

# AUGMENTED REALITY INCITEMENT: HOW THE CREATOR OF POKÉMON GO, AND THOSE WHO FOLLOW, ARE OPEN TO TORTIOUS LIABILITY

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Imagine a painting consisting of a new-age paint that changes colors randomly and at a faster rate when viewed while moving around the room. It would be questionable to hold the painter liable for a viewer's injuries resulting from tripping while moving around the room. This liability would chill the painter's artistic expression, violating her First Amendment right of free speech, solely based on the materials the painter used. Such a disturbing conclusion may be the result for augmented reality companies because a similar use of augmented reality technology has also led to a significant amount of negligent injuries.<sup>1</sup>

Pokémon GO, the frontrunner in augmented reality applications,<sup>2</sup> utilizes technology which, has led to many casualties.<sup>3</sup> Pokémon GO uses the technology in players' smartphones to layer fictional characters called

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1. Companies that utilize "augmented reality" technology seamlessly blend virtual objects with users' physical surroundings utilizing electronic devices, such as smartphones, as the medium. See Joshua Goldman & John Falcone, *Virtual Reality Doesn't Mean What You Think It Means*, CNET (Mar. 9, 2016, 12:49 PM), <https://www.cnet.com/news/virtual-reality-terminology-vr-vs-ar-vs-360-video/>.

2. See Luke Kawa & Lily Katz, *These Charts Show that Pokemon Go is Already in Decline*, BLOOMBERG MARKETS (Aug. 22, 2016, 10:19 AM), <http://www.bloomberg.com/news/articles/2016-08-22/these-charts-show-that-pokemon-go-is-already-in-decline>. Pokémon GO had 45,000,000 daily users at its peak, has been the top-grossing application on iTunes multiple times, and has made \$600,000,000 in revenue faster than any other mobile application. *Id.*; Eddie Makuch, *Pokémon Go Back to No. 1 on Top-Grossing Chart After Halloween Update*, GAMESTOP (Oct. 28, 2016), <http://www.gamespot.com/articles/pokemon-go-back-to-no-1-on-top-grossing-chart-aft-1100-6444908>; Dean Takahashi, *Pokémon Go is the Fastest Mobile Game to Hit \$600 Million in Revenues*, VENTURE BEAT (Oct. 20, 2016, 6:10 AM), <http://venturebeat.com/2016/10/20/pokemon-go-is-the-fastest-mobile-game-to-hit-600-million-in-revenues/>.

3. See POKÉMON GO DEATH TRACKER, [pokemongodeathtracker.com](http://pokemongodeathtracker.com) (last visited Feb. 24, 2017).

“pokémon” onto a birds-eye-view of the players’ surroundings.<sup>4</sup> Pokémon randomly appear in-game based on the physical characteristics of the players’ environments.<sup>5</sup> Pokémon GO players must constantly look at their phones to adequately prepare themselves to catch pokémon,<sup>6</sup> and Pokémon GO further encourages players to pay attention to their phones by showing the nearby pokémon within the “sightings” feature.<sup>7</sup> The high level of attention required to play Pokémon GO has resulted in players getting shot and killed,<sup>8</sup> falling off a cliff,<sup>9</sup> crashing cars,<sup>10</sup> and numerous other injuries<sup>11</sup> because they were not paying attention to their surroundings.<sup>12</sup> But holding Niantic, the creator of Pokémon GO, liable for these injuries is as absurd as holding the painter liable for injuries suffered by the viewers of her painting. Nonetheless, current case law leaves Niantic and the painter open to liability.<sup>13</sup>

The United States Supreme Court made clear in *Brandenburg v. Ohio* that a speaker may be criminally liable for her speech when she intends to cause “imminent lawless action,” and that action is likely to occur.<sup>14</sup> This preliminary requirement for a speaker to be liable for her speech is known as

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4. Robert Levine, *The Mapping Expert Behind Pokémon Go*, BLOOMBERG (July 21, 2016, 3:10 PM), <http://www.bloomberg.com/news/articles/2016-07-21/the-mapping-expert-behind-pokemon-go>.

5. *Finding and Catching Wild Pokémon*, POKÉMON GO, <https://support.pokemongo.nianticlabs.com/hc/en-us/articles/221957648-Finding-and-Catching-wild-Pok%C3%A9mon> (last visited Nov. 11, 2016).

6. Luke Kerr-Dineen, *Here’s Why Everyone Is So Obsessed with the New “Pokemon Go” App*, USA TODAY SPORTS: FOR THE WIN (July 11, 2016, 12:55 PM), <http://ftw.usatoday.com/2016/07/i-downloaded-the-pokemon-go-app-and-its-actually-really-fun>.

7. Dave Thier, *How “Sightings” Works in “Pokémon GO,”* FORBES (Aug. 11, 2016, 12:03 PM), <http://www.forbes.com/sites/davidthier/2016/08/11/nearby-tracker-tracking-how-sightings-works-in-pokemon-go/#61318b7c6ad3>.

8. *Pokémon Go Player Killed in San Francisco’s Aquatic Park*, CBS SF BAY AREA (Aug. 7, 2016, 10:39 PM), <http://sanfrancisco.cbslocal.com/2016/08/07/man-shot-dead-near-sf-aquatic-park/>.

9. Janissa Delzo, *Men Fall from Cliff Playing Pokémon Go*, CNN (July 16, 2016, 9:43 PM), <http://www.cnn.com/2016/07/15/health/pokemon-go-players-fall-down-cliff/>.

10. *Pokémon Go Player Crashes Car into School While Playing Game*, THE GUARDIAN (July 28, 2016, 18:28 EDT), <https://www.theguardian.com/australia-news/2016/jul/29/pokemon-go-player-crashes-car-into-school-while-playing-game>.

11. See POKÉMON GO DEATH TRACKER, *supra* note 3.

12. See Petr Svab, *Pokemon GO Causes Havoc as Players Trip Over Augmented Reality*, THE EPOCH TIMES (July 15, 2016, 11:29 PM), [http://www.theepochtimes.com/n3/2115472-pokemon-go-causes-havoc-as-players-trip-over-augmented-reality/?utm\\_expvariant=D002\\_02&utm\\_expid=21082672-18.dmPUWQm0QDq0pZBHW0FDfA.1&utm\\_referrer=https%3A%2F%2Fwww.google.com%2F](http://www.theepochtimes.com/n3/2115472-pokemon-go-causes-havoc-as-players-trip-over-augmented-reality/?utm_expvariant=D002_02&utm_expid=21082672-18.dmPUWQm0QDq0pZBHW0FDfA.1&utm_referrer=https%3A%2F%2Fwww.google.com%2F); Kerr-Dineen, *supra* note 6.

