

Next Pokestop: The Courtroom?

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Pokemon Go

Pokémon Go—the new free-to-play augmented-reality app—is capturing the nation's attention, sending Niantic Inc.'s valuation soaring and players over cliffs, literally and figuratively.

Within the first week of its release, it had already garnered 21 million users in the United States alone. The location-based game has received praise for getting people out of the house and harsh criticism as a nuisance and for its role in accidents. The game raises a litany of legal questions—among them, whether players can hold the game developers at Niantic liable if they walk off cliffs, crash their cars, illegally cross the border or happen upon a land mine while trying to catch 'em all.

Niantic has potential liability for designing a game where it is foreseeable that players may injure themselves as a result of pursuing Pokémon. In the California Supreme Court case of *Weirum v. RKO General*, the court held that a radio station with a large teen audience was not freed from liability for designing a contest which required participants to drive about in search of one of the disc jockeys. The court found the station liable where in the course of one such contest, a minor participant negligently forced another car off the road, killing the car's occupant.

The *Weirum* court determined that it was foreseeable that the contest would lead to injury or death. In addition, in the California case of *Strange v. Entercom Sacramento*, a jury found a radio station liable for wrongful death, where in an ill-conceived contest, people were encouraged to drink huge amounts of water in order to win a Nintendo Wii, resulting in the death of contestant Jennifer Strange. Notably, Strange was not found comparatively negligent for having voluntarily participated in the contest.

However, the vast majority of players are likely unaware of the terms of service that they agreed to when they downloaded the game. These terms of service advise players to remain aware of their surroundings and to play safely. The terms also include an arbitration clause. Pokémon Go's terms of service are of the clickwrap variety and are extremely lengthy. A player can opt out of the arbitration clause within 30 days of agreeing to the game's terms of service and still play. However, players seeking to sue Niantic will have waived their rights to a jury trial and their right to participate as a plaintiff in any class action and will instead be required to go through the arbitration process.

Clickwrap contracts are increasingly being called into question. In the absence of affirmative consent to the terms, courts have expressed reluctance to enforce online arbitration clauses in clickwrap contracts. For example, in the case of *Nguyen v. Barnes & Noble*, the U.S. Court of Appeals for the Ninth Circuit rejected an arbitration clause contained in Barnes & Noble Inc.'s clickwrap contract. Barnes & Noble had placed its terms of use in a hyperlink on its website, but it had not required consumers to affirmatively click on this hyperlink or otherwise affirmatively agree to the terms.

Comparable to Barnes & Noble's terms, Pokémon Go's terms of service do not require players to affirmatively click that they have read or agreed to them. Instead, after players have downloaded the game, they can review the terms by going into "settings" and then clicking on "Terms of Service."

In addition to Pokémon Go's problematic lack of requiring affirmative agreement to its terms, it is important to note that a significant number of Pokémon Go players are minors. A recent SurveyMonkey poll shows that 22 percent of players are between ages 13 and 17. Thus even if courts decide that the terms are enforceable against adults, the game could force courts to face the largely unanswered question of whether minors can be bound to a smartphone application's clickwrap terms of service.

Pokémon Go's terms are governed by the laws of the state of California. Most contracts entered into by an unemancipated minor are voidable and may be disaffirmed until the minor reaches age 18 or soon thereafter. This doctrine was rooted in society's interest in protecting children from being exploited. See, e.g., *Pearson v. Superior Court*. Therefore, potentially, an unemancipated minor who agrees to Pokémon Go's terms of service can disaffirm the contract until he or she turns 18.

However, two main exceptions to the doctrine occur where either: 1) the minor entered into a contract for necessities, or 2) the minor received a benefit from the contract. (See e.g., *Field v. Hughes* (1933) 131 Cal. App. 144, 146; I.B. by and through *Fife v. Facebook* (N.D. Cal., Dec. 20, 2013, No. C 12-1894 CW) 2013 WL 6734239, at *4.) While Pokémon Go is unlikely to be deemed a necessity, it is unclear whether a minor can be said to have received a benefit from it.

In two notable cases that addressed the issue of kids and clickwrap contracts, the courts favored an expansive conception of the benefits exception. In the 2009 decision of *A.V. v. iParadigms*, the Fourth Circuit affirmed the district court's ruling that high school students who had to submit papers to Turnitin (an online service that compared submissions to work in its database and on the internet to check for plagiarism) in order to pass their class had gained a benefit under the clickwrap contract with Turnitin and could not disaffirm the contract based on the defense of infancy to prevent the site from archiving their work.

In *iParadigms*, the district court held that the teens, by contracting with Turnitin, had received the benefit of receiving a grade in their class that allowed them to remain in good standing at school, thus seeming to vastly expand the benefit exception. In the California federal case *C.M.D. v. Facebook* in 2014, the court held that the minor users had entered into a valid contract with Facebook Inc., which allowed the site to use their names and photos in a manner that arguably constituted advertising in exchange for the benefits of being members.

The infancy defense has gained increasing criticism in the digital age, as children are becoming increasingly independent and tech-savvy. However, children are still less cognitively mature than adults, and are unlikely to understand the ramifications of agreements that they enter into. Although the infancy defense has been challenged in cases such as *iParadigms* and *C.M.D.*, Pokémon Go may well present an entirely new challenge to the courts if minors seek to sue the developers of the game.

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