

**COVER YOUR ASH<sup>1</sup>: UPHOLDING THE PHYSICAL ENTRY  
REQUIREMENT FOR TRESPASS IN THE AGE OF  
POKÉMON GO**

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INTRODUCTION

You and your friends are preparing for a Legendary weekend.<sup>2</sup> But this is not “legendary” in the way that Barney Stinson has popularized the phrase.<sup>3</sup> Peer-to-peer messenger applications such as Discord, Messenger, and WhatsApp curate a virtual community with members of your real community.<sup>4</sup>

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1. See PHILIP BATES, THE FASCINATING HISTORY OF POKÉMON 21 (2017), <https://static.makeuseof.com/wp-content/uploads/2017/11/The-Fascinating-History-of-Pokemon-Every-Fan-Must-Know.pdf> [<https://perma.cc/3J62-HDJ3>] (identifying Ash as the main character of the Pokémon anime series).

2. See *infra* text accompanying note 197 (explaining that “Legendary Pokémon” are the rarest in the game).

3. See Anna Silman et al., *Every Time Barney Says ‘Wait for It’ on How I Met Your Mother*, VULTURE (Mar. 31, 2014), <https://www.vulture.com/2014/03/barney-stinson-wait-for-it-legendary-compendium.html> [<https://perma.cc/6WBD-PNH9>] (explaining that “legendary” is one of character Barney Stinson’s oft-quoted lines).

4. See Stephanie Dube Dwilson, *‘Pokemon Go’: How to Find Nearby Trainers for Raids*, HEAVY (Jun 28, 2017) <https://heavy.com/games/2017/06/pokemon-go-how-to-find-nearby-trainers-players-for->

To get the most out of today, you will need to carefully map out your route. You have powered up your best team and are ready to rendezvous with the Trainers in your community to take down some Legendary bosses. After all, you “Gotta Catch ‘em All,” and you need some teammates to make that happen.<sup>5</sup>

Released in the summer of 2016, Pokémon Go quickly became one of the most downloaded mobile games.<sup>6</sup> Niantic produced and developed the Pokémon Go mobile app.<sup>7</sup> In the game’s first three weeks, mobile phone users downloaded the app more than 30 million times.<sup>8</sup> The game went on to set multiple records for the mobile-gaming industry.<sup>9</sup> In-app purchases reached \$206.5 million in the first month.<sup>10</sup> Although the game celebrated its third anniversary in 2019, a consistent introduction of new features and characters keeps players coming back for more.<sup>11</sup> Total revenue from the game as of March 2019 was \$2.4 billion, and Niantic’s daily revenue approached \$200,000 in April 2019.<sup>12</sup>

The game’s success has been called a phenomenon and is attributed in part to Pokémon being one of Nintendo’s best-selling brands.<sup>13</sup> Beyond brand,

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raids-coordinate-local-tips-pokemongo/ [https://perma.cc/BT23-ME6P] (listing third-party applications to coordinate gameplay).

5. See *infra* text accompanying note 197 (explaining that some rare Pokémon can only be caught with the help of teammates); see also Dan Rys, *Can’t Regret Them All: The Story of the Very Lucrative ‘Pokemon Theme’*, BILLBOARD (Aug. 1, 2016), <https://www.billboard.com/articles/news/7453639/true-story-behind-pokemon-theme-song> [https://perma.cc/DV9K-4HU6] (recounting the story behind the Pokémon theme song, known for its infectious tagline: “Gotta Catch ‘em All”).

6. See Jeff Grubb, *Pokémon Go Is at 75 Million Downloads as It Sets More Records*, VENTURE BEAT (July 25, 2016), <https://venturebeat.com/2016/07/25/pokemon-go-is-at-75-million-downloads-as-it-sets-more-records/> [https://perma.cc/XX46-PPQM] (reporting that Pokémon Go reached downloading milestones faster than any other app).

7. *Id.*

8. Answer to Second Consolidated Amended Class Action Complaint ¶ 4, *In re Pokémon Go Nuisance Litig.*, No. 3:16-cv-04300-JD (N.D. Cal. Apr. 24, 2018) [hereinafter Answer].

9. See Rachel Swatman, *Pokémon Go Catches Five New World Records*, GUINNESS WORLD RECORDS (Aug. 10, 2016), <https://www.guinnessworldrecords.com/news/2016/8/pokemon-go-catches-five-world-records-439327> [https://perma.cc/Y89S-T32G] (listing the records that Pokémon Go broke during its first month: most revenue, most-downloaded app, and most international top charts).

10. *Id.*

11. Andrew Webster, *Two Years Later, Pokémon Go Finally Has Some Competition*, VERGE (July 12, 2018), <https://www.theverge.com/2018/7/12/17562444/pokemon-go-ar-games-walking-dead-jurassic-world> [https://perma.cc/G2AS-P4MM] [hereinafter Webster, *Competition*] (discussing new generations of Pokémon and features for in-app battles and trades).

12. Mansoor Iqbal, *Pokémon GO Revenue and Usage Statistics (2019)*, BUS. APPS (May 10, 2019), <https://www.businessofapps.com/data/pokemon-go-statistics/> [https://perma.cc/V3P3-UM28].

13. Jack Rear, *Which Are Nintendo’s Most Valuable Franchises?*, VERDICT (Feb. 1, 2018), <https://www.verdict.co.uk/which-are-nintendos-most-valuable-franchises-nintendo-shares/> [https://perma.cc/44KJ-NWHD] (listing Pokémon second—after Mario—and Pokémon spin-off games at sixth). *But see* Shaun Musgrave, *Who Owns Pokémon, Anyway? It’s Complicated*, TOUCHARCADE (July 28, 2016), <https://toucharcade.com/2016/07/28/who-owns-pokemon-anyway-its-complicated/>

another feature that sets Pokémon Go apart from other mobile games is its augmented reality (AR) technology. AR uses technology to augment the user's experience beyond the five senses.<sup>14</sup> To do this, AR technology interfaces the real world with the digital world through a tangible device.<sup>15</sup> While AR might sound futuristic, it is already heavily incorporated into our daily lives.<sup>16</sup> One familiar example of AR technology is its use in televised sports: for example, the first-down line in football.<sup>17</sup> The goal of AR "is to make our everyday world inhabited by digital objects . . . to move the intertwinement between digital elements and users' everyday lives to a completely different level."<sup>18</sup> Pokémon Go creates this augmented experience by layering a digital gameboard over the player's physical world.<sup>19</sup> The game works using GPS and camera technology on the user's cellphone.<sup>20</sup> To play the game, players must physically move to new locations and use their phones to reveal objects.<sup>21</sup> In the game, users take on the role of Trainers and search for digital monsters called "Pokémon."<sup>22</sup> Trainers can collect Pokémon by encountering them on the augmented map—overlaid on the physical world—competing in a Raid with other Trainers at a digital Gym, or by trading with their friends.<sup>23</sup>

The gameboard is a digital map linked to the physical world.<sup>24</sup> This linkage is the subject of recent litigation involving Niantic and Pokémon Go.<sup>25</sup> In a consolidated class action, real property owners alleged that Niantic's augmented *digital* interface caused them *real-world* harm.<sup>26</sup> This Note will

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[<https://perma.cc/JHU9-J88E>] (explaining that Nintendo is one of several owners of the Pokémon brand and not the developer behind the mobile app).

14. BRIAN D. WASSOM, *AUGMENTED REALITY: LAW, PRIVACY, AND ETHICS* 19 (Chris Katsaropoulos ed., 2015).

15. *Id.*

16. *Id.* at 6.

17. *Id.* at 7–8.

18. Nicola Liberati, *Phenomenology, Pokémon Go, and Other Augmented Reality Games*, 41 *HUM. STUD.* 211, 213 (2017).

19. POKÉMON GO (Niantic, Android/iOS app. 2016) (downloaded using App Store) [hereinafter Pokémon GO! App].

20. See *What Is Pokémon Go, and How Does It Work?*, TECHBOOMERS, <https://techboomers.com/t/what-is-pokemon-go> [<https://perma.cc/4CK5-S9GR>] (explaining that Pokémon Go works by using a mobile phone's GPS to connect a player's real-world location to the app's map of items and showing that the player interface places virtual objects into live images from the phone's camera).

21. See *infra* text accompanying notes 76–83 (describing the app's basic design).

22. See *infra* text accompanying notes 76–83.

23. See *infra* text accompanying notes 76–83.

24. See *infra* text accompanying notes 76–77.

25. See Second Consolidated Amended Class Action Complaint *passim*, *In re* Pokémon Go Nuisance Litig., No. 3:16-cv-04300-JD (N.D. Cal. Aug. 28, 2017) (alleging that Niantic's virtual content intruded on the Plaintiffs' real property) [hereinafter Second Amended Complaint].

26. See *generally id.* (detailing the harms Plaintiffs suffered from the actions of Pokémon Go Trainers).

analyze the Pokémon Go litigation and argue that the game developer should not be held liable for the actions of the game users.

Part I of this Note will give a brief history of the Pokémon franchise leading up to the development of the Pokémon Go mobile app. Additionally, Part I will provide background information on AR technology, Niantic, and the predecessors to the Pokémon Go mobile app. In Part II, this Note will introduce the Plaintiffs' claims of trespass from the lawsuit *In re Pokémon Go Nuisance Litigation*.<sup>27</sup> This Part will then introduce the inducement-to-trespass and virtual trespass theories as advanced by the Plaintiffs. Next, it will present Niantic's Terms of Service and examine their enforceability in the Ninth Circuit.

Part II.B will introduce Niantic's new crowd-source approach to PokéStops and analyze whether the approach can successfully protect Niantic from future litigation based on virtual trespass theory. Although the parties ultimately settled, Niantic began taking steps during the litigation that suggest an attempt to moot the lawsuit.<sup>28</sup> Part II.E will discuss mootness and whether the changes made by Niantic have the potential to impact future lawsuits. Part III of this Note will provide the terms of the settlement agreement, discussing impacts to the game and the potential model that the settlement may create for other location-based AR developers. The Note ultimately concludes that Niantic should not be held liable under inducement-to-trespass or virtual trespass theories.

## I. BACKGROUND

### A. *Welcome to the World of Pokémon!*

"Pokémon" is a contraction of the Japanese words *poketto monsuta*, meaning "pocket monsters."<sup>29</sup> These pocket monsters are the "brainchild" of Satoshi Tajiri of Tokyo, Japan.<sup>30</sup> Satoshi loved collecting insects and exploring outside as a child.<sup>31</sup> His childhood memories, coupled with his feelings about urbanization, led him to develop the idea for Pokémon.<sup>32</sup> Satoshi wanted to develop a game that would allow children to "explore" despite having to stay

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27. *In re Pokémon Go Nuisance Litig.*, No. 3:16-cv-04300-JD (N.D. Cal. filed July 29, 2016).

28. See *infra* text accompanying note 216 (explaining that Niantic removed all game items from the Plaintiffs' property after litigation began).

29. BATES, *supra* note 1, at 4.

30. *Id.*

31. *Id.* at 5.