13. See *infra* Part II.

14. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

“incitement.”<sup>15</sup> Incitement can be reduced to three elements: (1) intent to incite, (2) imminence of the incited action, and (3) likelihood the incited action will occur.<sup>16</sup> The incitement requirement is intended to allow “abstract advocacy of violence in the advancement of political and social causes, on the one hand, [but not] actual incitement on the other.”<sup>17</sup> Courts following *Brandenburg* have required plaintiffs to prove incitement is present when suing an entertainment company for negligent harm caused by that company’s products.<sup>18</sup> Incitement’s elements are satisfied when applied to new uses of augmented reality technology without fulfilling the spirit of incitement,<sup>19</sup> and thus this note proposes various ways to remedy this disconnection.<sup>20</sup>

Profitable, yet problematic features of Pokémon GO are likely to satisfy the elements of incitement without satisfying the policy underlying this requirement.<sup>21</sup> Namely, Niantic intends to cause negligent harm to Pokémon GO players because it is substantially certain<sup>22</sup> such harm will result. Niantic is substantially certain harm will result from Pokémon GO because Pokémon GO incentivizes players to move around their environments with their attention placed solely on their phones.<sup>23</sup> Moreover, the in-game incentives that encourage players to move have a limited shelf-life and spawn in random locations, and thus the game calls for “imminent” action from the players.<sup>24</sup> And finally, it is common sense that harm will likely result because Pokémon GO demands the players’ attention that would otherwise be focused on the dangers surrounding the players in every-day life.<sup>25</sup> Yet, Pokémon GO, a family-friendly game which encourages exercise, appears to be far less

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15. See generally Rodney A. Smolla, *Should the Brandenburg v. Ohio Incitement Test Apply in Media Violence Tort Cases?*, 27 N. KY. L. REV. 1, 8 (2000).

16. *Id.* at 10.

17. *Id.* at 12-13.

18. In other words, the First Amendment bars a negligence claim for harm caused by an entertainment company’s speech unless the plaintiff proves the incitement standard is satisfied. See *James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 193 (Ct. App. 1988); *Watters v. TSR, Inc.*, 715 F. Supp. 819, 823 (W.D. Ky. 1989); *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264, 1279-81 (D. Colo. 2002). For reference, a claim of negligence against a company using augmented reality like Pokémon GO could, for example, be for the company unreasonably luring players across extremely dangerous environments such as freeways, electrical power plants, and cliffs.

19. See *infra* Part II.

20. See *infra* Part III.

21. See *infra* Part II.

22. Intent is proven when the defendant either desired or was substantially certain the harm would result. See *Garratt v. Dailey*, 279 P.2d 1091, 1093 (Wash. Ct. App. 1955).

23. Svab, *supra* note 12; Kerr-Dineen, *supra* note 6.

24. See *infra* Part II.

25. See Svab, *supra* note 12; Kerr-Dineen, *supra* note 6.

dangerous than a hitman manual, which was not held to incite imminent lawless action.<sup>26</sup> Nonetheless, Niantic's use of augmented reality technology, which requires players to interact with their environment through electronic devices, fulfills incitement's requirements without satisfying the policy underlying the incitement requirement.<sup>27</sup>

This note highlights three potential solutions to provide augmented reality companies with the First Amendment protections they were intended to retain. The first solution would be to deem imminence not satisfied when an augmented reality company uses "fixed" algorithms, which spawn the in-game incentives. The second solution necessitates legislative or judicial action eliminating or reinterpreting the intent element, within the meaning of incitement and as applied to augmented reality products, as proven only when the entertainment company *desired* the harm that resulted. The third solution requires legislative or judicial action reinterpreting incitement's intent element to be proven in the augmented reality context only when a reasonable augmented reality company is "virtually" certain, as opposed to "substantially" certain, that harm would result from its product. As will be discussed, the third solution is the best way of reinvigorating the First Amendment protections driving the incitement requirement in the augmented reality framework.

This note argues that incitement must be harder to prove against augmented reality companies. This change must occur because when incitement is applied to those companies, their artistic expression is likely to be silenced in a way unintended by the creators of the incitement requirement.<sup>28</sup> Part I explains the incitement requirement and the policy behind it. Part II illuminates how key elements of Pokémon GO, which are bound to be reanimated in other augmented reality products, fulfills the incitement requirement but not its policy. Part III shows how to alleviate this contradiction of law and policy.<sup>29</sup>

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26. See *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 267 (4th Cir. 1997) (denying the entertainment defendant's motion for summary judgment).

27. See *infra* Parts I-II.

28. See *infra* Parts I-II.

29. While this note addresses incitement as applied to augmented reality companies, it does not address whether those companies would actually be liable for damages under a tort action. For two discussions on the merits of tortious claims against Pokémon GO, see Mark Talise, *Pokémon GO (Carefully)*, DAILY JOURNAL (Sept. 12, 2016), <http://www.hbblaw.com/files/Uploads/Documents/2016-09-12%20Talise%20Pokemon%20Final%20Daily%20Journal.pdf>; see also Eric Lindenfeld, *Pokemon Go's Product Liability Woes*, LAW 360 (Aug. 3, 2016, 3:56 PM), <https://www.law360.com/articles/824588/pokemon-go-s-product-liability-woes>.

## I. WHAT IS INCITEMENT?

The First Amendment extends broad protection to artistic expression,<sup>30</sup> which includes video games.<sup>31</sup> This protection is so extensive that only the “human creative impulse” dictates what media has First Amendment protection.<sup>32</sup> Yet, artistic expression can be regulated in specific situations.<sup>33</sup>

First Amendment protection does not apply to speech that incites imminent lawless action.<sup>34</sup> Incitement consists of a three prong test.<sup>35</sup> Namely, the incitement requirement is satisfied when the speech is: (1) “intended toward the goal of producing . . . lawless conduct,” (2) that lawless conduct is “imminent,” and (3) that lawless conduct is likely to occur.<sup>36</sup> This test was initially formulated in *Brandenburg v. Ohio*, where the Supreme Court directed its opinion towards speech advocating imminent criminal action.<sup>37</sup> Courts now apply incitement to tortious actions<sup>38</sup> and courts have acknowledged that it is possible for this requisite intent to be inferred from the content of the entertainment product.<sup>39</sup>

Tortious actions, such as negligence, have been brought against entertainment companies for harm allegedly caused by their products.<sup>40</sup> It is difficult to prove artistic expression incites negligent harm.<sup>41</sup> For one, artistic expression is not typically translated in real time<sup>42</sup> and, thus, the speech is not

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30. See Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WIS. L. REV. 221, 244-45 (1987); *Freedom of Expression in the Arts and Entertainment*, ACLU, <https://www.aclu.org/other/freedom-expression-arts-and-entertainment> (last visited Nov. 27, 2016).

31. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011).

