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'Pokémon Go' all fun and games until someone's privacy is invaded

Right after the Fourth of July long weekend, New Jersey resident Jeffrey Marder noticed strangers gathering outside his house. Five people knocked on his front door at different times to ask for permission to "catch Pokémon" in his backyard. Marder was not happy.

Unless you've been living under a rock (like some of the mythical Pokémon do) you have no doubt heard of the "Pokémon Go" craze. "Pokémon Go" is a location-based, augmented reality game in which players, known as "trainers," use their smartphones to "catch" Pokémon (mythical creatures) in the players' real-world environment.

The game creates an "augmented reality" by utilizing the GPS, camera and gyroscope features on users' smartphones to superimpose the animated Pokémon images on the real-world images displayed on the phone screens. Using algorithms, the game designates real-world locations as "Pokéstops" and "Pokémon gyms," where players can catch Pokémon, access in-game items and engage with other players.

The game has been lauded for getting people out from in front of their televisions and video games, exploring the outdoors and socializing as well as creating a bonus for local businesses.

Chicago saw what's believed to be the first and one of the largest "Pokémon Go" meetups, when approximately 5,000 people flocked to Millennium Park on July 17 to stalk common and rare Pokémon characters. Launched on July 6, the app is wildly successful. By the end of July, it had been downloaded more than 30 million times and had earned more than \$35 million in revenue.

The game also has sparked a number of privacy concerns.

The placement of Pokéstops and Pokémon gyms on private property has riled property owners who say the unauthorized action is an invasion of privacy. Marder, who had no idea the game had designated his property a hunting ground for Pokémon and wasn't happy about it, filed a class-action lawsuit in a California federal court against Niantic Inc., the developer and publisher of "Pokémon Go"; Pokémon Co., which markets and licenses the Pokémon franchise; and Nintendo Co. Ltd., the publisher of the Pokémon video game series and the world's largest video game company in terms of revenue.

Marder's suit alleges that the game creates a nuisance and unjustly enriched the defendants, while invading property owners' privacy. "Within days of the game's release, it became clear that a number of the GPS coordinates that defendants had designated as Pokéstops and Pokémon gyms were, in fact, on or directly adjacent to private property, and that defendants had placed these Pokéstops and Pokémon gyms without the consent of the properties' owners," Marder's complaint asserts.

In addition to claims of physical invasions of privacy, Niantic is also facing scrutiny and at least one lawsuit alleging violations of players' digital privacy.

Florida resident David Beckman argues that "Pokémon Go" has deceptive and unfair terms of service that caused him unknowingly to grant access to his private information. Beckman sued Niantic in a Florida state court on July 26,

PRIVACY, TECHNOLOGY AND LAW



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alleging the game's terms of service violate the Florida Deceptive and Unfair Trade Practices Act.

According to Beckman's complaint, Niantic creates a user's Pokémon Go account by extracting personal information from Google, Facebook and other third-party accounts. Agreeing to the terms of service grants Niantic a "perpetual" and "irrevocable" license, which will survive cancellation, discontinuation or termination of the user's

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access to Niantic's services, the complaint says.

The amount of data collected by the game prompted the Electronic Privacy Information Center, or EPIC, to ask the Federal Trade Commission to investigate, pointing out in a July 22 letter to the agency that the "Pokémon Go" app initially

granted itself full access to users' Google accounts.

Niantic was able to "view users' contacts; view and send e-mail; view and delete Google Drive documents; access search and map navigation history; and view private photos stored in Google Photos," notes EPIC.

"During this time," EPIC added, "all users' full accounts were at risk of hacking and data breach." Niantic sharply reduced its access in the first software update it issued, EPIC acknowledged, and the company now can view only users' IDs and e-mail addresses associated with their public Google profiles.

EPIC also has suggested that Niantic's relationship with Google should be a cause for concern. Niantic began as an internal startup at Google, where it developed an augmented reality game that paved the way for "Pokémon Go" and was spun off in 2015.

Niantic's founder and CEO, John Hanke, was a co-founder of a company bought by Google to develop Google Earth and, according to EPIC, oversaw the development of Google Maps, Google Earth and Google Street View.

EPIC is suggesting that because Street View raised privacy concerns when it was initially launched, Niantic and "Pokémon Go" should be more heavily scrutinized.

At the federal level, Sen. Al Franken, D-Minn., has expressed concern over a number of privacy-related issues. In a July 12 letter to Hanke, Franken points out that the "Pokémon Go" privacy policy "specifically states that any information collected — including a child's — 'is considered to be a business asset' and will thus be disclosed or transferred to a

third party in the event that Niantic is party to a merger, acquisition or other business transaction.”

Franken requested that Niantic describe how it ensures parents provide “meaningful consent” for their children’s use of the app and the collection of their children’s personal information and how it informs parents about the collection and use of the children’s information.

Franken also seeks a list of current third-party service providers who may be given users’ information and a description of the reasons why Niantic would share or sell such data.

The company responded, in a letter to Franken, that “Niantic uses mobile analytics services to

collect and interpret data about the use of the app, and to receive crash reports,” and that “[f]rom time to time, we also engage third parties to perform marketing, demographic and similar forms of analysis for us on aggregated sets of data.”

The company reported: “Niantic does not and has no plans to sell Pokémon Go user data — aggregated, de-identified or otherwise — to any third party,” and that, in the future, the company may provide “certain reports to (location) sponsors about visits and game actions (such as redeeming a promotion at the location), but these reports will contain aggregated data only.”

In response, Niantic also

assured Franken that the company doesn’t share data about users younger than 13 with the outside companies it uses for its analytics.

The game is receiving similar scrutiny outside the United States. The Federation of German Consumer Organizations, a consumer advocacy group, has suggested that the “Pokémon Go” terms of service give Niantic the right to share user data with third parties and the right to change policies without users’ consent.

And at least one member of the European Parliament has asserted that the game violates European privacy laws, including the current data protection laws and the General Data Protection

Regulation, the EU data privacy regime that goes into effect in 2018, as well as the EU ePrivacy Directive.

The huge popularity of “Pokémon Go” all but ensures that a boom in augmented reality games is on the way. The game’s financial success means imitators will be rushing their own augmented reality apps to market, while designers will be looking for new, innovative ways to build on and improve augmented reality technology.

With so many legislators and consumer advocates closely watching, more government action and more lawsuits — with new causes of action and theories of liability — will undoubtedly be forthcoming.