32. *Id.*

inside their homes.<sup>33</sup> Pokémon, inspired by insect collecting, is—at its core—a game about “collectable monster[s].”<sup>34</sup>

Pokémon’s Red and Green versions made their debut in Japan for the Nintendo Game Boy on February 27, 1996.<sup>35</sup> In the hand-held game, players take on the role of Trainers to collect, trade, and train their Pokémon to fight in Gyms and battle against their friends.<sup>36</sup> Pokémon Red begins with Professor Oak, the narrator of the story, who gladly welcomes and orients Trainers to game tasks: “Your very own [Pokémon] legend is about to unfold! A world of dreams and adventures with [Pokémon] awaits! Let’s go!”<sup>37</sup> Trainers enter the game and prepare to embark on an adventure to collect Pokémon.<sup>38</sup>

The world of Pokémon, set in the imaginary Kanto Region, originally contained 150 monsters.<sup>39</sup> The game owes much of its success to the presence of an “easter Egg”: Mew, the mythical 151st Pokémon.<sup>40</sup> An Easter Egg is a hidden game feature, typically added with the permission of the developer, that can be unlocked by completing events or tasks inside a game.<sup>41</sup> Game programmer Warren Robinett placed the first Easter Egg ever discovered in *Adventure* for Atari.<sup>42</sup> Pokémon designer and programmer Shigeki Morimoto created a 151st Pokémon for himself and his peers—it was never planned for public release.<sup>43</sup> A glitch in the game caused Mew, the 151st Pokémon who resembles a pink cat, to be released in a limited number of games.<sup>44</sup> Rumors of a mythical hidden Pokémon caused an increase in sales and publicity for the games.<sup>45</sup> Unless your game cartridge had a glitch, Mew was only available

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33. See *id.* Urbanization has made catching insects rare, and because kids play inside their homes, they have forgotten about catching insects. *Id.* Satoshi wanted to roll “everything I did as a kid” into one game: Pokémon. *Id.*

34. See *CoolGames Inc: Grandma Wants It Al Dente (feat. Chris Grant)*, POLYGON (Jan. 27, 2016), <https://player.fm/series/coolgames-inc/episode-1-grandma-wants-it-al-dente> (last visited Dec. 1, 2019) (marking on the importance of “collectable monster[s]” as an in-game feature).

35. BATES, *supra* note 1, at 6.

36. *Id.* at 7–8.

37. mtkennerly, *Pokémon Red Version: Game Script*, GAMEFAQS (July 26, 2007), <https://gamefaqs.gamespot.com/gameboy/367023-pokemon-red-version/faqs/48982> [<https://perma.cc/YAC4-T4DW>].

38. Answer, *supra* note 8, ¶ 2.

39. BATES, *supra* note 1, at 6, 8.

40. *Id.* at 6.

41. *Easter Egg*, TECHNOPEdia, <https://www.techopedia.com/definition/3786/easter-egg> [<https://perma.cc/6AKL-MZJ8>].

42. Melissa Brinks, *The Very First Easter Egg in Video Game History*, RANKER, <https://www.ranker.com/list/first-video-game-easter-egg-atari-2600-adventure/melissa-brinks> [<https://perma.cc/95RL-SSTH>].

43. BATES, *supra* note 1, at 6.

44. *Id.*

45. *Id.*

through the developer as a reward for winning official distribution contests and events.<sup>46</sup>

Pokémon Red and Green were followed by other versions.<sup>47</sup> Each new version begins similarly: Trainers are greeted by a Professor (usually named after a deciduous tree) and introduced to new Pokémon and regions to explore.<sup>48</sup> Each new set of Pokémon are referred to as a “Generation.”<sup>49</sup> Each time a player encounters or catches a Pokémon, the Pokémon is indexed into the player’s Pokédex—a digital encyclopedia of the monsters that a player has encountered.<sup>50</sup> One of the primary goals of the game is to complete the entries in the Pokédex, thus, achieving the status of Pokémon Master.<sup>51</sup>

### B. Niantic, Ingress, and AR Technology

Niantic is a leading AR gaming company.<sup>52</sup> The company has “pioneered real world gaming—adventures on foot with others—which has helped transform the Earth into the new game board.”<sup>53</sup> Niantic began as Keyhole in 2001.<sup>54</sup> Keyhole was a small startup comprised of “computer scientists, gamers, cartographers, and AI researchers” that produced an interactive 3D map of the planet designed to let users view and explore planet Earth.<sup>55</sup> Google acquired Keyhole in 2004 and rebranded the startup as Google Earth.<sup>56</sup> In the early 2000s, the AR technology from Keyhole served as a basis and inspiration for Google technologies like Google Maps, Street View, SketchUp, and Panoramio.<sup>57</sup>

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46. *Id.* at 6–7.

47. *Id. passim* (listing other versions including Blue, Yellow, Gold, Silver, Sapphire, Ruby, Emerald, Diamond, Black, White, Black 2, White 2, Sun, Moon, X, Y, Alpha Sapphire, Omega Ruby, Ultra Sun, Ultra Moon, FireRed, and LeafGreen).

48. Scott Baird, *Pokémon: 15 Things You Didn’t Know About Professor Oak (and the Other Professors)*, SCREEN RANT (Sept. 4, 2016), <https://screenrant.com/pokemon-things-you-did-not-know-about-professor-oak-willow/> [<https://perma.cc/G3L6-S7A3>].

49. BATES, *supra* note 1, at 7.

50. See Pokémon GO! App, *supra* note 19 (including, in the main menu, an option to view the Pokédex which indexes all encounters with each type of Pokémon).

51. *Pokedex*, BULBAPEDIA, <https://bulbapedia.bulbagarden.net/wiki/Pok%C3%A9dex> [<https://perma.cc/Z9QC-HQVA>].

52. *The Mobile AR Leaders of 2018*, NEXT REALITY (Oct. 4, 2018), <https://next.reality.news/news/nr30-mobile-ar-leaders-2018-0186095/> [<https://perma.cc/CK5Z-HEPD>].

53. *The Niantic Story*, NIANTIC LABS, <https://www.nianticlabs.com/about/> [<https://perma.cc/SE7R-V9DZ>].

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

In 2010, Niantic Labs was founded as a Google subsidiary.<sup>58</sup> Niantic's goal was to develop mobile gaming based on the Keyhole and Google platforms.<sup>59</sup> The first step was the production of Field Trip, Niantic's first app, which launched in 2012.<sup>60</sup> Field Trip allowed users to find landmarks and other real-world points of interest (POI) near their location.<sup>61</sup> This location-based-mapping technology created the underlying platform for Niantic's first gaming app, Ingress.<sup>62</sup> In Ingress, players compete in teams to claim landmarks, called portals, for their faction—essentially a world-wide game of virtual capture the flag.<sup>63</sup> After the success of Ingress, Niantic was spun off into an independent private company and began developing Pokémon Go in 2015.<sup>64</sup> In addition to Ingress and Pokémon Go, Niantic is also the developer behind a Harry Potter AR game.<sup>65</sup> The long-awaited app, Harry Potter: Wizards Unite released in June of 2019.<sup>66</sup> The app boasts the same mapping platform as Ingress and Pokémon Go, but with role-playing elements to enhance gameplay.<sup>67</sup> Additionally, Wizards Unite is based on more recent and robust cellphone data, yielding more spawn sites for player interactions.<sup>68</sup>

### C. The Next Iteration: Pokémon Go!

Although Pokémon was originally designed to entertain children indoors, Pokémon Go is designed to encourage exploration outside.<sup>69</sup> The game's spirit of exploration is key to the legal controversy surrounding Pokémon Go and

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58. *Id.*; NEXT REALITY, *supra* note 52.

59. *The Niantic Story*, *supra* note 53.

60. *Id.*; NEXT REALITY, *supra* note 52.

61. NEXT REALITY, *supra* note 52.

62. *Id.*

63. *Id.*

64. *Id.*; *The Niantic Story*, *supra* note 53.

65. *The Niantic Story*, *supra* note 53.

66. Chris Pereira, *Harry Potter: Wizards Unite Mobile Game from Pokemon Go Is Out Now for Free*, GAME SPOT (June 21, 2019), <https://www.gamespot.com/articles/harry-potter-wizards-unite-mobile-game-from-pokemo/1100-6467923/> [<https://web.archive.org/web/20190930222826/https://www.gamespot.com/articles/harry-potter-wizards-unite-mobile-game-from-pokemo/1100-6467923/>].

67. *Id.*

68. Clifford Colby, *Harry Potter: Wizards Unite Beats Pokemon Go Every Way but One*, CNET (June 25, 2019), <https://www.cnet.com/how-to/harry-potter-wizards-unite-best-pokemon-go-every-way-but-one/> [<https://web.archive.org/web/20190624014511/https://www.cnet.com/how-to/harry-potter-wizards-unite-bests-pokemon-go-every-way-but-one/>] (detailing differences between Wizards Unite and Pokémon Go, such as the larger number of structures in Wizards Unite, including inns, castles, greenhouses, and traces of magic).

69. See *The Niantic Story*, *supra* note 53 (explaining that Niantic's games are based on three core principles: "[e]xploration and discovery of new places," "[e]xercise," and "[r]eal world social interaction with other people").

other AR mobile games.<sup>70</sup> In 2016, twenty years after the release of the original games, Niantic released Pokémon Go for mobile platforms.<sup>71</sup> Trainers who grew up with the games as children can now explore and find familiar monsters in their homes, workplaces, and “in the wild.”<sup>72</sup>

Much like the original games and generations, Pokémon Go Trainers begin the game with a greeting from Professor Willow.<sup>73</sup> Professor Willow explains the game dynamics and structure of gameplay.<sup>74</sup> Trainers, the Professor explains, catch Pokémon by interacting with their real-world environment.<sup>75</sup> The game uses the device’s GPS to locate Trainers and display their avatars on the map.<sup>76</sup> As Trainers move in the real world, their avatar follows them on the map.<sup>77</sup>

To catch a Pokémon, Trainers first need to find Poké Balls.<sup>78</sup> These are an in-game item that Trainers “throw” at Pokémon in an attempt to catch them.<sup>79</sup> To throw a ball, Trainers manipulate the Poké Ball graphic on the screen with their finger—the action somewhat resembles use of a traditional videogame joystick.<sup>80</sup> Trainers can obtain Poké Balls by visiting a PokéStop or a Poké Gym.<sup>81</sup> PokéStops, Professor Willow tells Trainers, are “found at interesting places like sculptures and monuments.”<sup>82</sup> Niantic does not publish an official map of PokéStops or Gyms—the POI are only available to view through the app in the AR experience. However, game users have crowdsourced an online

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70. See Answer, *supra* note 8, ¶ 27 (“Pokémon Go is dependent in equal parts on both Defendant Niantic’s software code and on the existence of a physical space for its players to explore.”).

71. Grubb, *supra* note 6.

72. BATES, *supra* note 1, at 16. For example, see *My Brother, My Brother and Me: Face 2 Face: Live from Drowzee City*, MAXIMUM FUN (July 18, 2016), <https://www.maximumfun.org/my-brother-my-brother-and-me/mbmbam-312-face-2-face-live-drowzee-city>, in which long-time Pokémon fan Griffin McElroy plays Pokémon Go with his brothers, Justin and Travis, and their fans in Boston during a live podcast. See also Iqbal, *supra* note 12 (reporting that the average Pokémon Go player is 29 years old) (citing Larry Kim, *9 Need-to-Know Facts on How Pokemon Go Players Engage with Businesses*, INC., <https://www.inc.com/larry-kim/9-need-to-know-facts-on-how-pokemon-go-players-engage-with-businesses.html> [<https://perma.cc/8A29-GUHB>]).

73. HeroVoltsy, *Pokemon GO Part 1 - I Choose You! Gameplay Walkthrough*, YOUTUBE (July 5, 2016), <https://www.youtube.com/watch?v=aByfSY3iFh8>.

74. *Id.*

75. *Id.*

76. Answer, *supra* note 8, ¶ 2.

77. Pokémon GO! App, *supra* note 19.

78. HeroVoltsy, *supra* note 73.

79. Pokémon GO! App, *supra* note 19.

80. *Id.*; Answer, *supra* note 8, ¶ 2 (describing the motion that players use to throw Poké Balls as “swiping”).