32. ACLU, *supra* note 30; see, e.g., *Candy Lab Inc. v. Milwaukee Cty.*, No. 17-CV-569-JPS, 2017 U.S. Dist. LEXIS 113122, at \*2, \*13-18 (E.D. Wis. July 20, 2017) (finding an augmented reality video game similar to Pokémon GO has First Amendment protection).

33. *Government and the Arts*, HARVARD LAW SCHOOL, [http://www.law.harvard.edu/faculty/martin/art\\_law/public\\_art.htm](http://www.law.harvard.edu/faculty/martin/art_law/public_art.htm) (last visited Nov. 27, 2016).

34. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

35. See *id.*

36. *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 193 (Ct. App. 1988).

37. See 395 U.S. at 446-47.

38. See *James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002); *McCullum*, 249 Cal. Rptr. at 193; *Watters v. TSR, Inc.*, 715 F. Supp. 819, 823 (W.D. Ky. 1989); *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d. 1264, 1279-81 (D. Colo. 2002).

39. See *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 265-66 (4th Cir. 1997); *Waller v. Osbourne*, 763 F. Supp. 1144, 1151 (M. D. Ga. 1991); Jennifer Jones, *Evolving Entertainment Technology: Can New Types of Fun Lead to New Types of Liability?*, 13 YALE J. L. & TECH. 188, 212-13 (2011).

40. See *James*, 300 F.3d at 698; *Rice*, 128 F.3d at 265-66; *McCullum*, 249 Cal. Rptr. at 193.

41. See generally ROBERT LIND ET AL., ENTERTAINMENT LAW: LEGAL CONCEPTS & BUSINESS PRACTICES §§ 14:7-14:13 (3d ed. 2015).

42. *Id.* § 14:7.

calling for *imminent* lawless action.<sup>43</sup> Moreover, courts have been hesitant to rule that an entertainment company intended the speech.<sup>44</sup> Incitement acts as defense for speakers from being liable for others' actions resulting from the speaker's speech.<sup>45</sup>

In formulating the incitement requirement, the *Brandenburg* Court designed a high hurdle for plaintiffs to jump in order to obtain relief.<sup>46</sup> Even the racist violence spewed by a KKK member in *Brandenburg* did not rise to the level of incitement, but rather was just "abstract teaching," protected by the First Amendment.<sup>47</sup> If the racist advocacy of violence by the Klansman in *Brandenburg* was not held to incite,<sup>48</sup> one could only imagine what it would take for an entertainment company to incite imminent lawless action.

In fact, virtually all courts considering whether a defendant incited imminent lawless action have held no such incitement was present.<sup>49</sup> Moreover, no video game company has been held to incite<sup>50</sup> and the broader entertainment context contains only two cases indicating incitement was present.<sup>51</sup> Of those two cases, one court denied the entertainment defendant's motion for summary judgment<sup>52</sup> and another court found an entertainment defendant liable for harm but did not even address the incitement requirement.<sup>53</sup> The application of incitement resulting in so few cases where a defendant is found to incite demonstrates the intent behind incitement – to protect artistic expression unless it is outrageously atrocious.<sup>54</sup>

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43. Davidson v. Time Warner, Inc., No. Civ.A. V-94-006, 1997 WL 405907, at \*19-22 (S.D. Tex. Mar. 31, 1997).

44. Robert Firester & Kendall T. Jones, *Catchin' the Heat of the Beat: First Amendment Analysis of Music Claimed to Incite Violent Behavior*, 20 LOY. L.A. ENT. L. REV. 1, 14 (2000).

45. See Jeffrey Haag, *If Words Could Kill: Rethinking Tort Liability in Texas for Media Speech that Incites Dangerous or Illegal Activity*, 30 TEX. TECH L. REV. 1421, 1463-64 (1999).

46. See *id.*

47. *Brandenburg v. Ohio*, 395 U.S. 444, 446-48 (1969). Some of the toxic language included "[t]his is what we are going to do to the niggers," "[b]ury the niggers," "[w]e intend to do our part," and the "[n]igger will have to fight for every inch he gets from now on." *Id.* at 446 n.1.

48. *Id.* at 446-47.

49. Firester & Jones, *supra* note 44, at 11.

50. Lindsay E. Wuller, Note, *Losing the Game: An Analysis of the Brown v. Entertainment Merchants Association Decision and its Ramifications in the Area of "Interactive" Video Games*, 57 ST. LOUIS L.J. 457, 481 (2013).

51. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997); *Weirum v. RKO General, Inc.*, 539 P.2d 36 (1975).

52. See *Rice*, 128 F.3d 233.

53. *Weirum*, 539 P.2d 36.

54. Sufficiently atrocious speech sought to be silenced by applying the incitement requirement is speech that is essentially "preparing a group for violent action and steeling it to such action." See *Noto v. United States*, 367 U.S. 290, 298 (1960).

### A. *Imminence Element of Incitement*

It is difficult to prove artistic expression imminently incited lawless action because artistic expression is typically not transmitted to individuals in real time, but rather recorded.<sup>55</sup> For example, the court in *McCollum v. CBS, Inc.* held that musical lyrics and poetry cannot *imminently* incite action when they are recorded.<sup>56</sup> More specifically, recorded content is “physically and temporarily remote” from consumers, providing for “infinitely variable” conditions where those products could be consumed.<sup>57</sup> The *McCollum* court held that the defendant could not have foreseen the lawless action that occurred because of the remote recording of the lyrics.<sup>58</sup> Thus, imminence is not met when enough time passes between the recording and the consumption of the recording such that the expression within the recording is physically and temporarily remote from the consumption.<sup>59</sup>

Imminence is also not met when a significant amount of time passes between when the entertainment product is first consumed and when the lawless action takes place.<sup>60</sup> For example, the court in *Watters v. TSR, Inc.* held imminence was not present when five years passed between when the deceased consumed the product and when the deceased committed suicide.<sup>61</sup> That court indicated imminence may have been met if the game had been played only “a few times” and the following lawless action resulted “immediately.”<sup>62</sup> But even if imminence is shown, a plaintiff must still prove the entertainment company had the requisite intent.<sup>63</sup>

### B. *Intent Element of Incitement*

A plaintiff must also show the video game manufacturer *intended* to incite imminent lawless action.<sup>64</sup> This tortious intent can be proven if the manufacturer desired the harm or was substantially certain the harm will result from its actions.<sup>65</sup> A tortfeasor is substantially certain that harm will result from her actions when she knows those actions have a high probability

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55. See LIND ET AL., *supra* note 41, § 14:7.

56. See *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 193 (Ct. App. 1988).

57. *Id.* at 194 n.10.

58. *Id.*

59. *Id.* at 194.

60. See *Watters v. TSR, Inc.*, 715 F. Supp. 819, 823 (W.D. Ky. 1989); see also *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 245 (4th Cir. 1997).

61. *Watters*, 715 F. Supp. at 823.

62. *Id.* (emphasis omitted).

