

Pokémon Go Raises Legal and Privacy Issues: Don't Get Caught While Trying to "Catch'em All"

By

Niantic, Inc.'s wildly popular Augmented Reality ("AR") mobile app, Pokémon Go, was released on July 6 in the United States. In the two weeks since then, it has been downloaded a whopping 30 million times worldwide, and is being played by 20 million daily active users. This technological phenomenon stands at the crossroads of gaming, social media, and pop culture. Even Hillary Clinton is talking about it on the campaign trail.

Pokémon Go requires players to visit real-life locations while looking at their smartphone screens in order to catch animated Pokémons, cute cartoon creatures popularized by Nintendo, which are superimposed onto the real-world landscape. With so many people playing the game, and so much of our society affected by it, it is important to start considering some of the legal implications and risks that Pokémon Go presents.

Disclaimer

Pokémon Go's Terms of Service Agreement disclaims "all liability related to any property damage, personal injury, or death." So you may not be able to blame Niantic Lab if, as recently happened in Baltimore, you crash into a police car as you try to play the game while driving. Such disclaimers are common to many consumer products and services, but AR experiences pose special concerns about distracted movement, so you may want to think twice before you waive your rights by playing. There is little doubt that Niantic Lab and players will be sued by uninvolved third parties who are injured by persons playing Pokémon Go.

Arbitration Opt-out Notice

Upon signing up, Pokémon Go players consent to the binding arbitration clause of the Terms of Service unless they opt out. In other words, you agree not to sue Niantic in a court of law. The exceptions under the clause are small claims court actions and intellectual property actions.

In order to preserve the right to litigate any claims they may have against the app's developer, players must send an e-mail to termsofservice@nianticlabs.com with "Arbitration Opt-out Notice" in the subject line, or in the alternative, mail the written notice to 2 Bryant St., Ste. 220, San Francisco, CA 94105, within 30 days of accepting the Terms of Service. Failure to do so will constitute a waiver of the right "to a trial by jury or to participate as a plaintiff or class member in any purported class action or representative proceeding" against Niantic. Because the app has only been available since July 6, that means that every player in the U.S. is still within the 30-day grace period to opt out of the binding arbitration clause.

Cybersecurity/ Data Privacy Risk

In order to play the game, either a Pokémon Trainer Club (PTC) account or a Google account has to be used. Almost everyone is choosing to use a Google account due to the high traffic on the PTC website.

The Pokémon Go app initially requested full access to users' Google accounts without providing any option to edit the privacy permissions. It has been reported that iPhone users were predominantly affected. The Google Play store states that the app may request access to a user's full network, camera, contacts, location, SD card storage, and Google Play billing service.

Although Niantic recently released a statement saying that they have fixed the issue and that the app only accesses basic Google profile information (user ID and email address), it would be safe to create a new Google account rather than signing in through your existing Google account if you have any concerns about third-party access to your personal data.

Click [here](#) to check if your version of Pokémon Go is infected by malware that leaves your device or your data vulnerable.

The app's privacy policy also gives Niantic permission to share "aggregate information and non-identifying information with third parties for research and analysis, demographic profiling, and other similar purposes," including disclosing information about you or your child "to government or law enforcement officials or private parties." Will this be the next battle ground for "free range" parenting, or will information on a child's Pokémon Go activities find its way into family law proceedings?

Pokémon Go users should understand that their activities and movements while playing Pokémon Go (and perhaps at other times) may be monitored by Niantic and may be used in unwelcome ways.

Workplace Concerns

If you have a Non-Disclosure Agreement or you may have trade secrets or other sensitive employer data in your Google account or elsewhere on your device, make sure it's adequately protected before you download Pokémon Go, to avoid compromising your employer's physical and intellectual property. And employers should review their employee handbook policies to prohibit their employees from installing apps like Pokémon Go that require account access on employer provided devices.

Trespass/ Attractive Nuisance

Players should remember that trespass laws still apply even when you are in augmented reality, and that playing the game is not an excuse for trespassing. As noted above, players can become so immersed in the chase for Pokémon that they don't realize they are walking into private property. A Virginia Sheriff's Office posted an alert on Facebook noting that they have "been experiencing a rise in Trespassing and Suspicious Activity events recently due to the new Pokemon Go app." They also cautioned players to "refrain from going onto property without proper permission or after appropriate times."

There is also a question of whether the placement of a so-called Pokémon Gym or Pokéstop on private property can create an attractive nuisance, which would create a duty for the private property owner to post a warning or take action to protect children. The app apparently uses some proprietary algorithm to determine which venues will become these high-concentration areas for Pokémon. However, the game does not offer property owners the option of removing themselves as a location where Pokémon reside. Even the most hallowed ground is not off limits, as the U.S. Holocaust Memorial Museum recently discovered. It will be interesting to see how property owners try to assert their rights to be Pokémon-free zones.

Target of Crime

Although playing the game itself seems harmless enough, it is easy to become the target of crime if you are not paying attention to your surroundings. Pokémon Go players should try to stay in groups while playing the game, avoid secluded areas, and stay on well-lit paths.

The game is tracking players' locations at all times. After all, the app relies on GPS to make the AR experience work. While GPS tracking is not uncommon for many types of apps, the fundamentally location-driven aspect of AR can raise new safety concerns, such as players being lured to specific spots where they get robbed. It seems that the game may have even claimed a death already. In Guatemala, a teenager was shot and killed while playing the game with his cousin. Police have speculated that "the attackers found the teenagers using the app itself - which has location features that make it possible to encourage people to go to specific areas, or to locate players."

GPS tracking aside, players may even risk robbery and other hazards simply by becoming too immersed in the game and not paying attention to their surroundings as they walk down the street with their eyes glued to their smartphone screen, which recently happened in Maryland.

Pokémon Go is a groundbreaking AR app and it is increasing in popularity. The game is bound to give players, employers, property owners, and public safety personnel many legal issues to consider,

particularly as it is released in more countries.

Law clerks Esna Abdulamit and Sarah Son contributed to this blog post.