81. Answer, *supra* note 8, ¶ 3; HeroVoltsy, *supra* note 73.

82. HeroVoltsy, *supra* note 73.



map and plotted locations near them to show other users popular locations to play the game.<sup>83</sup>

The online map and the game show Trainers the location of PokéStops that are associated with physical locations.<sup>84</sup> Trainers can then visit these locations to load up on supplies for exploring the digital world.<sup>85</sup> In addition to Poké Balls, Trainers can also obtain other helpful in-game items like potions, eggs, berries, or gifts to send to their friends.<sup>86</sup> Each trainer has a bag in which to store their digital supplies (an important aspect of gameplay is building stores of supplies to use when Trainers are unable to visit a PokéStop or Gym).<sup>87</sup> Once Professor Willow orients Trainers, they are ready to enter the world of Pokémon and compete to Catch ‘em All!

## II. THE POKÉMON CLASS ACTION

### A. *The Pokémon Plaintiffs*

At the core of *In re Pokémon Go Nuisance Litigation* is a dispute about whether digital content is placed on or “associated with” real property.<sup>88</sup> Adapting an adage, Benjamin Nimphie sums up the controversy:

If a tree falls in the forest, and no one is around to hear it, does it make a sound? By the same token, if a valuable Pokémon is digitally placed on your lawn, is the company whose algorithm spawned that Pokémon guilty of trespassing if a nearby gamer enters your property to catch it?<sup>89</sup>

Ingress, Pokémon Go’s predecessor, primarily associated POI with landmarks in public spaces; however, some of the in-game features of

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83. POGOMAP, <https://www.pogomap.info/> (last visited Nov. 26, 2019). For an idea of what the virtual layer looks like around you, visit the user-generated map at [pogomap.info](https://www.pogomap.info/).

84. *Id.*

85. See *Gathering Items at PokéStops and Gyms*, Niantic Labs, <https://niantic.helpshift.com/a/pokemon-go/?p=web&s=getting-started&f=gather-items-at-pokestops-and-gyms&l=en> [<https://perma.cc/42PP-4YU9>] (detailing the process the player can use to collect items at PokéStops and add them to the player’s inventory).

86. *Id.*

87. Pokémon GO! App, *supra* note 19 (path: touch the Poké Ball icon in the bottom of the screen, then select the backpack icon labeled “items” to view available supplies).

88. See Answer, *supra* note 8, ¶ 5 (disputing whether virtual objects like Pokémon, PokéStops, or Poké Gyms are placed on or “associated with” physical locations).

89. Benjamin P. Nimphie, *AR-Induced Trespass May Yet Be a Thing*, AUGMENTED LEGALITY (June 12, 2018), <http://augmentedlegality.wnj.com/?p=6863> [<https://perma.cc/5LZZ-TNKX>].

Pokémon Go are associated with private property.<sup>90</sup> Jeffery Marder, The Villas of Positano, Scott and Jayme-Gotts Dodich, Jill M. Barbarise, Jason Sarkis, Melissa Perez, “Sam” Cogshan Hao, Bruce Garton, Sally Rogers, Deborah J. Pimentel, and Loren Morgan filed nuisance and trespass claims against Niantic that are related to the association of Pokémon, PokéStops, or Poké Gyms with or adjacent to their private property.<sup>91</sup>

The above actions were consolidated into a single class action in the Northern District of California.<sup>92</sup> On November 28, 2018, the parties reached a settlement in principle.<sup>93</sup> Nine months later, on August 30, 2019, the court entered a final judgment adopting a settlement.<sup>94</sup> Although each Plaintiff had a unique experience with the game, the common complaint was that Niantic was incentivizing, or inducing, Trainers to visit real-world locations that are associated with PokéStops, Poké Gyms, and rare Pokémon.<sup>95</sup> Their complaints are as follows.

The Villas of Positano is a mixed residential and shopping center located in Hollywood, Florida. Previously, a PokéStop was associated with its location.<sup>96</sup> Originally associated with an image called “Greek Architect,” inspired by the Mediterranean architecture of the Villas, the PokéStop has since been removed.<sup>97</sup> The residents of the Villas complained that Trainers would gather at the PokéStop during late hours of the night, parking illegally, talking, shouting, and playing loud music.<sup>98</sup>

Sally Rogers is a property owner in Tesuque, New Mexico.<sup>99</sup> Her property is located adjacent to the Shidoni Foundry, Gallery, and Sculpture Gardens. She allows Shidoni to display sculptures on her property.<sup>100</sup> Before July 2016, Shidoni displayed a sculpture entitled “Bacon and Eggs” on her property, but it was purchased and removed before the release of Pokémon Go in July of

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90. WASSOM, *supra* note 14, at 169; *see* Second Amended Complaint, *supra* note 25, *passim* (alleging generally and specifically that Niantic placed game objects on private property); *see also supra* text accompanying notes 61–62 (discussing the types of POI locations for predecessor applications).

91. Second Amended Complaint, *supra* note 25, ¶¶ 51–125.

92. Consolidation and Case Management Order ¶ 2, *In re* Pokémon Go Nuisance Litig., No. 3:16-cv-04300-JD (N.D. Cal. Sept. 23, 2017).

93. Joint Notice of Settlement in Principle and Request to Vacate Schedule at 2, *In re* Pokémon Go Nuisance Litig., No. 3:16-cv-04300-JD (N.D. Cal. Nov. 29, 2018).

94. Order Approving Class Action Settlement and Entry of Final Judgment at 8, *In re* Pokémon Go Nuisance Litig., No. 3:16-cv-04300-JD (N.D. Cal. Aug. 30, 2019) [hereinafter Final Judgment] (adopting the proposed settlement as laid out in the Plaintiffs’ Motion in Support of Preliminary Approval of Settlement, cited at *infra* note 256).

95. Second Amended Complaint, *supra* note 25, ¶ 50.

96. *Id.* ¶ 52.

97. Answer, *supra* note 8, ¶ 52.

98. Second Amended Complaint, *supra* note 25, ¶ 53.

99. *Id.* ¶ 103.

100. *Id.* ¶ 104.

2016.<sup>101</sup> Unfortunately, Niantic did not get the message.<sup>102</sup> Despite the sale and removal of the sculpture, Niantic associated a PokéStop labeled “Bacon and Eggs” with Ms. Rogers’s property.<sup>103</sup> Ms. Rogers noticed an influx of people and visitors to the Sculpture Gardens in the summer of 2016.<sup>104</sup> She also noticed that many visitors wandered onto her property, looking lost, and holding up their smartphones.<sup>105</sup> She confronted one of the Trainers, and he showed Ms. Rogers that he was searching for the “Bacon and Eggs” statue that was no longer displayed on the property.<sup>106</sup>

After learning of the game and PokéStop, Ms. Rogers contacted Niantic to demand that the PokéStop be removed from her property.<sup>107</sup> She and other plaintiffs made requests by email or through a form on the Niantic website.<sup>108</sup> Plaintiffs received responses in the form of boilerplate emails that thanked the requester for their submissions and explained that Niantic reviews complaints and determines an appropriate action for each.<sup>109</sup> Ms. Rogers received a response four months later stating that Niantic would “promptly proceed in reviewing [her] request.”<sup>110</sup> Enraged, Ms. Rogers responded:

You sleazy pricks don’t seem to realize that you are not in the driver’s seat on this . . . Niantic et al has made millions off the inconvenience, intrusion, violation, and misery of others, and yet you blithely take a half a year to respond[—]and when you finally do it’s a do-nothing BULLSHIT EMAIL that merely repeats your previous asinine view that you have the right to “decide” whether I have to put up with your shit, vis-à-vis MY PROPERTY. Again, for your thick skulls: MY PROPERTY, not yours. The class action lawsuit I have joined, along with the US court system, will be the ultimate deciders and I am confident that you will be on the receiving-end of justice . . . Here’s my “suggestion” for you lazy-ass pricks in the meantime: Remove this location immediately, or you and your stupid gamers can and will suffer the consequences[—]all of them.<sup>111</sup>

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101. *Id.* ¶ 106.

102. *Id.*

103. *Id.* ¶ 109.

104. *Id.*

105. *Id.*

106. *Id.* ¶ 108.

107. *Id.* ¶ 114.

108. *Id. passim.*

109. *Id.* ¶ 115.

110. *Id.* ¶ 116.

111. *Id.* ¶ 117.

The award for most vocal plaintiff certainly goes to Ms. Rogers. However, the above response exemplifies the frustrations that she and the other plaintiffs experienced with the release of Pokémon Go.<sup>112</sup> The challenge for Plaintiffs is to convert their compelling stories of injury into actionable legal claims. As discussed below, Plaintiffs' primary legal theories are virtual trespass and inducement-to-trespass.<sup>113</sup>

## B. Legal Theories

### 1. Virtual Trespass Theory

Plaintiffs' first theory is that Niantic committed a virtual trespass by placing PokéStops, Poké Gyms, and Pokémon on their private property.<sup>114</sup> The tort of trespass requires an unauthorized entry onto real property.<sup>115</sup> To show an unauthorized entry, "a tangible entry upon the land was traditionally required."<sup>116</sup> However, virtual objects lack the physical element that defines a trespass.<sup>117</sup> In fact, a virtual object cannot enter real property; it is by its very nature intangible.<sup>118</sup> That is, game items and POI exist only on a server interfaced through a phone screen.<sup>119</sup>

During litigation, Niantic disputed the physical entry by arguing that "virtual objects cannot be 'placed' 'on' or 'adjacent' to a physical location."<sup>120</sup> Instead, virtual objects can only be "associated with" GPS coordinates.<sup>121</sup> Niantic's Answer to the Second Consolidated Amended Class Action Complaint reiterates the crucial distinction between tangible and virtual

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112. *Id.* ¶¶ 51–125 (quoting and summarizing a litany of complaints by private property owners, cemetery managers, county park operators, and others).

113. *Id.* ¶¶ 180–87.

114. *Id.*

115. RESTATEMENT (SECOND) OF TORTS § 158 (AM. LAW INST. 1965).

116. DAN B. DOBBS, THE LAW OF TORTS § 53, at 104 (2000).

117. See Jennifer Huddleston, *Can You Trespass Without Setting Foot on a Piece of Property?*, MERCATUS CTR. (June 28, 2018), <https://www.mercatus.org/bridge/commentary/can-you-trespass-without-setting-foot-piece-property> [<https://perma.cc/UZ7V-Z35F>] (noting that the Plaintiffs' case is unique because Plaintiffs accuse Niantic of trespassing without alleging that any individual developers physically entered private property).

118. Cf. Erica Neely, *Augmented Reality, Augmented Ethics: Who Has the Right to Augment a Particular Physical Space?*, 21 ETHICS & INFO. TECH. 11, 12 (2019), <https://link.springer.com/article/10.1007/s10676-018-9484-2> [ <https://perma.cc/T2A4-3HPK> ] (defining virtual objects as those that exist in the virtual world—a world that one can only access by using the appropriate technology).

119. See Answer, *supra* note 8, ¶ 2 (explaining that items in the game, such as a Pokémon, appear when a player nears certain GPS coordinates).

120. *Id.* ¶ 5.