63. See *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969).

64. *McCollum*, 249 Cal. Rptr. at 193.

65. *Garratt v. Dailey*, 279 P.2d 1091, 1093 (Wash. Ct. App. 1955).

of harm to others, yet she consciously disregards that likelihood of harm.<sup>66</sup> Thus, a plaintiff proves a video game manufacturer intended to incite imminent lawless action when the plaintiff shows the manufacturer consciously disregarded a high probability of harm.<sup>67</sup> These tort principles are helpful when applied to our hypothetical tortfeasor – the painter.

Does the painter who used new-age paints intend to harm viewers of her work? It can be inferred that she does. This is because the new-age paint provides for a high probability of harm because it incentivizes viewers to move around the room by enriching the viewing experience with quicker changing colors when the viewers do, in fact, move while viewing. Using the paint, despite this obvious high probability of harm, amounts to a conscious disregard for the welfare of the viewers. This demonstrates the painter was substantially certain the harm would result and, thus, intended the harm. While the viewers could simply view the painting while standing still, they would not be experiencing the painter's artistic expression, manifested through her painting and all of its intricacies, to its fullest potential. But even if imminence and intent are shown, the plaintiff must still prove that it is likely that harm would occur.<sup>68</sup>

### C. *Likelihood Element of Incitement*

Even after proving an entertainment company intends to incite imminent unlawful action, that unlawful action must be likely to occur for the incitement requirement to be satisfied.<sup>69</sup> Foreseeability dictates whether it is likely the incited action will occur.<sup>70</sup> While courts have been hesitant to find that an entertainment company could have reasonably foreseen its speech would cause imminent lawless action,<sup>71</sup> new technology calls for new considerations.<sup>72</sup>

<Enter our painter.> She projects artistic expression with materials that encourage viewers to move. It is foreseeable that when those viewers move

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66. *Bradley v. Am. Smelting and Ref. Co.*, 709 P.2d 782, 786 (Wash. 1985).

67. *See McCollum*, 249 Cal. Rptr. at 193; *see also Garratt*, 279 P.2d at 1093; *Bradley*, 709 P.2d at 786.

68. *Brandenburg*, 395 U.S. at 447.

69. *See id.*; *see also Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1276 (D. Colo. 2002).

70. *See Watters v. TSR, Inc.*, 904 F.2d 378, 381 (6th Cir. 1990); *see also Sanders*, 188 F. Supp. 2d at 1271-73, 1281; *Davidson v. Time Warner, Inc.*, No. Civ.A. V-94-006, 1997 WL 405907, at \*13 (S.D. Tex. Mar. 31, 1997).

71. *See Watters*, 904 F.2d at 381; *see also Sanders*, 188 F. Supp. 2d at 1281; *Davidson*, 1997 WL 405907 at \*13.

72. *See, e.g., Riley v. California*, 134 S. Ct. 2473, 2478 (2014).

around the room, they will bump into each other or trip, resulting in cuts, bruises, and maybe even broken bones. Thus, it is likely the incited unlawful action, negligent harm, would result from the painter utilizing the new-age paint. Therefore, the third element of incitement is satisfied for our poor painter.

This marks the final nail crucifying the painter's First Amendment protections. More specifically, the painter would be subject to tortious liability regardless of her First Amendment protections because, as shown above, all three elements of incitement are satisfied. Yet, the broad protections against this liability, through incitement, were not intended to be satisfied according to the medium of expression.<sup>73</sup> The painters' mere use of the technologically advanced paint is difficult to perceive as advocating abstract violence, let alone actual incitement, when it simply encourages movement.<sup>74</sup> This disconnect between the application and spirit of incitement requires a change in the law in order to adapt to new technologies like the painter's new-age paint, or, as will be seen in Part II, augmented reality technology.

## II. WHAT IS POKÉMON GO?

Similar to the painting that incites negligent harm because of the new-age paint, Niantic incites negligent harm through Pokémon GO's augmented reality technology, which uses GPS technology and smartphone interactivity. While Pokémon GO seems to be a family fun game that encourages people to get out and get exercise,<sup>75</sup> the fulfillment of the incitement requirement makes it appear even more dangerous to society than the racist hateful speech projected in *Brandenburg*.<sup>76</sup> Yet, Pokémon GO does not look anywhere near as dangerous as the racist venom spewed by the Klansmen in *Brandenburg*.<sup>77</sup>

Pokémon GO is an application for smartphones that is premised on players hunting down pokémon,<sup>78</sup> which are digital monsters.<sup>79</sup> Players work to fill a digital storage device called a pokédex with each pokémon they

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73. See *Brandenburg*, 395 U.S. at 447-49.

74. Smolla, *supra* note 15, at 12-13.

75. *Pokémon Go Can Boost Health by Making Gamers Exercise, Says GP*, THE GUARDIAN (Aug. 10, 2016), <https://www.theguardian.com/technology/2016/aug/10/pokemon-go-health-players-exercise-obesity-walking>.

76. See *Brandenburg*, 395 U.S. 444.

77. See *id.* at 446.

78. See *Pokémon Go*, POKÉMON, <http://www.pokemon.com/us/pokemon-video-games/pokemon-go/> (last visited Mar. 27, 2017).

79. See *Parent's Guide to Pokémon*, POKÉMON, <http://www.pokemon.com/us/parents-guide/> (last visited Mar. 27, 2017).

successfully catch.<sup>80</sup> Pokémon GO utilizes a birds-eye-view screen, similar to the Google Maps platform, to show the players' surroundings, super-imposed pokémon,<sup>81</sup> and a pokémon tracker showing how close pokémon are and their identities.<sup>82</sup> While a player could remain in one place in hopes that pokémon pop up on the player's screen,<sup>83</sup> players are encouraged to move around their surroundings and catch different pokémon.<sup>84</sup>

The in-game incentives, which encourage players to move around their surroundings, manifest in a few ways.<sup>85</sup> Two key incentives deal with where a player is and whether the player is moving.<sup>86</sup> More specifically, different pokémon can be found in different environments, like at a pier or in a desert.<sup>87</sup> Furthermore, playing the game while moving triggers more pokémon to spawn on a player's screen,<sup>88</sup> allowing those players to potentially fill their pokédex at a faster rate. The "sightings" feature, which shows players what pokémon are nearby, further incentivizes players to move because the pokémon displayed by this tracker may spawn on the players' screens if they take a few steps.<sup>89</sup> Unfortunately, the use of these seemingly harmless aspects have resulted in Pokémon GO players becoming injured while playing the game because players must pay most of their attention to the game instead of their surroundings while moving around their environments.<sup>90</sup>

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80. *Id.*

81. Candy Lab Inc. v. Milwaukee Cty., No. 17-CV-569-JPS, 2017 U.S. Dist. LEXIS 113122, at \*4 (E.D. Wis. July 20, 2017); Robert Levine, *The Mapping Expert Behind Pokémon Go*, BLOOMBERG (July 21, 2016, 3:10 PM), <http://www.bloomberg.com/news/articles/2016-07-21/the-mapping-expert-behind-pok-mon-go>.

