

Product Liability

Virtual Trespass, Real Property Collide in Pokémon Go Suits

Virtual trespass, meet real property (*In re Pokémon Go Nuisance Litig.*, N.D. Cal., No. 16-4300, motion filed 7/27/17).

Homeowners alleging Pokémon Go players wreaked havoc on their land in search of virtual quarry may soon learn if they can sue app maker Niantic Inc. for trespassing.

Niantic says the would-be class suits should be thrown out. There's no such thing as "virtual" trespass, the developer says.

A hearing on Niantic's dismissal motion is set for July 27 in the U.S. District Court for the Northern District of California.

Few court decisions have addressed app maker liability.

"In this case, the plaintiffs are obviously arguing for expansion of traditional trespass laws whereas the defendants argue that the traditional trespass laws, which require an actual physical invasion of property, apply," Lesli D. Harris of Stone Pigman in New Orleans told Bloomberg BNA.

As apps become more commonplace, though, "we will see expanding case law on app-maker liability," said Harris, whose practice includes intellectual property law.

Still Popular The game reached phenomenon status when it was released last summer, and still enjoys a large following.

But not everyone joined the throng.

Some homeowners say the ensuing gaggle of players bothered them or even fouled their properties while attempting to catch creatures placed on or near their homes by Niantic.

The suits raise "two related but distinct issues," Stanford Law School professor Mark A. Lemley told Bloomberg BNA: "Is Pokémon Go helping people trespass on land, and is placing a virtual Pokémon Go 'on' your land itself virtual trespass."

There is no current concept of "contributory trespass," or helping another to physically trespass without doing so yourself, said Lemley, the director of the Stanford Program in Law, Science, and Technology.

And "courts today generally don't recognize the idea of 'virtual trespass' by bits," he said.

For example, Lemley referred to a 2003 California Supreme Court decision, *Intel Corp. v. Hamidi*, that said unwanted emails to approximately 35,000 Intel employees over Intel's Intranet didn't constitute a trespass because they didn't damage the computer system.

But "this case may feel different because the virtual data appears to be physically located in a space the plaintiff owns," Lemley said.

A decision that Niantic could be held liable would be more legally significant than a dismissal, Marcus Chatterton of Balch & Bingham LLP in Birmingham, Ala., told Bloomberg BNA.

"The court would be affirming liability in an area where it has never really been explored before," said Chatterton, a technology-focused litigator.

Virtual World, Real Damage? Pokémon Go uses GPS and a smart phone camera. Players find, catch, train, and battle creatures called Pokémon—pocket monsters—that appear through augmented reality on device screens as if they are present in the real world.

New Jersey homeowner Jeffrey Marder, Michigan residents Scott Dodich and Jayme Gotts-Dodich, and The Villas, a Florida condominium association, seek to represent other U.S. homeowners whose properties became play areas.

The three separate suits were combined into one proceeding.

These are the only federal court suits brought against Niantic concerning Pokémon Go, according to Bloomberg Analytics.

The plaintiffs allege Niantic itself trespassed and created a nuisance by "placing" the Pokéstops—the places where players find their coveted Pokémon—on the virtual map.

Niantic also says it can't be held liable for the players' actions.

And allowing "virtual trespass" would threaten other apps that direct people to places, such as real estate listings or even parks or places to view rare birds, Niantic says.

Pomerantz LLP represents the plaintiffs.

Cooley LLP represents Niantic.

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