121. See *id.* (describing Niantic's process for creating POI as "associated with" the points with the GPS coordinates of a location in the physical world).

property—virtual content can only be “associated” and never “placed.”<sup>122</sup> Under Niantic’s interpretation, virtual trespass theory is incompatible with traditional notions and definitions of the tort and should fail as a matter of law.<sup>123</sup> Additionally, none of the jurisdictions from which a named plaintiff in the class action came extends trespass to a virtual intrusion.<sup>124</sup>

Still, because the lawsuit eventually settled, the question of how AR content interacts with trespass remains unresolved.<sup>125</sup> As discussed below, prior to settlement the court denied Niantic’s motion to dismiss.<sup>126</sup> Denying the motion shows that virtual trespass, at least in the Northern District of California, may be a plausible theory.<sup>127</sup> Such a ruling creates dangerous implications for other AR and location-based applications. For example, Geotourist is an app that guides users to attractions and landmarks.<sup>128</sup> Strayboots provides self-guided tours that contain scavenger hunts.<sup>129</sup> The applications BirdsEye and EBird aid bird-watchers in identifying rare birds.<sup>130</sup> Once identified, bird-watchers can log and share the locations of bird species on a map; thereby allowing other users to visit the area and, with luck, glimpse the birds.<sup>131</sup>

Ultimately, courts should be reluctant to extend trespass theory to the virtual realm—especially for game-developer liability—because the law of trespass is aimed at protecting a possessory interest in land from an unauthorized intrusion.<sup>132</sup> Eliminating the physical-entry element would negatively impact applications serving these and other functions, forcing developers to remove content or go through the painstaking process of obtaining the consent of property owners.<sup>133</sup> Drawing on the tree adage: if a

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122. *Id.*

123. See Motion to Dismiss Plaintiffs’ Consolidated Class Action Complaint at 1, *In re Pokémon Go Nuisance Litig.*, No. 3:16-cv-04300-JD (N.D. Cal. Jan. 27, 2017) (“Plaintiffs contort real property torts.”).

124. See Reply Memorandum in Support of Motion to Dismiss Consolidated Class Action Complaint at 1, *In re Pokémon Go Nuisance Litig.*, No. 3:16-cv-04300-JD (N.D. Cal. Mar. 23, 2017) (pointing out that Plaintiffs could not and did not cite any authority for their virtual trespass allegations).

125. Final Judgment, *supra* note 94, ¶ 11 (ordering dismissal of all claims).

126. See *infra* text accompanying note 308–310.

127. Cf. *Nimphie*, *supra* note 89 (positing, in the case of Plaintiffs’ inducement-to-trespass theory, that the court’s decision to deny the motion to dismiss means that the theory is plausible).

128. Savanna Syms, *10 Apps That’ll Help You Tour a New City*, WHERE TRAVELER, <https://www.wheretraveler.com/advise/10-apps-thatll-help-you-tour-new-city> [https://perma.cc/8CY9-4JTQ].

129. *Id.*

130. Pranay Parab, *Bird Watching Apps: Five Useful Apps to Get Started with Birding*, GADGETS360 (Dec. 29, 2016), <https://gadgets.ndtv.com/apps/features/bird-watching-apps-five-useful-apps-to-get-started-with-birding-1640679> [https://perma.cc/GB6B-8RK6].

131. *Id.*

132. DOBBS, *supra* note 116, § 52, at 102.

133. See Huddleston, *supra* note 117 (predicting that virtual trespass theory would subject the average app developer to broad liability).

Pokémon appears in your home and no one is there to catch it, can a trespass really occur?<sup>134</sup>

## 2. Inducement-to-Trespass

In the alternative, Plaintiffs alleged that, although Niantic itself did not physically enter private property, it induced Trainers to do so.<sup>135</sup> However, trespass is an intentional tort,<sup>136</sup> and as the discussion below will show, plaintiffs in future cases will struggle to show intent by Niantic to enter—or to induce others to enter—private property.<sup>137</sup> Trespass must be “an affirmative act.”<sup>138</sup> Yet, Niantic’s Terms of Service, User Agreement, and Trainer Guidelines explicitly state that Niantic does not encourage—and, in fact, forbids—trespass.<sup>139</sup>

### C. Niantic’s Defense—Terms of Service

Niantic’s primary defense against Plaintiffs’ inducement-to-trespass theory is its User Agreement.<sup>140</sup> Niantic introduced the Pokémon Go Terms of Service in July of 2016 and maintained them in their original form until October of 2018.<sup>141</sup> The Terms of Service, as released in 2016 and at the time of the lawsuit, contained provisions that directly prohibited trespass and nuisance.<sup>142</sup> The original terms also forbade Trainers from “encourag[ing] or enabl[ing] any other individual to” violate applicable laws such as trespass and nuisance.<sup>143</sup> Niantic reiterated these terms in the most recent version of its

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134. *Cf. supra* text accompanying note 89 (adapting a well-known saying).

135. *See* Second Amended Complaint, *supra* note 25, ¶¶ 180–87 (chronicling the various acts of trespass by Trainers that Plaintiffs witnessed).

136. 7 STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, *AMERICAN LAW OF TORTS* § 23:3 (Monique C.M. Leahy ed., 2018).

137. *See infra* Part II.C.2.

138. SPEISER, KRAUSE & GANS, *supra* note 136.

139. *See Pokémon GO Terms of Service*, NIANTIC LABS, [https://perma.cc/C3G3-NFXP] [hereinafter *Original Terms of Service*] (preserving, as of November 5, 2017, the Pokémon GO Terms of Service, which have been updated several times since); *see also Pokémon GO Trainer Guidelines*, NIANTIC, [https://perma.cc/P9BX-WUV8] (preserving, as of September 10, 2018, the Pokémon GO Trainer Guidelines, which have since been updated).

140. *See* Answer, *supra* note 8, ¶ V (asserting as a defense that Niantic’s “conduct was not a substantial factor causing the alleged incidents”); *see also infra* notes 142–44 and accompanying text (noting that Niantic expressly forbids trespass on private property in the Pokémon Go Terms of Service).

141. *Original Terms of Service*, *supra* note 139.

142. *See id.* (prohibiting trespass explicitly by requiring that users agree not to “trespass, or in any manner attempt to gain or gain [sic] access to any property or location where you do not have a right or permission to be”).

143. *Id.*

Terms of Service, which became effective on May 15, 2019.<sup>144</sup> During the litigation, Judge James Donato denied Niantic's request for judicial notice of the Terms of Service.<sup>145</sup> When considering a Rule 12(b)(6) motion to dismiss, courts frequently take judicial notice of documents incorporated into the complaint by reference as well as publicly available information.<sup>146</sup> Here, Judge Donato allowed the suit to survive the motion because of the "novel" issues at play in the case.<sup>147</sup> While it is true that virtual trespass theory is novel, user agreements could not be more commonplace.<sup>148</sup>

The Terms of Service are important for two reasons. First, the Terms of Service represent an enforceable contract between Trainers and Niantic.<sup>149</sup> Second, to state a claim of trespass, Plaintiffs must show that the tortfeasor, allegedly Niantic, intentionally entered Plaintiffs' land.<sup>150</sup>

### 1. Enforceability of the Terms of Service

Digital user agreements that require a user to click "I agree" before providing services are commonly referred to as "clickwrap."<sup>151</sup> In the past, users have asserted that clickwrap agreements cannot be binding because a user cannot possibly agree to all of the terms in a contract simply by clicking a button.<sup>152</sup> In fact, the Plaintiffs argued that the mere existence of a user agreement provided no basis for concluding that any player read or paid

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144. *Niantic Terms of Service*, Niantic Labs, <https://nianticlabs.com/terms/en> [<https://perma.cc/U4JZ-KGJX>].

145. See Civil Minutes at 1, *In re Pokémon Go Nuisance Litig.*, No. 3:16-cv-04300-JD (N.D. Cal. Mar. 29, 2018) (holding that the user agreement was irrelevant to the motion-to-dismiss inquiry).

146. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (explaining judicial notice in the context of a motion to dismiss).

147. See Cara Bayles, *Pokémon Go Trespass Row Raises Novel Issues, Judge Says*, LAW360 (Mar. 29, 2018), <https://www.law360.com/articles/1027825> (last visited Nov. 26, 2019) (noting that none of the states involved in the class action have definitive high court decisions on virtual objects as they relate to a trespass claim).

148. See J. Craig Williams & Bob Ambrogi, *Lawyer 2 Lawyer: The Legal Issues Surrounding Pokémon Go*, LEGAL TALK NETWORK (Aug. 5, 2016), <https://legaltalknetwork.com/podcasts/lawyer-2-lawyer/2016/08/legal-issues-surrounding-pokemon-go/> (explaining that Pokémon Go's Terms of Service are standard for games of its kind).

149. Pokémon Go's Terms of Service provide: "You will indemnify and hold harmless Niantic, TPC, and TPCI and their respective officers, directors, employees, and agents, from and against any claims, disputes, demands, liabilities, damages, losses, and costs and expenses, including without limitation, reasonable legal and accounting fees arising out of or in any way connected with (a) your access to or use of the Services or Content, (b) your User Content, or (c) your violation of these Terms." *Original Terms of Service*, *supra* note 139.

150. RESTATEMENT (SECOND) OF TORTS § 158 (AM. LAW INST. 1965).

151. Michael Terasaki, *Do End User License Agreements Bind Normal People?*, 41 W. ST. U. L. REV. 467, 469 (2014).

152. *Id.* at 467–68 (asserting that the typical software user does not notice that they are agreeing to terms of use, much less enforceable ones).

attention to the terms of the agreement.<sup>153</sup> While Plaintiffs' assumption may have been true at one point, courts have generally enforced clickwrap agreements since the 1996 landmark ruling in *ProCD, Inc. v. Zeidenberg*.<sup>154</sup>

In *ProCD*, the plaintiff sold software with a license agreement encoded on a CD-ROM rather than printed on the exterior of the packaging.<sup>155</sup> Licenses or agreements contained within packaging are referred to as “shrinkwrap”—however, courts treat clickwrap and shrinkwrap as equivalents.<sup>156</sup> The software user license in question was also available in the printed software manual inside the box and in digital format every time the user ran the software.<sup>157</sup> The court held that shrinkwrap licenses are enforceable unless the terms are unconscionable or violate a rule of positive law.<sup>158</sup>

To reach its decision, the court in *ProCD* analyzed the steps involved in a typical transaction for goods or services.<sup>159</sup> The court found that consumers frequently make purchases without viewing contracts or policies.<sup>160</sup> This phenomenon is especially common in the software industry,<sup>161</sup> because only a small percentage of sales involve a physical exchange.<sup>162</sup> Next, the court applied the Uniform Commercial Code (UCC) to the concept of shrinkwrap.<sup>163</sup> Section 2-204(1) of the UCC states that “[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.”<sup>164</sup> In the case of the license in *ProCD*, the court held that Zeidenberg had agreed to be bound by the terms of the license by indicating his agreement—through a click—each time the software operated.<sup>165</sup>

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153. Plaintiffs' Opposition to Defendant Niantic's Request for Judicial Notice at 3, *In re Pokémon Go Nuisance Litig.*, No. 3:16-cv-04300-JD (N.D. Cal. Jan. 16, 2018) [hereinafter Opposition to Request for Judicial Notice].

154. Terasaki, *supra* note 151, at 471.

155. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996).

156. Terasaki, *supra* note 151, at 471.

157. *Id.*

158. *ProCD*, 86 F.3d at 1449.

159. *See id.* at 1451 (reviewing, among other things, the purchase of insurance, software, and consumer goods).

160. *Id.*

161. *Understanding Mobile Apps*, FED. TRADE COMM'N (Feb. 2017), <https://www.consumer.ftc.gov/articles/0018-understanding-mobile-apps> [<https://perma.cc/GTJ2-CF6Z>] (observing that app users often download content without considering how an app makes money or collects and shares information about its users).

162. *See ProCD*, 86 F.3d at 1451 (“Only a minority of sales take place over the counter, where there are boxes to peruse.”).

163. *Id.* at 1452.

164. U.C.C. § 2-204(1) (AM. LAW INST. & UNIF. LAW COMM'N 2012).

165. *ProCD*, 86 F.3d at 1452.