82. Thier, *supra* note 7.

83. See, e.g., Megan Willett, *How to Play "Pokémon GO" Without Moving an Inch*, BUSINESS INSIDER (July 11, 2016, 12:38 PM), <http://www.businessinsider.com/play-pokemon-go-without-moving-2016-7>.

84. *Explore!*, POKÉMON GO, <http://www.pokemongo.com/en-us/explore/> (last visited Feb. 25, 2017).

85. There are more types of in-game incentives that encourage a player to move around their surroundings. See Chaim Gartenberg, *How to Play Pokémon Go*, THE VERGE (July 13, 2016, 9:04 AM), <http://www.theverge.com/2016/7/11/12149424/pokemon-go-tips-tricks-explainer-nintendo>. However, this note focuses on two types of in-game incentives because these are the only two of which have limited shelf-lives. As will be seen later in this section, incentives with a limited shelf-life are the most problematic aspect of Pokémon GO in regards to incitement.

86. See *Explore!*, *supra* note 84; Scott Tailford, *15 Crucial Tips & Tricks the Game Doesn't Tell You*, WHAT CULTURE (July 7, 2016), <http://whatculture.com/gaming/pokemon-go-15-crucial-tips-tricks-the-game-doesn-39-t-tell-you?page=9>.

87. See *Explore!*, *supra* note 84.

88. Tailford, *supra* note 86.

89. Thier, *supra* note 7.

90. See *supra* notes 6-12, 25, and accompanying text.

### A. *Imminence Element – Satisfied*

Pokémon GO satisfies the imminence element of incitement because the game actively encourages players to move around their surroundings.<sup>91</sup> Unlike the defendant in *McCollum*, whose musical product did not actively encourage the consumer to act,<sup>92</sup> Pokémon GO calls for *immediate* action from its players by premising the entire game on action – for the players to “go.”<sup>93</sup> Moreover, pokémon are not fixed or recorded like the lyrics were in *McCollum*.<sup>94</sup> Rather, pokémon appear based on a variety of factors, such as where a player is, if the player is moving, and if the player is using in-game features that attract pokémon to the player’s screen.<sup>95</sup> Thus, this expression manifested in Pokémon GO is constantly changing based on a variety of factors<sup>96</sup> rather than the expression in *McCollum*, which was “physically and temporarily remote” from consumers since it was fixed by a recording.<sup>97</sup>

Nonetheless, Niantic may argue that the pokémon are fixed by a recording because pokémon spawn according to algorithms consisting of crowd-sourced information, not a human operator actively drawing each player to peril.<sup>98</sup> While there is an element of mechanical spawning of pokémon, there are still a variety of factors indicating where and when pokémon spawn in an individual player’s game, including the player’s movement or lack thereof.<sup>99</sup> Thus, this algorithm acts just as the paint does in the painting – constantly changing and incentivizing constant movement. Both are fixed in that they are already in existence and encouraging movement, but regardless, Niantic and the painter still find themselves in hot water.

Even if a court were to find that an augmented reality application, like Pokémon GO, does not imminently incite because the expression is

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91. See *Explore!*, *supra* note 84; Matt Kamen, *How to Play Pokémon Go: From Catch Bonuses to Eggs, Pokéstops, Gyms and Buddies*, WIRED (Feb. 17, 2017), <http://www.wired.co.uk/article/how-to-play-pokemon-go-pikachu-tips>.

92. See *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Ct. App. 1988). The argument that lyrics encourage action in that the consumer must, at a minimum, press the play button may, concededly, constitute action. However, this action is far less active than that of Pokémon GO’s, which potentially may draw a player across the entire globe. See Gartenberg, *supra* note 85.

93. See *supra* notes 84-89 and accompanying text.

94. *Finding and Catching Wild Pokemon*, *supra* note 5.

95. See *id.*

96. See *id.*

97. *McCollum*, 249 Cal. Rptr. at 194 n.10.

98. Jimmy Blake, *How Pokemon Go Locations Work (Probably)*, BBC (July 15, 2016), <http://www.bbc.co.uk/newsbeat/article/36803747/how-pokemon-go-locations-work-probably>.

99. See *supra* notes 84-89 and accompanying text.

sufficiently recorded, imminence would *still* be present.<sup>100</sup> The time between when Pokémon GO was first released and when Pokémon GO players started to get injured from playing the game was brief. More specifically, injuries from Pokémon GO are so systematic that within two weeks of the game's release on July 6, 2016,<sup>101</sup> a list of common injuries and how to avoid them emerged.<sup>102</sup> Moreover, within five months of the release date, lawyers capitalized on these common injuries by advertising their services to those injured players.<sup>103</sup> This brief amount of time between when Pokémon GO was released, when the injuries occurred, and when they became normalized through published preventative practices and the legal field accepting them as normal shows imminence is present.<sup>104</sup>

### B. *Intent Element – Satisfied*

Niantic fulfills the requisite intent for incitement because it is substantially certain that harm will result from the augmented reality technology in Pokémon GO. Applications like Pokémon GO require gamers to be so involved in the game that they are not paying attention to their environment and the dangers around them.<sup>105</sup> The creators of Pokémon GO have acknowledged this as evidenced by two in-game warnings telling players to be aware of their surroundings.<sup>106</sup> But even with the warnings, any

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100. As seen above, courts have adopted at least two different ways to show the imminence element is present in regards to the context of speech from an entertainment company. See *supra* Part II.

101. *Pokémon Go*, *supra* note 78.

102. Ashitha Nagesh, *How to Avoid the Five Most Common Pokemon Go Injuries*, METRO (July 19, 2016), <http://metro.co.uk/2016/07/19/how-to-avoid-the-five-most-common-pokemon-go-injuries-6015554/>.

103. *Pokémon Go and Car Accidents*, BARRY P. GOLDBERG (July 19, 2016), <http://barrypgoldberg.com/pokemon-go-car-accidents/>; POKEMON GO LAWYERS, <http://mobilegamelawyers.com/> (last visited Feb. 25, 2017); Alyssa Bereznak, *Lawyers Are Stoked for "Pokémon Go" Cases*, THE RINGER (July 23, 2016), <https://theringer.com/lawyers-are-ready-for-your-pok%C3%A9mon-go-lawsuits-e01a35f3561f#jxxrcrck1>.

104. This is unlike the plaintiff in *Watters* who had been playing the game for five years. See *Watters*, 715 F. Supp. at 823. The Pokémon GO injuries resulted in a much shorter time frame after consumption of the game. That is so even if it is assumed that these injured players began playing the game right when Pokémon GO was released and did not stop playing until injured. Nonetheless, Niantic could argue that the injuries did not occur "immediately" after consumption of the game, as the *Watters* court emphasized must be present for this particular way of showing imminence. See *id.* However, there is insufficient case law to indicate if this claim would succeed.

