

Are augmented reality companies shielded from liability?

David R. Singh is counsel in the Silicon Valley office of Weil, Gotshal & Manges.



Alexis Kellert is a litigation associate in the firm's products liability practice group in New York.



Technology-based products and services often develop at a rate faster than legislation can respond. The unexpected - and seemingly overnight - rise in popularity of an augmented reality game, Pokémon Go, has sent legal commentators into a tizzy trying to predict the myriad legal implications. While legislators work to draft laws that would curb "distracted walking" and other user conduct, commentators have weighed in on where the boundaries of liability ought to be drawn. Many have pointed to the claims likely to be asserted, including data and privacy breaches, negligence, and personal injury claims, but few have dared to predict whether such claims will gain traction in American courtrooms. Perhaps emboldened by our defense backgrounds, we dare to gamble on the developers and owners of Pokémon Go (The Pokémon Company, Niantic and Nintendo) and explain why they are likely shielded from many of the anticipated claims.

Augmented reality games allow a user to interact with her surrounding physical world in an indirect manner enhanced with technology-based sound, video and graphics. Augmented reality has both passive and active applications. For example, sports fans watching football at home on television appreciate the augmented reality yellow field markers that players on the actual field do not experience. Pokémon Go represents a more active application whereby users move through the physical world trying to capture small, animated creatures (Pokémon) via their mobile devices.

Warning!

In the case of Pokémon Go, Niantic has the following disclaimer of liability on its privacy policy page that is accessible via its terms of service: "We take appropriate administrative, physical, and electronic measures designed to protect the information that we collect from or about you or your authorized child from accidental or unlawful destruction, accidental loss or unauthorized access, use, modification, interference, or disclosure. Please be aware, however, that no method of transmitting information over the Internet or storing information is completely secure. Accordingly, we cannot guarantee the absolute security of any information."

By disclaiming that the company "cannot guarantee the absolute security of any information" users are put on notice that any information shared through use with the company is at risk of interception from malicious third parties. This type of warning also keeps users safe by emphasizing that they should be circumspect about what types of information they permit access to by playing the game.

Critics of augmented reality games have emphasized the dangers of data collection and sharing that occurs when users download and play these games. However, it is this very same data collection that has, at least in part, enabled those behind Pokémon Go to provide or develop tailored warnings. For example, identifying when the app is launched, a user is prompted with a warning against distracted playing. Similarly, the Pokémon Go developers collect data regarding a user's location using GPS, which can in turn provide information about how fast a user is moving (e.g., whether the game is being played in a moving vehicle). This wealth of information can also arm developers to build in additional prophylactic warnings, such as

warning users not to play while driving. Thus, the more information developers have regarding user behavior, the more likely they are able to adapt warnings to defend against negligence-based claims.

Defeating the Traditional Class

Niantic, the creator of Pokémon Go, continually releases updates and bug fixes. In theory, each update or bug fix could give rise to unique claims. But the fact that continuous updates are being made can also minimize the risk of a class being certified.

Product manufacturers that provide identical offerings to masses of consumers across jurisdictions and time are often vulnerable to consumer class actions. In the ever-changing app-based world, however, few groups of users will interact with the same form of an augmented reality game. For this reason, the factors that courts consider when certifying a class - especially commonality, typicality and predominance - will often not be satisfied. Additionally, because updates and bug fixes may resolve a problem, they can cut off exposure and moot a putative class representative's claims for damages or injunctive relief.

The Threshold Duty

Nuances of the law vary from state to state, but it is typical that where a product could foreseeably harm others, a standard of reasonable care is necessary and a duty will arise. Defining the scope of "reasonable" in an ever-changing world (e.g., augmented reality) can be difficult. When considering a duty of care, courts generally consider whether there was a duty to protect against injuries for someone or something that was not expected (or intended) to be there when the harm occurs. Thus, in tort law, a claim will likely not succeed where a duty did not exist.

In the case of Pokémon Go, a duty is likely owed to any active users of the game. However, the company may have strong defenses that a duty of care was not owed to attenuated third parties.

Conclusion

For the foregoing reasons, app-based developers - like those behind Pokémon Go - will likely defeat most of the claims legal commentators have predicted are forthcoming. It will be interesting to watch how augmented reality games continue to challenge the current legal frameworks, and whether this prediction becomes (augmented) reality.