So too here. Like the license in *ProCD*, the Pokémon Go Terms of Service require the Trainer to signify their acceptance of the Terms of Service with a click.<sup>166</sup> Therefore, the Plaintiffs' assertion that no one read the agreement is irrelevant to the contract's enforceability.<sup>167</sup> The offeror is the master of the offer,<sup>168</sup> and Niantic has required Trainers to agree to the Terms of Service before allowing them to engage in gameplay.<sup>169</sup> Niantic has also reiterated parts of the Terms of Service each time a Trainer logs into the game.<sup>170</sup> Warnings include "Remember to be alert at all times," "Stay aware of your surroundings," "Do not trespass while playing Pokémon GO," and "Do not play Pokémon GO while driving."<sup>171</sup> A different warning appears at random each time the game is loaded on a Trainer's phone, and the user must click "OK" in order to begin gameplay.<sup>172</sup> This shows that Trainers are making a *repeated* affirmative action showing their assent to the terms that are outlined in Niantic's Terms of Service.<sup>173</sup>

The Ninth Circuit follows *ProCD* and explicitly extends that court's holding on license agreements to disputes involving a company's terms of service.<sup>174</sup> In *MYD Indus. v. Blizzard Entm't, Inc.*, the Ninth Circuit upheld the enforcement of World of Warcraft's Terms of Use, which was presented to users in clickwrap form.<sup>175</sup> The court held that the Terms of Use for World of Warcraft were "contract-enforceable covenants."<sup>176</sup> Therefore, under the precedent in the Ninth Circuit, a court should hold Niantic's Terms of Service, and its prohibition against trespass, as enforceable in any future litigation.<sup>177</sup>

## 2. Niantic's Lack of Intent

In addition to shielding Niantic from liability for its users' actions, the Terms of Service provide evidence that Niantic does not possess the requisite

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166. Pokémon GO! App, *supra* note 19.

167. *Cf. ProCD*, 86 F.3d at 1451 (reasoning by analogy that a traveler who makes a reservation can reject onerous terms by canceling the reservation, but "[t]o use the ticket is to accept the terms").

168. *See id.* (reasoning that the vendor—as master of the offer—can both invite acceptance and define what actions constitute acceptance).

169. Pokémon GO! App, *supra* note 19.

170. *See* Breanne L. Heldman, *Pokemon Go Adds New Safety Warnings*, ENT. WKLY. (July 31, 2016), <https://ew.com/article/2016/07/31/pokemon-go-new-safety-warnings/> [<https://perma.cc/ZSSN-B5E4>] (providing examples of messages that appear when a player logs onto the game).

171. *Id.*; Pokémon GO! App, *supra* note 19.

172. Pokémon GO! App, *supra* note 19.

173. *See ProCD*, 86 F.3d at 1452 (noting that the licensing terms appeared on the screen each time the user opened the software and the user could not proceed without accepting the terms).

174. Terasaki, *supra* note 151, at 472.

175. *MYD Indus. v. Blizzard Entm't, Inc.*, 629 F.3d 928, 957 (9th Cir. 2010).

176. *Id.*

177. *See id.* (holding that terms of use were enforceable under contract law).

intent to induce trespass. Courts in the Ninth Circuit routinely take judicial notice of websites and user agreements that are available online.<sup>178</sup> Although the court denied the request for judicial notice, the denial has no bearing on the evidentiary weight of the terms between Niantic and its Trainers once admitted.<sup>179</sup> At the time of the request for judicial notice, the court was also entertaining a motion to dismiss by Niantic.<sup>180</sup> The court may have been persuaded by Plaintiffs' argument that the Terms of Service were not "facts" within the meaning of the Federal Rules of Evidence.<sup>181</sup> Or, the court may have been hesitant, knowing that allowing judicial notice of the requested documents would convert a Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment.<sup>182</sup> Either way, the terms provide substantial evidence to negate the element of intent in Plaintiffs' inducement-to-trespass theory.<sup>183</sup> Moreover, although not a binding agreement, Niantic publishes a set of Player Guidelines, originally called Trainer Guidelines,<sup>184</sup> which explicitly prohibit trespassing.<sup>185</sup>

Further evidence of Niantic's lack of intent can be seen in its game design. Niantic has built a range feature, called a "mechanic," into Pokémon Go.<sup>186</sup> The Trainer stands on the map and moves in the physical world to move their avatar in the game.<sup>187</sup> As the avatar moves, a small circular pulse emanates from the avatar to a range of about 40 meter.<sup>188</sup> As the Trainer moves, so does

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178. See, e.g., *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 976 (N.D. Cal. 2015) (taking judicial notice of license agreements and policies that were "publicly available, standard documents"); *Moore v. Apple Inc.*, 73 F. Supp. 3d 1191, 1202 (N.D. Cal. 2014) (taking judicial notice of Apple's iOS agreements when granting a motion to dismiss); *Datel Holdings Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 983, 985 (N.D. Cal. 2010) (taking judicial notice of Microsoft's software license, Terms of Use, and website printouts because they were standard documents and publicly available online).

179. See Civil Minutes, *supra* note 145, at 1 (denying Niantic's request for judicial notice).

180. Defendant Niantic, Inc.'s Motion to Dismiss Plaintiffs' Second Consolidated Amended Class Action Complaint at 1, *In re Pokémon Go Nuisance Litig.*, No. 3:16-cv-04300-JD (N.D. Cal. Nov. 11, 2017).

181. Opposition to Request for Judicial Notice, *supra* note 153, at 2. Rule 201(b) of the FEDERAL RULES OF EVIDENCE limits judicial notice to facts. FED. R. EVID. 201(b).

182. See FED. R. CIV. P. 12(d) (providing that if the court considers anything outside of the pleadings in ruling on a motion to dismiss under Rule 12(b)(6), the court must treat the motion as a motion for summary judgment under Rule 56).

183. See *supra* Part II.B.2 (poking holes in Plaintiffs' inducement-to-trespass theory).

184. See *Pokémon GO Trainer Guidelines*, *supra* note 139.

185. *Id.* ("Please do not trespass, or in any manner gain or attempt to gain access to any property or location where you do not have the right or permission to be.")

186. Williams & Ambrogi, *supra* note 148; Sharon Boller, *Learning Game Design: Game Mechanics*, KNOWLEDGE GURU (July 17, 2013), <http://www.theknowledgeguru.com/learning-game-design-mechanics/> [<https://perma.cc/5JVE-SW6F>] ("A game's mechanics are the rules and procedures that guide the player and the game response to the player's moves or actions.")

187. *Id.*

188. *Id.* The image is reminiscent of sonar maps for a submarine. See Scott Bicheno, *As Pokémon GO Launches in the UK EE Reveals Record Uptake*, TELECOMS (July 14, 2016), <http://telecoms.com/474073/as-pokemon-go-launches-in-the-uk-ee-reveals-record-uptake/>

the set range.<sup>189</sup> The mechanic allows Trainers to interact with anything in their range, meaning that Trainers do not necessarily have to trespass or enter property to interact with a space.<sup>190</sup> In fact, Trainers can stand in one place and still interact with a variety of POIs around them.<sup>191</sup> In this way, a conscientious Trainer can avoid trespassing by choosing to interact only with the POIs that the Trainer can lawfully reach. The sheer number of POIs in the game means that resources are plentiful: if one POI is in a location that requires trespass, many more are not.<sup>192</sup> Niantic can argue that it included this feature in the game so that Trainers would not have an incentive to trespass.

#### *D. Game Updates, PokéStop Nominations, and Plaintiffs' Complaints*

Since the launch of the game and the consolidated class action, Niantic has released a number of new features and updates.<sup>193</sup> As the discussion below will show, many of the new guidelines and features are aimed at addressing the types of issues plaguing the class action Plaintiffs.<sup>194</sup> In June 2017, Niantic announced Raid Battles and updated Gym features.<sup>195</sup> The Raid feature allows for up to 20 Trainers to gather at a Gym to battle for a chance to catch a rare Pokémon.<sup>196</sup> The rarest type of Pokémon, called a “Legendary Pokémon,” can only be encountered by participating in a collaborative raid.<sup>197</sup> Legendary Pokémon appear in Raids for short periods of time, encouraging Trainers to plan ahead for their chance to add the Legendary to their Pokédex.<sup>198</sup> This new

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[<https://perma.cc/BE3H-TT96>] (depicting a Pokémon Go avatar surrounded by a circle, indicating the player's interactive range).

189. Pokémon GO! App, *supra* note 19.

190. See *Map Pokemon GO Wiki Guide*, IGN, <https://www.ign.com/wikis/pokemon-go/Map> [<https://perma.cc/GQ7M-9934?type=image>] (last updated Feb. 8, 2017) (explaining that players can act on game pieces within a set radius).

191. See Williams & Ambrogi, *supra* note 148 (explaining that players can see game pieces located within 40 meters of their digital signature).

192. See POGOMAP, *supra* note 83 (mapping a plethora of POIs, even in Vermont).

193. See *Updates*, Niantic Labs, <https://pokemongolive.com/en/post> [<https://perma.cc/BS5Y-VRLY>] (listing dates and linking to summaries of all updates pushed since the release of the game).

194. *Infra* Part II.D.

195. *Raid Battles and New Gym Features are Coming!*, Niantic Labs (June 19, 2017), <https://pokemongolive.com/en/post/raids/> [<https://perma.cc/7YDK-ZKQB>].

196. *Id.*

197. See *Legendary Pokémon Debut in Pokémon Go*, Niantic Labs (July 22, 2017), <https://nianticlabs.com/press/2017/legendaryrewards/> [<https://perma.cc/SRJ5-8NCD>] (announcing that Trainers can team up in order to battle Legendary Pokémon).

198. See, e.g., *Giratina Returns, Ready to Transform!*, Niantic Labs (Mar. 21, 2019), <https://pokemongolive.com/en/post/giratinareturns2019/> [<https://perma.cc/R8E4-9G2S>] (publicizing the return of the Legendary Pokémon, Giratina, for a limited time in Raid Battles).

feature is criticized in the Complaint for creating a “resurgence of interest in the game” and, as a result, a resurgence of Trainers congregating to battle.<sup>199</sup>

However, not all updates have renewed controversy. In September of 2018, Niantic released a new beta feature for Trainers to suggest or “nominate” new PokéStops for consideration.<sup>200</sup> At first, the beta feature was only available to Trainers in Brazil and South Korea,<sup>201</sup> but in November of 2019, Niantic launched the feature worldwide.<sup>202</sup> The feature allows Trainers who reach the highest level in the game to suggest new PokéStops by submitting images and descriptions of the suggested location.<sup>203</sup> The Ingress Operation Portal Recon (OPR) project reviews submissions.<sup>204</sup> Once a stop is reviewed, Niantic may decide to add it to the game.<sup>205</sup>

Trainers in rural locations frequently complain about a limited gameboard and are expecting the update to provide more POIs.<sup>206</sup> This update may be an attempt by Niantic to improve its board, but it may also be a response to the allegations in the class action. Plaintiffs alleged that Niantic is dependent upon having the largest board possible for players to engage with.<sup>207</sup> Granting Plaintiffs’ injunctive relief would make the game “less appealing . . . because there would simply be less to do.”<sup>208</sup> Any reduction of the game board has the potential to negatively impact revenue streams.<sup>209</sup> By crowd-sourcing new PokéStops, Niantic will be able to rapidly expand the game even while it removes other stops in response to the online request process.<sup>210</sup>

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199. Second Amended Complaint, *supra* note 25, ¶ 137.

200. Dom Peppiatt, *Pokemon GO UPDATE: PokeStop Nomination Beta Test REVEALED – How to Submit New PokeStops*, DAILY STAR (Sept. 12, 2018), <https://www.dailystar.co.uk/tech/gaming/729202/Pokemon-GO-UPDATE-Pokestop-Nomination-Beta-Test-REVEALED-How-to-Submit-new-Pokestops> [<https://perma.cc/TVY6-3UJF>]; *PokéStop Nomination Beta Comes to Brazil and South Korea!*, Niantic Labs, <https://pokemongolive.com/en/post/poi-submission-beta/> [<https://perma.cc/X6U2-PWBL>].