105. Michael Hirtzer, *Amid Frenzy, Pokemon Go Leads to Robberies and Injuries*, REUTERS (July 12, 2016), <http://www.reuters.com/article/us-nintendo-pokemon-crime-idUSKCN0ZR26K>.

106. George Norman, *12 Important Safety Tips for All Pokemon Go Players*, FIND MY SOFT (Aug. 1, 2016), <http://www.findmysoft.com/news/12-Important-Safety-Tips-for-All-Pokemon-Go-Players/>.

application demanding the same level of attention from its players, as Pokémon GO does, while incentivizing constant movement would be substantially certain that players will give that attention and move.

Furthermore, the on-going Pokémon GO injuries, coupled with Niantic's continued running of the game, demonstrates that Niantic consciously disregards the great risks the game poses.<sup>107</sup> As previously highlighted, Pokémon GO injuries are becoming part of the commonplace.<sup>108</sup> While some injuries have resulted from situations even an attentive player may fall victim to,<sup>109</sup> other injuries have resulted from players simply not paying attention to their surroundings.<sup>110</sup> Any manufacturer of a product whose consumers are suffering injuries on a consistent basis, like Pokémon GO players, would be substantially certain that these harms would continue.<sup>111</sup> Moreover, when Niantic continues to run Pokémon GO without fully addressing these issues, it is then consciously disregarding the substantial risk of these harms, thus intending those harms.

But what is Niantic to do in this situation? Its response was to implement warnings that players must acknowledge before playing the game.<sup>112</sup> From Niantic's perspective, these warnings show that Niantic does not intend the potential harms, but rather Niantic is doing its best to protect players (and

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107. *Bradley v. Am. Smelting and Ref. Co.*, 709 P.2d 782, 786 (Wash. 1985) (finding that tortious intent is present when an actor knows her acts have a high probability of injury to others, yet that actor acts with disregard to those injuries).

108. See *supra* notes 102-05 and accompanying text.

109. For example, multiple robbers have utilized in-game incentives to lure their victims to particular areas where the robbers prey on those victims. See, e.g., Alan Yuhas, *Pokémon Go: Armed Robbers Use Mobile Game to Lure Players into Trap*, THE GUARDIAN (July 11, 2016), <https://www.theguardian.com/technology/2016/jul/10/pokemon-go-armed-robbers-dead-body>; Lisa Fernandez, *Pokémon Go Robberies on the Rise in Berkeley, Pokémon Go Theft Victim in San Francisco Gets Phone Back*, NBC (Aug. 11, 2016, 7:21 AM), <http://www.nbcbayarea.com/news/local/Man-Attacked-Robbed-of-Phone-Passport-Pants-in-San-Francisco-389855041.html>.

110. See, e.g., Delzo, *supra* note 9; *Pokémon Go Player Crashes Car into School While Playing Game*, *supra* note 10; Sheldon Ingram, *Teenager Hit by Car Blames "Pokémon Go,"* PITTSBURGH'S ACTION 4 NEWS (July 13, 2016, 5:59 PM), <http://www.wtae.com/article/teenager-hit-by-car-blames-pokemon-go/7481057>; Svab, *supra* note 12.

111. It is reasonable to assume that an augmented reality company would be substantially certain its game would cause harm to its players if a previous augmented reality company utilizing a substantially similar game caused harm to its players. See *supra* notes 86, 103, 108, and accompanying text. However, even if substantial certainty cannot be imputed from another augmented reality company's conduct, the subsequent company will still fulfill substantial certainty in the same way that the initial company fulfilled that standard. See *infra* notes 117-20, and accompanying text.

112. Norman, *supra* note 106; Breanne L. Heldman, *Pokemon Go Adds New Safety Warnings*, ENTERTAINMENT WEEKLY (July 31, 2016), <http://www.ew.com/article/2016/07/31/pokemon-go-new-safety-warnings>.

itself) from potential harms that simply cannot be avoided.<sup>113</sup> But even if these warnings indicate Niantic does not intend harm, these warnings are wholly ineffective in proving Niantic does not have the requisite intent for incitement.<sup>114</sup>

Pokémon GO's in-game warnings are not a valid defense against a showing of incitement. In-game warnings are relevant for showing a player assumed the risk of a game.<sup>115</sup> However, this is relevant under a tort analysis, which is addressed *after* a finding of incitement.<sup>116</sup> In other words, the warnings may help Niantic, and other companies using similarly problematic augmented reality technology, in avoiding tortious liability, but the warnings are not a defense to incitement.<sup>117</sup>

Learning from incitement's applicability, Niantic and other similarly situated augmented reality companies may tailor where in-game incentives spawn as to minimize liability risks. However, this curating is unlikely. The appeal of Pokémon GO, as well as games that will soon follow in its footsteps, is that it is truly an open-world experience.<sup>118</sup> Namely, players get to hunt down pokémon in-game while exploring new uncharted neighborhoods and other environments not otherwise known to the player.<sup>119</sup> This experience is unlikely to be altered by Niantic, or other augmented reality companies, because limiting the scope of these types of games will also limit their appeal.

But even if augmented reality companies were to limit where their games could be played, it is impracticable for those companies to account for all of life's dangers, regardless of how small the scope of the game is. While it may be easy to not have pokémon spawn on a major freeway, it may not be

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113. For example, broken bones, sprains, and fractures cannot be avoided by Niantic. *See generally* LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 12.04 (Matthew Bender, rev. ed. 2001). Rather, it is the responsibility of the players to be aware of their surroundings. *Id.*

114. *Id.*

115. *See generally* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 18 (AM. LAW INST. 2010).

116. *See generally* LIND ET AL., *supra* note 41, §§ 14:7-14:3.

117. *See generally* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 18 (AM. LAW INST. 2010).

118. Rachel Metz, *Here's Why Pokémon Go is Taking Off*, MIT TECHNOLOGY REVIEW (July 12, 2016), <https://www.technologyreview.com/s/601880/heres-why-pokemon-go-is-taking-off/>.

