff: Jeffrey Marder, New Jersey

Jeffrey Marder was the first individual to come forth with a complaint against the Defendants.<sup>68</sup> Mr. Marder is a resident of West Orange, New Jersey and has alleged that the Defendant’s placement of Pokémon, Pokéstops, and/or Pokémon Gyms on or near his property has interfered with the use and enjoyment of his property and caused significant harm to him.<sup>69</sup>

Specifically, Mr. Marder noticed that strangers were gathering outside of his home and holding up their smart phones as if they were photographing him and/or his property.<sup>70</sup> Simultaneously, people began knocking on his door and asked him for permission to enter his *private* backyard, as there were Pokémon there to be “caught.”

### 2. Plaintiff: Scott Dodich and Jayme-Gotts-Dodich

The second individuals to come forward were Plaintiffs Scott Dodich and Jayme Gotts-Dodich in mid-August.<sup>71</sup> They are residents of St. Clair Shores, Michigan.<sup>72</sup> Similar to Mr. Marder’s claims, Mr. and Mrs. Dodich have alleged the same claims.

The Dodich’s live on a private cul-de-sac across from Wahby Park (“Park”).<sup>73</sup> Shortly after the release of the game, the number of visitors to the Park increased significantly, from an estimated 15-20 visitors at any given time, to at least several hundred.<sup>74</sup>

Despite the posted signs indicating this area was private property, individuals continued to park their cars in front of the Dodich’s residence, trespassed on the Dodich’s lawns, trampled their landscape, and even peered into the private windows of their residence.<sup>75</sup>

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<sup>65</sup> *See id.*

<sup>66</sup> Complaint, *In Re Pokémon Go Nuisance Litigation*, No. 16-cv-04300 at ¶ 8, *Id.*

<sup>67</sup> *In Re Pokémon Go Nuisance Litigation*, No. 16-cv-04300, 2016 WL 6126786.

<sup>68</sup> David K. Li and Priscilla DeGregory, *The Hero Who’s Taking Pokémon Go Fools to Court*, NEW YORK POST (Aug. 2, 2016), <http://nypost.com/2016/08/02/the-hero-whos-taking-pokemon-go-fools-to-court/>.

<sup>69</sup> Complaint, *In Re Pokémon Go Nuisance Litigation*, No. 16-cv-04300 at ¶ 10.

<sup>70</sup> *Id.* at ¶ 29.

<sup>71</sup> *Id.* at ¶ 41.

<sup>72</sup> *Id.* at ¶ 34.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Complaint, *In Re Pokémon Go Nuisance Litigation*, No. 16-cv-04300 at ¶ 35.

In light of the repeated requests made on the designated request form made through the Defendant's website that it remove the GPS coordinates placed on or near their residence, they received an automatic reply stating that it would "[be reviewed and appropriate action would be taken]".

### 3. Plaintiff: The Villas of Positano Condominium Association, Inc.

The third group to bring a complaint against the Defendants were The Villas of Positano Condominium Association, Inc. ("Association"). It is a non-profit corporation incorporated in the State of Florida.<sup>76</sup> The membership of the Association is comprised of the owners of the condominiums, located in Hollywood, Florida.<sup>77</sup> The Association collected the periodic association fees that each owner pays for the facilities, insurance, and community maintenance.<sup>78</sup> The claims brought are the same as the previous two Plaintiffs. Shortly after the release of the game, residents became aware of hundreds of non-residents coming onto its private property at odd hours in the morning and evenings.<sup>79</sup> Defendant Niantic, Inc. has designated the property as a Pokéstop labeled the "Greek Architect" because of the Villas' Mediterranean-influenced aesthetic.<sup>80</sup> Additionally, Niantic programmed the game to spawn certain rare Pokémon at the wee hours of the morning, which thereby resulted in increased traffic of non-residents on the property.<sup>81</sup> People would show up at early hours in the morning, park illegally, block driveways, and interact at very high volumes that would prevent residents from getting to sleep at night.<sup>82</sup> The condition of the property also suffered as garbage was left out on the property.<sup>83</sup> Additionally, as a result of no public bathroom facilities, a few residents discovered non-residents using the property as their own private toilet late at night.<sup>84</sup>

The Association also contacted Defendant Niantic through its website, requesting Niantic remove it as a PokéStop, which has resulted in trespassers, the deteriorating conditions of the landscaping, and the residents' inability to enjoy their property throughout the day and night. Similar to the Dodich's, this came with no success, just another automatic reply saying it would be looked into, yet, and it is still designated as a PokéStop in the game. Consequently, the Plaintiffs have hired off-duty police officers to patrol the property into early hours in the morning.<sup>85</sup>

As such, the Association has standing to bring this action on behalf of its members.<sup>86</sup>

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<sup>76</sup> *Id.* at ¶ 12.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at ¶ 30.