201. Peppiatt, *supra* note 200.

202. Paul Tassi, *How to Submit ‘Pokémon GO’ Pokestop Location Nominations in Your Area*, FORBES (Nov. 14, 2019), <https://www.forbes.com/sites/paultassi/2019/11/14/how-to-submit-pokmon-go-pokestop-location-nominations-in-your-area/#33a108ee54e0> [<https://perma.cc/DD4Z-K57N>].

203. Peppiatt, *supra* note 200.

204. *See id.* (specifying that the OPR project is made up of Ingress users).

205. Peppiatt, *supra* note 200.

206. *See* Jasmine Henry, *Pokemon GO Now Taking New PokeStop Nominations*, GAME RANT (Sept. 12, 2018), <https://gamerant.com/pokemon-go-pokestop-nominations/> [<https://perma.cc/4PRT-CKQF>] (explaining that rural players feel left out when compared to urban hubs).

207. Second Amended Complaint, *supra* note 25, ¶ 138.

208. *Id.*

209. *Id.*

210. *Submitting a PokéStop Nomination*, Niantic Labs, <https://niantic.helpshift.com/a/pokemon-go/?p=web&s=pokestops&f=submitting-a-pokestop-nomination&l=en> [<https://perma.cc/3JHY-7HCG>] (laying out the process that players can use to propose new PokéStops).

To aid Trainers, Niantic released a set of guidelines for nominating new PokéStops.<sup>211</sup> The guidelines address many of the issues in the Complaint, suggesting that Niantic is recruiting PokéStops that will avoid similar conflicts in the future.<sup>212</sup> Nominations that are “high-quality,” and meet the elements of the guide, have a higher chance of approval.<sup>213</sup> High-quality nominations include public parks; public libraries; places of worship; tourist attractions; locations with “[a] cool story, a place in history or educational value”; unique art or architecture; and local “hidden gem[s].”<sup>214</sup> Low-quality nominations are considered ineligible and include nominations that do not have pedestrian access; primary and secondary schools or childcare centers; items within private residential properties; seasonal items; graffiti; and private residences that are also historic landmarks.<sup>215</sup> During the litigation, Niantic removed in-game items such as PokéStops and Poké Gyms from Plaintiffs’ properties.<sup>216</sup> But, PokéStops like those associated with Plaintiffs’ properties fall into many of the ineligible categories.<sup>217</sup>

For example, Plaintiff Jeffery Marder alleged that at least five individuals came to his house to ask for access to his backyard after the release of the game.<sup>218</sup> Plaintiff Jill M. Barbarise also experienced Trainers seeking to enter her property to interact with a PokéStop.<sup>219</sup> Melissa Perez experienced a similar issue with her property.<sup>220</sup> Niantic previously designated the swimming pool in her back yard as a PokéStop or Gym.<sup>221</sup> Under Niantic’s new system, “[p]rivate residences [and] private residential property” are not eligible for nomination.<sup>222</sup> No new PokéStops could be positioned within the boundaries of back yards or residential properties—eliminating future disputes like those experienced by the Plaintiffs here.<sup>223</sup>

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211. *Id.*

212. *Compare* Second Amended Complaint, *supra* note 25, ¶ 5 (noting that many original PokéStops were adjacent to or actually on private property), *with* *Submitting a PokéStop Nomination*, *infra* note 215 (explaining that new PokéStop submissions are ineligible if they are on private property).

213. *Submitting a PokéStop Nomination*, *supra* note 210.

214. *Id.*

215. *What Makes a High-Quality PokéStop?*, Niantic Labs, <https://niantic.helpshift.com/a/pokemon-go/?l=en&s=pokestops&f=what-makes-a-high-quality-pokestop&p=web> [<https://perma.cc/ZX7L-GRC7>].

216. Answer, *supra* note 8, *passim*.

217. Second Amended Complaint, *supra* note 25, *passim*.

218. *Id.* ¶ 51.

219. *Id.* ¶ 70.

220. *Id.* ¶ 86.

221. *Id.* ¶ 87.

222. *Submitting a PokéStop Nomination*, *supra* note 210.

223. *Id.*

Plaintiff Jason Sarkis complained that a sign indicating an entrance to a public park, adjacent to his property, was associated with a Poké Gym.<sup>224</sup> Although Niantic has since removed the Poké Gym, a public marker to a trail may still be eligible under the new nomination procedures.<sup>225</sup> Niantic encourages adventurous interactions with the real world as a primary element of gameplay, and “[a]dventurous tourist attractions . . . signs or markers atop mountain peaks, etc.” remain eligible under the new nomination criteria.<sup>226</sup> Such a PokéStop may be ineligible based on its location within private property, but little information is available on which criteria will control in a conflicting situation like this.<sup>227</sup> If it is Niantic’s goal to increase the gameboard while avoiding conflicts and responding to the suit, one can expect them to err on the side of caution to limit interference with private property owners.<sup>228</sup>

Plaintiff Sally Rogers experienced disturbances on her property associated with a piece of artwork that was removed before the release of the game in 2016.<sup>229</sup> The artwork was on loan from a sculpture museum and was only a temporary installation.<sup>230</sup> Under the new guidelines, “[nominations] that are not permanent” are ineligible.<sup>231</sup> Limiting nominations to permanent displays will avoid attracting Trainers to areas where no real POI exists. This guideline is aimed at limiting suggestions that are seasonal displays, but it would also apply to situations like the one experienced by Ms. Rogers.<sup>232</sup>

Other guidelines for suggesting PokéStops directly address complaints that Niantic has received through its online system and through media attention.<sup>233</sup> Niantic has already been responsive, removing locations at culturally sensitive locations such as the Holocaust Museum in Washington, D.C.;<sup>234</sup> its new guidelines continue this trend by declining to accept nominations that are cemeteries, gravestones, or burial grounds.<sup>235</sup> Regardless of whether these features are addressing the litigation specifically or AR

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224. Second Amended Complaint, *supra* note 25, ¶ 75.

225. *Id.* ¶ 81; *Submitting a PokéStop Nomination*, *supra* note 210.

226. *What Makes a High-Quality PokéStop?*, *supra* note 215.

227. *Submitting a PokéStop Nomination*, *supra* note 210 (covering, in detail, the process players can use to suggest PokéStops but providing no explanation of the review process).

228. *See* Second Amended Complaint, *supra* note 25, ¶ 155 (identifying the risks Niantic faces from litigation, including a reduced gameboard and lost revenues).

229. *Id.* ¶ 106.

230. *Id.*

231. *Submitting a PokéStop Nomination*, *supra* note 210.

232. *Id.*

233. *Compare Submitting a PokéStop Nomination*, *supra* note 210 (specifying that all nominations must be to permanent POIs), with Second Amended Complaint, *supra* note 25, ¶ 106 (stating that the “Bacon and Eggs” sculpture was only temporarily located on Ms. Rogers’s property as part of a museum display).

234. Answer, *supra* note 8, ¶ 5.

235. *What Makes a High-Quality PokéStop?*, *supra* note 215.

gaming generally, Niantic's beta feature will likely produce higher-quality PokéStops and an interface that is less likely to disrupt real-property owners.

### *E. Can Niantic Easily Moot Future Claims?*

While the new guidelines do not solve all of Niantic's issues, the company may retain the power to moot many future lawsuits.<sup>236</sup> Mootness rests in the "case or controversy" requirement of Article III.<sup>237</sup> Under Article III, the role of the court is to decide actual controversies, not controversies that have already been remedied outside of the judicial system: courts are not "empowered" to decide moot cases.<sup>238</sup> Whether a case is moot depends on the continuation of the involved controversy.<sup>239</sup> The burden to prove mootness rests on the asserting party, usually the defendant.<sup>240</sup> A case is generally considered to be moot if a judicial ruling will not provide redress.<sup>241</sup> Frequently, a case becomes moot after the suit is filed because the circumstances leading to the litigation change.<sup>242</sup> For example, in *In re Pokémon Go Nuisance Litigation*, Niantic mooted the named Plaintiffs' claim for injunctive relief by removing associated game content from their properties.<sup>243</sup>

Generally, courts do not consider a claim to be moot as long as there is a continuing injury to the plaintiff for which a court can grant relief.<sup>244</sup> Thus, Niantic faces two hurdles in its attempts to moot future lawsuits. First, Plaintiffs sought damages in addition to injunctive relief in *In re Pokémon Go*

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236. See David Hill Koysza, Note, *Preventing Defendants from Mooting Class Actions by Picking off Named Plaintiffs*, 53 DUKE L.J. 781, 781 (2003) (observing that class action defendants have exploited the mootness doctrine to force dismissal of cases and, thus, minimize liability).

237. *Id.* at 805; U.S. CONST. art. III, § 2, cl. 1.

238. See *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920) (quoting *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 314 (1893)) (reciting that the Court is not empowered to decide moot questions when a "controversy has come to an end"); see also *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. at 314 ("The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it.").

239. *Moot Case*, BLACK'S LAW DICTIONARY (10th ed. 2014).

240. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000).

241. *Woodward Park Homeowners Ass'n v. Garreks, Inc.*, 77 Cal. App. 4th 880, 888 (2000).

242. Sidney A. Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. PENN. L. REV. 125, 126, 130–31, 140 (1946) (explaining that a suit can become moot after it is commenced if, for example, the parties settle, merge, or permanently cease their harmful conduct).

243. Answer, *supra* note 8, *passim*.

244. See, for example, *Chafin v. Chafin*, 568 U.S. 165, 173–75 (2013), which discussed mootness at length in the context of a child abduction. The Court held that the dispute between the parents involved was not moot because the custody of the child presented an unresolved and ongoing issue. *Id.* The Court also noted that the prospects of success in the suit did not factor into the mootness inquiry. *Id.*

*Nuisance Litigation.*<sup>245</sup> Monetary damages are not continuing and cannot become moot because they accrue based on past conduct.<sup>246</sup> In the lawsuit, Plaintiffs claiming monetary damages included Jill M. Barbarise,<sup>247</sup> Melissa Perez,<sup>248</sup> and The Villas of Positano.<sup>249</sup> Although those claims have settled, there are potentially many more claimants with similar issues due to the scale of Niantic's digital content.<sup>250</sup>

Second, the voluntary cessation of conduct is not enough to moot all claims.<sup>251</sup> In *United States v. W.T. Grant Company*, the Supreme Court held that ceasing conduct would only suffice to moot a lawsuit if the defendant established that "there is no reasonable expectation that the wrong will be repeated."<sup>252</sup> Under this precedent, courts have dismissed issues as moot only when defendants make absolutely clear that the injurious behaviors will no longer continue.<sup>253</sup> Under these circumstances, Niantic's new policies and procedures are not enough to address the ongoing issues associated with the nuisance and trespass claims in the class action.<sup>254</sup> It is likely that the new PokéStop nomination standards will improve issues of trespass by removing POIs located within residential properties and historical markers used for residential purposes.<sup>255</sup> However, this will not be enough to moot a class action

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245. See Second Amended Complaint, *supra* note 25, ¶ B (demanding an award of monetary damages and an injunction).

246. See *Board of Pardons v. Allen*, 482 U.S. 369, 370 n.1 (1987) (finding that the plaintiffs' claims did not become moot when they were released on parole because the plaintiffs also sought damages).

247. See Second Amended Complaint, *supra* note 25, ¶ 72 (alleging that Ms. Barbarise paid \$150 to have ground stakes in a fence replaced after Trainers entered her property and attempted to pull the gate open).

248. See *id.* ¶ 90 (alleging that Ms. Perez spent \$3000 to replace a fence after players attempted to enter her property and an additional \$100 to replace construction materials stolen while the fence was being rebuilt).