119. Megan Julia, *Pokémon Go Players Take Their Hunt to the Streets of New York*, N.Y. TIMES (July 11, 2016), [http://www.nytimes.com/2016/07/12/nyregion/pokemon-players-take-their-hunt-to-the-streets-of-new-york.html?utm\\_source=affiliate&utm\\_medium=ls&utm\\_campaign=hL3Qp0zRBOc&utm\\_content=355861&utm\\_term=1&siteID=hL3Qp0zRBOc-8h2nA0z3s0VcAxRVL9.PNw&\\_r=0](http://www.nytimes.com/2016/07/12/nyregion/pokemon-players-take-their-hunt-to-the-streets-of-new-york.html?utm_source=affiliate&utm_medium=ls&utm_campaign=hL3Qp0zRBOc&utm_content=355861&utm_term=1&siteID=hL3Qp0zRBOc-8h2nA0z3s0VcAxRVL9.PNw&_r=0).

as simple to account for cliffs<sup>120</sup> or other natural dangers that are less obvious. Moreover, even if these companies were to account for these less obvious dangers, they will likely slash their success by limiting how extensive their game is. After all, the attention-grabbing part about these games is how you might travel to a new and exciting neighborhood, park, city, state, or country in the hunt of an ultra-rare pokémon.<sup>121</sup> But since it is unlikely these dramatic steps would be taken by an augmented reality company like Niantic, the intent element of incitement will still be satisfied. And since imminence is also met, Pokémon GO incites imminent lawless action if the final element is present – that the incited action is likely to occur.<sup>122</sup>

### C. Likelihood Element – Satisfied

Pokémon GO satisfies incitement’s likelihood element because it is reasonably foreseeable that imminent lawless action would result from the game. It is common sense that negligent harm would result from a game that encourages players to move around while having to take attention away from their surroundings to play the game successfully.<sup>123</sup> While some injuries may have an intervening cause, such as the robberies that have taken place,<sup>124</sup> a large amount of injuries do not have the same or any intervening causes.<sup>125</sup> Yet, it does not seem right that Niantic would be deprived of First Amendment protections because they encourage players to go outside and catch pokémon.

Niantic’s expression in Pokémon GO fulfills the incitement requirement, opening itself to liability for negligent harm. Yet, the speech within Pokémon GO is far from the type of speech contemplated by the *Brandenburg* court that should be chilled and punishable. Rather, the unique technological qualities of Pokémon GO satisfy the incitement requirement. However, the

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120. Delzo, *supra* note 9.

121. Brendan Morrow, “*Pokemon Go*” *Rare Pokemon List: Where to Find Snorlax, Dratini, Lapras & More*, HEAVY (July 19, 2016), <http://heavy.com/games/2016/07/pokemon-go-rare-pokemon-list-location-map-chart-how-to-find-dratini-magnemite-electabuzz-hitmonchan-hitmonlee-chansey-lapras-snorlax-porygon-mew-mewtwo-moltres-zapdos-articulo-ditto>; Sean Gibson, *Pokemon Go: Full List of Pokemon Available to Catch, Including Region-Exclusives and Details on Articuno, Zapdos and Moltres*, THE TELEGRAPH (Sept. 6, 2016), <http://www.telegraph.co.uk/gaming/what-to-play/pokemon-go-full-list-of-original-151-pokemon-available-to-catch/>.

122. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

123. See *supra* notes 6-12, 25 and accompanying text. To be more specific, the lawless action indicated within this context includes a seemingly endless number of situations such as trespassing on private property, suicide by walking onto a freeway, and even train wrecking.

124. See *supra* note 109.

125. See *supra* note 110.

spirit of incitement is not fulfilled because Pokémon GO hardly advocates violence, and does far less that actually incite.<sup>126</sup> First Amendment protections are distorted when incitement is not present when a Klansman says “we are going to . . . [b]ury the niggers,”<sup>127</sup> while incitement is present when a family-style video game using technology allows players to interact with their environments in new ways. This inconsistency demands for a change in the law.<sup>128</sup>

### III. THE SOLUTIONS

The disconnect between the spirit backing the incitement requirement and its application against augmented reality companies using profitable features within Pokémon GO demands a change in the law.<sup>129</sup> Two potential ways of resolving this problem involve altering the imminence element of incitement and altering the intent element of incitement.<sup>130</sup> As will be seen, the intent element is the best element to alter or reinterpret to provide augmented reality companies the First Amendment protections they deserve. If this problem is addressed as this note suggests, companies using augmented reality technology will retain the same First Amendment protections incitement provides for other forms of expression.<sup>131</sup>

#### A. *Imminence Solution*

Augmented reality companies would seemingly have the same First Amendment protections as other entertainment companies if the algorithms spawning in-game incentives would be deemed “recorded” or “fixed.” If the algorithms utilized in augmented reality games are deemed recorded in the

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126. See *Brandenburg*, 395 U.S. at 447-49.

127. See *id.* at 446-48.

128. See *Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992).

129. One major factor for overruling a prior Supreme Court case is present in this scenario. See *id.* at 855 (indicating a reason to overrule precedent, and thus altering the law, is when facts have so changed as to rob a rule of its “significant application or justification”). However, the other three factors listed in *Casey* indicate that *Brandenburg* should not be overruled based on its application to augmented reality technology. See *id.* at 854-55. Thus, a narrow abrogation, or carve-out, of the general rule in found in *Brandenburg* is far more appropriate.

130. While this note does not foreclose the altering of the likelihood element of incitement as a plausible solution, the intent and imminence elements are the aspects of incitement which are most problematic when applying this threshold requirement to augmented reality technology. See *supra* Part II. A solution involving the likelihood element may cause more problems than addressing the problematic elements – like how balancing an unbalanced seesaw with increased weight on one side, opposed to taking weight off the heavier side, causing more pressure on the seesaw.

131. See *supra* note 18 and accompanying text.

same way lyrics were deemed recorded in *McCollum*,<sup>132</sup> imminence will not be automatically satisfied by the use of randomly spawning in-game incentives. This would require plaintiffs to prove that augmented reality companies are more active in how they entice players to move around their surroundings for imminence to be present. For example, if a plaintiff can show a Niantic employee manually inserted each pokémon in Pokémon GO for individual players, imminence would be satisfied.

While this first plausible solution is logical and is familiar to incitement jurisprudence,<sup>133</sup> it may provide an unintentional loophole for augmented reality companies to actually incite players while still avoiding liability. More specifically, if individual algorithms were set for individual players, those algorithms would be deemed sufficiently “fixed” because they are implemented in the augmented reality context, regardless of whether they are targeting players to harm them. For example, Niantic could set an algorithm, spawning pokémon for a single person, drawing her towards major freeways with the desire to harm her. Niantic would still not satisfy the imminence element in this context simply because it records its expression through the use of an algorithm. Thus, this solution may cause additional unintended consequences.

### B. Intent Solutions

The better solution, which provides adequate First Amendment protection to augmented reality companies, is through the intent element of incitement. This note discusses two ways that the intent element can be tailored to appropriately strengthen the incitement safeguard for augmented reality companies. First, to allow intent to be proven only when the augmented reality company *desired* the harm. Second, to reinterpret what it means when an augmented reality company is *substantially* certain that harm will result from its product. As will be seen, the former would be easier to implement, however the latter is more fruitful.