<sup>80</sup> *Id.* at ¶ 31.

<sup>81</sup> Complaint, *In Re* Pokémon Go Nuisance Litigation, No. 16-cv-04300 at ¶ 31.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at ¶ 31.

<sup>84</sup> *Id.* at ¶ 31.

<sup>85</sup> *Id.* at ¶ 32.

<sup>86</sup> *Id.* at ¶ 12.

## B. Who are the Defendant's Named in the Class Action?

### 1. Defendant: Niantic, Inc.

As mentioned earlier in this Article, Defendant Niantic, Inc. is a software development company headquartered in San Francisco, California.<sup>87</sup> In 2002, the company formed under the name Niantic Labs, an internal startup company at Google, Inc. and became its own independent entity in October 2015.<sup>88</sup> Niantic, Inc. is the developer and publisher of Pokémon Go and received a percentage of all revenues generated by the game.<sup>89</sup>

### 2. Defendant: The Pokémon Company

Defendant, The Pokémon Company (“Defendant Pokémon Company”) is responsible for the marketing and licensing of the Pokémon franchise.<sup>90</sup> It is headquartered in Tokyo, Japan and was established as a joint venture by Nintendo and *Game Freak/Creatures*, two other companies with copyright ownership in Pokémon.<sup>91</sup>

### 3. Defendant: Nintendo Co., Ltd.

Defendant Nintendo Co., Ltd. (“Defendant Nintendo”) is a multinational consumer and electronics software company headquartered in Kyoto, Japan.<sup>92</sup> Originating as a playing card company in 1889, Nintendo entered the video game industry in the 1970s and is the world’s largest video game company by revenue.<sup>93</sup> It holds a 32% ownership stake in Defendant Pokémon Company and received a percentage of all revenues generated by the Pokémon Go game.<sup>94</sup>

## C. What Are the Alleged Claims?

### 1. Nuisance

At common law, the tort of ‘nuisance’ is where an individual’s private interest in the use and enjoyment of their property has been interfered with or invaded in some way and causes significant harm.<sup>95</sup>

Plaintiffs have alleged that through the designation of specific GPS coordinates, Defendant Niantic intentionally placed Pokémon, Pokéstops, and/or Pokémon gyms on or near the properties of the Plaintiffs and other members of the proposed Class,

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<sup>87</sup> Complaint, *In Re* Pokémon Go Nuisance Litigation, No. 16-cv-04300 at ¶ 13.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at ¶ 14.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at ¶ 15.

<sup>93</sup> Complaint, *In Re* Pokémon Go Nuisance Litigation, No. 16-cv-04300 at ¶ 15.

<sup>94</sup> *Id.* at ¶ 15.

<sup>95</sup> *Nuisance*, Legal Dictionary, available at <http://legal-dictionary.thefreedictionary.com/Tort+of+nuisance> (2017).

which has caused numerous intrusions, property damage, threats of physical harm, and costs to clean up, maintain, and secure the properties.<sup>96</sup>

## 2. Trespass

At common law, the tort of ‘trespass’ is committed when an individual enters onto the land of another and causes a thing or a 3<sup>rd</sup> party to enter onto the property.<sup>97</sup>

Specifically, by placing specific GPS coordinates on or near the properties of the Plaintiffs, Defendant Niantic has caused Pokémon, Pokéstops, and Pokémon Gyms to be placed on or near the properties allowing for multitudes of people to enter onto Plaintiffs’ properties.<sup>98</sup>

## 3. Unjust Enrichment

Resulting from the popularity of Pokémon Go, Defendants have created a more immersive gaming experience which in turn has continued to increase the popularity and profitability of the game.<sup>99</sup> Specifically, this has encouraged millions of users to enter onto the properties of Plaintiffs and other members of the proposed Class.<sup>100</sup>

As mentioned earlier, Defendants continue to receive a percentage of all revenues generated by Pokémon Go.

As of May 2<sup>nd</sup>, 2017, a Stipulation with a Proposed Order Requesting the Modification of Hearing Date for Pending Motions and Initial Case Management Conference has been filed by Defendant Niantic, Inc., in lieu of the Case Management Conference set for June 15<sup>th</sup>, 2017.

The arguments set forth in the Complaint will presumably set forth precedent at the end of this case for future gaming applications incorporating the use of augmented reality and coding interfaces through mobile devices.

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<sup>96</sup> Complaint, *In Re* Pokémon Go Nuisance Litigation, No. 16-cv-04300 at ¶¶ 39-40.

<sup>97</sup> *Id.* at ¶ 48.

<sup>98</sup> *Id.* at ¶¶ 49-50.

<sup>99</sup> *Id.* at ¶ 57

<sup>100</sup> *Id.*