249. See *id.* ¶ 55 (alleging that Trainers' presence on the property compelled the condominium to hire security guards to handle the increased nighttime foot traffic and pay for extra trash removal and litter cleanup).

250. See Pogomap, *supra* note 83.

251. See *supra* text accompanying note 216 (explaining that Niantic removed all POIs from the Plaintiffs' property after litigation began).

252. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 448 (2d Cir. 1945)).

253. *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968).

254. See Second Amended Complaint, *supra* note 25, *passim* (identifying the claims advanced in this litigation).

255. See *What Makes a High-Quality PokéStop?*, *supra* note 215 (explaining that residential properties, including historical properties which are actively occupied as residences, are ineligible to become a PokéStop or Poké Gym).



claim because there is still a reasonable expectation that a class member may encounter a problem with existing PokéStops or Poké Gyms.<sup>256</sup>

If future courts decline to extend virtual trespass at common law, Niantic could conceivably moot an individual claim. On the other hand, if a court follows the inducement-to-trespass theory, trespass claims are likely to remain an ongoing issue for PokéStops and Poké Gyms that are already programmed in the game. Either way, Niantic should consider expediting the process for updating and removing current PokéStops after the three-year settlement period ends.<sup>257</sup> Niantic is notoriously slow in responding to its online service forms for requesting removal of in-game content.<sup>258</sup> Although the named Plaintiffs are not experiencing ongoing damages for trespass (because Niantic has responded to their individual complaints), other potential class members may not be similarly situated.<sup>259</sup>

Niantic has the discretion to remove any in-game item that a property owner or a Trainer reports.<sup>260</sup> Decreasing response time may provide an effective means to address disputes and resolve issues with property owners before disputes escalate to litigation.<sup>261</sup> While this may not have been possible at the time of the game's release, it is likely that the volume of reported stops and incidents has become manageable.<sup>262</sup>

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256. See Plaintiffs' Motion in Support of Preliminary Approval of Settlement at 19, *In re Pokémon Go Nuisance Litig.*, No. 3:16-cv-04300-JD (N.D. Cal. Mar. 14, 2019) [hereinafter Motion in Support of Settlement] (describing the class membership as including people and properties throughout the country).

257. See Final Judgment, *supra* note 94, ¶ 7 (mandating a resolution of reported issues in 15 days). *Id.* ¶ 8.

258. See, e.g., Second Amended Complaint, *supra* note 25, *passim* (providing many examples of Plaintiffs who requested removal of in-game content and received only automated replies). Some Plaintiffs did receive responses that required follow-up information showing ownership interest in the properties mentioned in the complaint form and eventually received notice that the content was removed. *Id.* However, most Plaintiffs waited upwards of four months to receive any personalized contact from Niantic despite reaching out on more than one occasion to submit removal requests. See, e.g., *Id.* ¶ 116 (describing how Ms. Rogers waited four months for a personalized email from Niantic).

259. See Answer, *supra* note 8, *passim* (admitting that PokéStops were previously associated with Plaintiffs' property but have since been removed).

260. See Second Amended Complaint, *supra* note 25, ¶ 3 (asserting that Niantic is the game developer and controls the placement and removal of game items).

261. Stephanie Fogel, *Pokemon Go Creator Niantic Will Allow 130 Foot Buffer Zones to Protect Private Property from Trespassing Players*, BUS. INSIDER, (Feb. 15, 2019), <https://www.businessinsider.com/pokemon-go-new-rules-private-property-legal-settlement-2019-2> [<https://perma.cc/8TWW-VNLX>] (reporting that the settlement requires Niantic to respond to complaints within 15 days).

262. See Second Amended Complaint, *supra* note 25, ¶ 116 (quoting an email message from Niantic stating that responses were delayed "due to the unusually high usage of the game, and subsequent requests, for both the removal and addition of game locations").

### III. FINAL SETTLEMENT’S POTENTIAL IMPACT ON ABOVE ANALYSIS

The Final Settlement addresses many of the above issues.<sup>263</sup> During the three-year settlement period, Niantic has agreed to improve its procedures for addressing complaints and modify some aspects of gameplay.<sup>264</sup> The Settlement addresses POIs such as PokéStops or Poké Gyms.<sup>265</sup> Notably, spawn sites are absent from the agreement, despite being an initial point of contention in the Second Amended Complaint.<sup>266</sup> For the settlement period, Niantic will maintain a website related to removal of POIs and respond to complaints—resolving 95% annually.<sup>267</sup> The Settlement does not state whether “resolve” means to remove the disputed POIs in all cases.<sup>268</sup> Instead, “Niantic will use [commercially reasonable efforts] to resolve the complaints and communicate a resolution” within 15 days.<sup>269</sup> However, when the contested POI is within 40 meters of a “single-family residential property,” Niantic agrees to remove the POI within five business days of resolving the complaint.<sup>270</sup> A time-sensitive remedial measure responds to the distress and anger experienced by plaintiffs like Ms. Rogers, who waited months for Niantic to respond to requests through an online portal.<sup>271</sup> However, the text of the Final Settlement does not specify under what conditions a non-residential POI must be removed; it only states that Niantic has 15 days to resolve an issue and communicate to the complainant.<sup>272</sup>

The Final Settlement also addresses Niantic’s crowd-sourcing strategy of PokéStop nominations.<sup>273</sup> Niantic has agreed to update the current nomination evaluation instructions to increase scrutiny of nominations that *may* be within 40 meters of single-family residential properties and neighborhood parks.<sup>274</sup> Among other things, the updated instructions will direct nomination reviewers to investigate the proposed POI using mapping services that will help inform

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263. See generally Final Judgment, *supra* note 94 (approving the parties’ settlement agreement).

264. *Id.* ¶ 7.

265. *Id.* ¶ 8.

266. Compare *id.* (omitting any mention of spawn sites), with Second Amended Complaint, *supra* note 25, ¶ 177 (emphasis added) (“The invasion . . . remains ongoing . . . [as] Niantic continued to designate GPS coordinates on or near the properties of Plaintiffs and other members of the proposed Class as Pokémon spawning locations, Pokéstops and/or Pokémon gyms in *Pokémon Go*.”).

267. Final Judgment, *supra* note 94, ¶ 7.

268. See *id.* (requiring removal of POI associated with “single-family residential property” but remaining silent on other conditions triggering removal).

269. *Id.*

270. *Id.*

271. See Second Amended Complaint, *supra* note 25, ¶ 114 (lambasting Niantic’s months-long delay in responding to emails).

272. Final Judgment, *supra* note 94, ¶ 7.

273. *Id.*

274. *Id.*

the reviewer of the POI's relation to single-family residential properties.<sup>275</sup> Niantic was not willing to give so much ground on POIs in public parks.<sup>276</sup> As previously discussed, Ingress and Pokémon Go rely heavily on public parks and spaces—presumably to avoid conflicts like the current litigation.<sup>277</sup> Nonetheless, in the Final Settlement, Niantic agreed to maintain a registry for parks where parks may request that the POIs inside the boundaries are limited to the official hours of operation.<sup>278</sup> Niantic will publicize this opportunity to parks annually during the three-year settlement term.<sup>279</sup> Limiting POIs inside parks to the location's specific hours of operation will burden Niantic in terms of programming, but it appears to be a good compromise that allows Niantic to maintain the current gameboard inside public parks.<sup>280</sup>

To address social mechanisms outside of virtual gameplay, the Final Settlement requires Niantic to push notifications to users who are participating in Raids “which Niantic's systems indicate will involve more than 10 participants.”<sup>281</sup> The text of the notification is left to the “sole discretion” of Niantic, but the intention is to remind Trainers to be respectful and courteous to others.<sup>282</sup> In addition to warning Raid participants, Niantic will also add a new warning to the rotating warnings already pushed at the start of each game session.<sup>283</sup> In fact, updated warnings went live in July 2019, prior to the final judgment.<sup>284</sup> The Final Settlement suggests that the warning will state, “[b]e courteous to members of real-world communities as you play Pokémon GO,” but again, Niantic has retained the discretion to select the final language.<sup>285</sup> The new warnings added in July 2019 contain the same text from the original rotating warnings, however, Niantic has increased the size of the warning and added a yellow warning triangle image.<sup>286</sup> The additional push notifications do

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275. *Id.*

276. *See supra* text accompanying note 213–14 (identifying public parks as a high-quality nomination for a PokéStop).

277. *See supra* notes 177–78 and accompanying text (discussing the Ninth Circuit's judicial notice of user agreements); *see also supra* note 139 and accompanying text (explaining that Niantic's user agreement forbids trespass).

278. Final Judgment, *supra* note 94, ¶ 7.

279. *Id.*

280. *Compare* Second Amended Complaint, *supra* note 25, ¶ 155 (acknowledging that the lawsuit put Niantic's gameboard in jeopardy), *with* Motion in Support of Settlement, *supra* note 256, at 13 (outlining Niantic's compromise on public parks), *and* Final Judgment, *supra* note 94, ¶ 7 (adopting the compromise).

281. Final Judgment, *supra* note 94, ¶ 7.

282. *Id.*

283. *Id.*

284. *Pokémon GO Warning Screens Updated to Include New Images*, POKÉMON BLOG (July 7, 2019), <https://pokemonblog.com/2019/07/07/pokemon-go-warning-screens-updated-to-include-new-images/> [<https://perma.cc/2WQ2-96LM>].

285. Final Judgment, *supra* note 94, ¶ 7.

286. *See* POKÉMON BLOG, *supra* note 284.

not overburden Niantic; however, it is unclear how effective additional warnings will be to address issues of nuisance or trespass.

Finally, Niantic has agreed to self-auditing and outside-monitoring of the obligations in the Final Settlement.<sup>287</sup> A “statistically significant percentage” of new POI nominations must be reviewed manually with the purpose of avoiding POIs that are likely to create nuisance or trespass issues.<sup>288</sup> Manual review may be conducted by a Niantic employee or a private contractor.<sup>289</sup> Additionally, an outside contractor will conduct audits at Niantic’s expense at a time of Plaintiffs’ choosing.<sup>290</sup>

Overall, the Final Settlement agreement appears to allow Niantic to maintain some discretion for resolving complaints and removing Poké Gyms and PokéStops.<sup>291</sup> The Final Settlement limits Niantic’s discretion for single-family residences and somewhat for parks.<sup>292</sup> However, parks will have to request that Niantic limit POI to hours of operation, placing the burden on government actors to file a request rather than imposing a bright-line limitation.<sup>293</sup> While all of the above terms strike a balance between the right to exclude and the rights of game developers, it is important to remember that the settlement term is only a three-year period and applies only to Pokémon Go.<sup>294</sup>

If Niantic’s success with Pokémon Go and Harry Potter: Wizards Unite are any indication, the issues involved are unlikely to decline. The new Harry Potter game is built on the same mapping platform as Pokémon Go.<sup>295</sup> Additionally, Harry Potter boasts a variety of new features that rival the Pokémon Go suite.<sup>296</sup> New features include professions, skill trees, combat, and a narrative story.<sup>297</sup> Techradar calls the app “[y]our forever Harry Potter game,” promising that the game has longevity and that Niantic is already planning post-launch updates.<sup>298</sup>

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287. See Final Judgment, *supra* note 94, ¶ 7 (stipulating that Niantic will confirm compliance with an independent audit).

288. *Id.*

289. *Id.*

290. *Id.*

291. See *supra* text accompanying notes 263–90 (explaining the terms of the settlement).

292. See *supra* text accompanying notes 270–80 (explaining the terms of the settlement as they relate to parks and single-family homes).