An augmented reality company utilizing the same elements as Pokémon GO in its game automatically satisfies the intent element of incitement because it is substantially certain that harm will result from its game. When an augmented reality company utilizes the planet Earth as its game’s venue while encouraging those players to simultaneously move and focus on their phones, it is substantially certain that harm will result.<sup>134</sup> Moreover, any augmented reality company using the same problematic elements of

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132. *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 194-95 (Ct. App. 1988).

133. *See id.*

134. *See supra* Parts I and II.

Pokémon GO would find itself in a similar situation.<sup>135</sup> Abrogating the rule governing when intent is proven in this context heightens the level of protection augmented reality companies would receive, making it less likely for plaintiffs to prove those companies intended the harm their players endured.

But if incitement's intent can only be proven when an augmented reality company desired the harm, these pit falls in the current incitement standard are immaterial. As discussed earlier, the augmented reality technology used in Pokémon GO is problematic because it proves Niantic is substantially certain that harm will result from the content of its product.<sup>136</sup> Eliminating substantial certainty would require a plaintiff to demonstrate that Niantic, or another company using similarly problematic elements in its game, *desired* the harm that resulted thereby showing that it intended the harm.<sup>137</sup> The result of this change would be that "intent" could not be inferred from Pokémon GO's elements alone. While this approach is appealing in its simplicity and effectiveness, it is not perfect.

By eliminating substantial certainty as a way of proving augmented reality companies intend to incite imminent lawless action, augmented reality companies will have *more* protections than other entertainment companies. Namely, augmented reality companies will retain First Amendment protection when the content of their games demonstrate they are *more* substantially certain that harm will result from their product than Pokémon GO is. For example, a company could have tips that pop-up indicating that rarer incentives can be found in dangerous places like next to live wires in electrical power plants. Absent evidence the company desired players to go in these power plants, an injured player could not show the company intended the harm that resulted from a potential electrocution. This is an absurd result because such areas are so dangerous that harm is not just substantially, but *virtually* certain to result.

Thus, the last alternative is to raise the substantially certain bar to *virtual* certainty. "Virtual certainty" is used in Fourth Amendment jurisprudence as evidenced by the Sixth<sup>138</sup> and Eleventh Circuits.<sup>139</sup> These cases interpreted a way of determining whether a government agent is within the bounds of the private search doctrine, an exception to the Fourth Amendment warrant

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135. See *supra* Parts I and II.

136. See *supra* Part II.

137. See *supra* notes 64-65 and accompanying text.

138. See *United States v. Lichtenberger*, 786 F.3d 478 (6th Cir. 2015).

139. See *United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015).

requirement.<sup>140</sup> Namely, law enforcement does not need a warrant to search electronic containers when it is *virtually certain* that the law enforcement will not learn facts outside what the private searcher learned.<sup>141</sup> Thus, when there is a *mere possibility* that new facts outside the private search can be discovered by the subsequent search, there is a Fourth Amendment violation.<sup>142</sup>

Applying virtual certainty to the augmented reality context, intent for incitement is fulfilled when a reasonable augmented reality company is virtually certain that its consumer will be injured by playing the game. Moreover, an augmented reality company does not intend the harm if there is a *mere possibility* that a player could play the game in the way that the particular plaintiff did without being injured. For example, there is a possibility that a player would not get hurt in searching for pokémon in an active electrical power plant, and thus, intent would not be present. However, there is no possibility for a Pokémon GO player to jump on an electrical coil at an active electrical power plant without injury, and thus intent would be fulfilled if the game advocated for that action.

The virtual certainty approach would make it much harder to prove that an augmented reality company intended to incite. This approach provides augmented reality companies their fundamental First Amendment protection while still remaining susceptible to fulfilling incitement's intent element without a showing the company desired the harm. Thus, reinvigorating the policy concerns that drove incitement's manifestation in the first place.<sup>143</sup> Moreover, adopting this approach would allow courts to find refuge in established jurisprudence opposed to creating carve-outs in concretely established tort law.

#### IV. CONCLUSION

Augmented reality companies using Pokémon GO's basic elements will likely be vulnerable to tortious liability due to the law's failure to adapt to

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140. See *Lichtenberger*, 786 F.3d 478; see also *Sparks*, 806 F.3d at 1334-36; see generally Orin Kerr, *Sixth Circuit Creates Circuit Split on Private Search Doctrine for Computers*, THE WASHINGTON POST (May 20, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/20/sixth-circuit-creates-circuit-split-on-private-search-doctrine-for-computers/?utm\\_term=.a6dbe0888bbd](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/20/sixth-circuit-creates-circuit-split-on-private-search-doctrine-for-computers/?utm_term=.a6dbe0888bbd).

141. See *Lichtenberger*, 786 F.3d at 488-89; see also *Sparks*, 806 F.3d at 1336.

142. *Lichtenberger*, 786 F.3d at 488-489 (finding the government agents exceeded the scope of the private search when they viewed photos on a cellphone that were possibly not viewed by the private searcher).

143. See *supra* notes 45, 54 and accompanying text.

this new technology.<sup>144</sup> These companies would similarly incite players because these companies intend their speech to cause imminent lawless action and that action is likely to result.<sup>145</sup> Yet, the purpose of the incitement, to distinguish punishable speech calling for immediate unlawful action from abstract advocacy of violence, is not carried out in this context.<sup>146</sup>

The law's failure to satisfy both incitement's elements *and* policy, when applied to augmented reality companies, is best remedied in one of three ways.<sup>147</sup> The first way is by deeming the algorithms that spawn in-game incentives in augmented reality games as "fixed." The second and third way is by allowing courts to find an augmented reality company intended to incite imminent lawless action only when the company desired the harm, or when it is "virtually certain," opposed to "substantially certain," that the harm would result.<sup>148</sup> Virtual certainty would require plaintiffs to show that there is no possibility they could play the game without getting injured.<sup>149</sup> This heightened standard would provide augmented reality companies adequate First Amendment protections while still keeping those companies accountable for their speech.<sup>150</sup>

First Amendment jurisprudence and tort law have constantly undergone changes throughout history.<sup>151</sup> Technological advancements demand changes in the law.<sup>152</sup> Augmented reality technology demands a change in the law. The incitement requirement, when applied to the speech within an augmented reality game, must be heightened to protect the artistic expression of this new industry.

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144. *See supra* Part II.

145. *See supra* Part II.

146. *See supra* Part II.

147. *See supra* Part III.

148. *See supra* Part III.

149. *See supra* Part III.

150. *See supra* Part III.

151. Jessica Rettig, *The Struggle for Free Speech in the 21st Century*, U.S. NEWS (Feb. 11, 2010, 10:37 AM) <http://www.usnews.com/opinion/articles/2010/02/11/the-struggle-for-free-speech-in-the-21st-century>; John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021 (2005).

152 *See, e.g.*, *Riley v. California*, 134 S. Ct. 2473 (2014).

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