293. Final Judgment, *supra* note 94, ¶ 7.

294. *Id.*

295. See Emma Boyle & Vic Hood, *Harry Potter Wizards Unite: Everything You Need to Know*, TECHRADAR (June 21, 2019), <https://www.techradar.com/news/harry-potter-wizards-unite> [<https://perma.cc/4RQC-EBZ3>] (introducing Harry Potter Wizards Unite as a Niantic-created AR game similar to Pokémon Go).

296. *Id.*

297. *Id.*

298. *Id.*

Currently, Niantic has only three location-based AR games (Ingress, Pokémon Go, and Harry Potter), but other developers are anxious to gain a piece of the market.<sup>299</sup> In 2018, Google announced plans to open its mapping technology to game developers.<sup>300</sup> At the time of the announcement, Google was already partnering with developers to launch Jurassic World, Ghostbusters World, and the Walking Dead: Our World.<sup>301</sup> Opening up Google mapping technology will allow developers and popular franchises to reskin the environment and produce location-based games with ease.<sup>302</sup> One of the reasons that Pokémon Go was able to corner the location-based market early was because of Niantic's relationship with Google, which provided access to previously existing and reliable mapping technology.<sup>303</sup> Professor of AR technology, Brian Wassom, envisions a future with factions of players from different gaming universes competing for real-world space associated with AR content.<sup>304</sup> While such a dystopian future remains uncertain, it is certain that real property owners will continue to fight for their right to exclude digital content from their physical property.<sup>305</sup>

#### IV. HOW A COURT MIGHT RULE

##### A. A Plausible Virtual Trespass Theory?

The law of virtual trespass in the context of AR games like Pokémon Go is still unsettled.<sup>306</sup> As of this writing, no jurisdictions have addressed the issue of virtual trespassing.<sup>307</sup> The presiding judge in *In re Pokémon Go Nuisance Litigation*, Judge Donato, believed that the case presented novel issues that were enough to save it from a decision at the motion to dismiss phase.<sup>308</sup> He

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299. Webster, *Competition*, *supra* note 11.

300. Andrew Webster, *Google Is Opening Up Maps So Game Developers Can Create the Next Pokémon Go*, VERGE (Mar. 14, 2018), <https://www.theverge.com/2018/3/14/17114494/google-maps-location-games-jurassic-world-walking-dead> [<https://perma.cc/EF4X-6DC8>].

301. *Id.*

302. *See id.* (hypothesizing that developers can create a fantasy world by, for example, mapping restorative inns on top of known hotel locations).

303. *Supra* text accompanying notes 52–57; *see also The Niantic Story*, *supra* note 53 (explaining Keyhole's mapping technology and Niantic's history with Google).

304. WASSOM, *supra* note 14, at 169.

305. *See* Julie Steinberg, *Pokémon Go Trespass Class Settlement Gets Tentative Nod*, BLOOMBERG L. NEWS (May 3, 2019), <https://news.bloomberglaw.com/product-liability-and-toxics-law/pokemon-go-trespass-settlement-gets-tentative-nod> [<https://perma.cc/4QCN-NAPN>] (reporting that Niantic has a dedicated email inbox for future trespass complaints).

306. Final Judgment, *supra* note 94, ¶ 11 (ordering dismissal of all Plaintiffs' claims including those advancing the novel theory of virtual trespass).

307. *See* Bayles, *supra* note 147.

308. *Id.*

stated: “I don’t think it’s right to turn off the plaintiffs’ tap off at this stage. I think it would be wrong to say of new legal questions, simply because they’re new, that’s enough to stop the case. . . . Novel and open issues cut strongly against dismissal.”<sup>309</sup> While the case was novel enough to survive a motion to dismiss, the Terms of Service and the physical element of trespass at common law strongly favor granting summary judgment for Niantic.<sup>310</sup>

At the summary judgment phase, questions of fact involving the tenuous connection between the game and trespassing, and elements of causation, become more relevant.<sup>311</sup> Physical entry is a well-established element of the tort of trespass.<sup>312</sup> Extending the law to encompass virtual objects defined by coordinates without physical components no longer protects the right to exclude that trespass was designed to protect.<sup>313</sup> The assertion that a virtual object somehow interferes with the right of exclusive possession is irreconcilable with the laws of physics. Virtual objects and AR technology require the end user to possess hardware that enables them to see the augmented content.<sup>314</sup> Anyone without the requisite hardware or software would not even know that a digital object existed in association with their property.<sup>315</sup>

Furthermore, if a property owner did possess the tools necessary to view digital content, no amount of programmed digital content would displace the owner or interfere with their exclusive possession.<sup>316</sup> In fact, Ingress, Pokémon Go, and Harry Potter: Wizards Unite rely on most of the same points.<sup>317</sup> Multiple layers of virtual content can be associated with the same coordinate simultaneously without displacing real or virtual objects.<sup>318</sup> Unlike the physical world, where no two objects can exist in the same space, the virtual world can host infinite objects in the same “place”—only to be revealed with the proper interface or device.

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309. *Id.* (emphasis omitted).

310. *See supra* Part II.C (outlining Niantic’s defenses and judicial treatment of analogous cases).

311. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 902 (1990) (Blackmun, J., dissenting) (“[T]he showing . . . required to overcome a motion for summary judgment is more extensive than that required in the context of a motion to dismiss.”).

312. *DOBBS, supra* note 115, § 52, at 102.

313. *See id.* (explaining that the right to sue for trespass was originally developed to protect the right to physically exclude others).

314. *See* Husain Sumra, *Augmented Reality Explained: What Is AR and What’s Coming Next?*, WAREABLE (Apr. 25, 2018), <https://www.wearable.com/ar/everything-you-need-to-know-about-augmented-reality> [<https://perma.cc/2Q7R-GAYB>] (listing the types of hardware needed for AR to function).

315. *See id.* (noting that AR technology operates on certain devices).

316. *See* Neely, *supra* note 118.

317. *See supra* notes 60–67 (explaining that Niantic built all three games on the same mapping platform).

318. *See* Neely, *supra* note 118 (reasoning that two virtual objects would only conflict if their creators relied on the same platform).

There are also important policy reasons that a court might weigh in favor of retaining the physical-entry element to claims of trespass. AR is a rapidly growing sector of the technology industry.<sup>319</sup> An adverse ruling would have a “chilling effect” on the growth and development of applications involving mapping and geo-location technologies.<sup>320</sup> This is true for any interactive application—not just games like those produced by Niantic.<sup>321</sup> Additionally, developing a solution at common law would remove uniformity from the market and further encumber developers.<sup>322</sup> The long-standing tradition of the physical element, its ease of administrability, and the promotion of AR and geo-location technologies all favor the continuation of a physical element for a claim of trespass and counsel dismissal of the virtual trespass theory.<sup>323</sup> Given these facts, a court should dismiss a claim of virtual trespass and refuse to extend the common law into virtual territory.

### *B. A Plausible Inducement-to-Trespass Theory?*

Inducement-to-trespass theory should likewise fail. Although Niantic has arguably encouraged Trainers to go in the vicinity of private property, it has also made every effort to discourage Trainers from trespassing.<sup>324</sup> Not only has Niantic warned Trainers at login, but the company has also introduced mechanisms and guidelines that will allow new high-quality PokéStops to be introduced while lower-quality PokéStops can be removed.<sup>325</sup> While previously unresponsive, Niantic recently began removing PokéStops that

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319. Paul Ryznar, *AR-riving Soon: Enterprise AR Trends and Technologies to Watch*, FORBES (June 11, 2019), <https://www.forbes.com/sites/forbestechcouncil/2019/06/11/ar-riving-soon-enterprise-ar-trends-and-technologies-to-watch/#1599d8335d49> [<https://perma.cc/G5AC-UJUD>].

320. *Cf. Exploring Augmented Reality: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 114th Cong. 53 (2016) (statement of Stanley Pierre-Louis, Senior Vice President and General Counsel, Entertainment Software Association) (asserting that additional regulations would have a “chilling effect” on the AR industry).

321. *See id.* at 52 (predicting that AR technology will impact sectors other than entertainment, including education, healthcare, and architecture).

322. *See Nimphie*, *supra* note 89 (explaining that a ruling for the plaintiffs would create new risks for actors in the AR market).

323. *Supra* Part II.B (making the case against extending trespass to include virtual intrusion).

324. *See Original Terms of Service*, *supra* note 139 (requiring users to agree that they will not commit trespass or violate other laws while playing the game or encourage others to do so); *see also* Pokémon GO! App, *supra* note 19; Heldman, *supra* note 170 (listing the warnings against trespassing displayed when a player launches the game); *supra* notes 186–92 and accompanying text (describing the game’s range mechanic and explaining that it allows players to interact with game pieces within 40 meters of the player’s location).

325. Pokémon GO! App, *supra* note 19; *see* Heldman, *supra* note 170 (listing the warnings against trespassing displayed when a player launches the game); *see What Makes a High-Quality PokéStop?*, *supra* note 215 (listing the criteria by which proposed PokéStops will be evaluated for inclusion in the game).

created issues for or were reported by private landowners.<sup>326</sup> The Final Settlement terms ensure that Niantic will continue to be responsive to property owners even though the terms do not explicitly guarantee that PokéStops will be removed.<sup>327</sup>

The Terms of Service, User Agreement, and Player Guidelines all demonstrate that Niantic lacks the element of intent required to commit the intentional tort of trespass.<sup>328</sup> Holding Niantic accountable would be against the principles of contract law that allow Niantic to dictate the terms of use for its licensees.<sup>329</sup> The Terms of Service agreement is a legally enforceable document and supports the inference that Niantic does not wish for Trainers to break the law while using the game.<sup>330</sup> And, any claims that the Trainers do not read or are not aware of the Terms of Service are invalid because clickwrap agreements have largely been upheld.<sup>331</sup> The Terms of Service, Player Guidelines, and informational material on Niantic's webpage would all be admissible as evidence to disprove intent as an element of a traditional trespass claim.<sup>332</sup> Therefore, in the event that a new lawsuit arises, Niantic is well positioned to defeat a claim of trespass associated with its Pokémon Go app.

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326. Second Amended Complaint, *supra* note 25, ¶¶ 51–125; Answer, *supra* note 8, ¶¶ 51–125.

327. Final Judgment, *supra* note 94, ¶ 7.

328. RESTATEMENT (SECOND) OF TORTS § 158 (AM. LAW INST. 1965).

329. *See supra* notes 154–65 and accompanying text (highlighting the fact that the user agreements are enforceable and binding on licensees)

330. *See Original Terms of Service*, *supra* note 139 (requiring users to agree that they will not commit trespass or violate other law while playing the game or encourage others to do so); Heldman, *supra* note 170 (listing the warnings against trespassing displayed when a player launches the game).

331. *See supra* notes 151–77 and accompanying text (analyzing the caselaw on the enforceability of software licensing agreements).

332. *See supra* notes 178–92 and accompanying text (observing that courts have taken judicial notice of similar online materials in past cases, thereby signaling the general admissibility of such evidence).



## CONCLUSION

The novel legal issues presented by *In re Pokémon Go Nuisance Litigation* are far from resolved. Abandoning the physical-entry element of trespass in favor of a virtual or an inducement-to-trespass theory would have catastrophic effects on the ability of developers to create and distribute AR content of any kind. This would be particularly chilling in the context of mapping or geo-location software. In the future, courts should avoid extending the common law to constrain technological innovations that do not harm established rights.

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\*. Madison L. Pevey (she/her) is a 2020 J.D. candidate at Vermont Law School with an incomplete Pokédex. She would like to thank Adam Mittermaier for his encouragement and editing prowess, Professor Mark Latham for his Royal guidance in Tort law, and Neil Kucera for opening her eyes to the possibility of a career in law. This Note would not be possible without the unconditional love and support of Shelby Modisett, Jonathan “Georgia” Lollar, Sarah Foster, and Hayley Gildersleeve.

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