

PARK PERMIT FOR LOCATION-BASED "POKÉMON GO" GAMES

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The first runaway hit in this augmented reality game genre, Pokémon Go, arrived on the scene in July 2016. "Augmented reality" (AR) refers to the digital enhancement of physical senses, most commonly sight. Mobile games like Pokémon Go use location-sensing technology and AR imagery to create a game world in which players interact with digital content in designated geolocations, called "game stops," to discover virtual creatures that are algorithmically generated in response to players' locations. Pokémon Go quickly became one of the world's most popular mobile game applications. Across the country, the unanticipated popularity of Pokémon Go drew thousands of visitors to public parks and places to play the game.

As described in the case of *Candy Lab Inc. v Milwaukee County*, 2017 U.S. Dist. LEXIS 113122 (E.D. Wis. 7/20/2017), Milwaukee County claimed those playing Pokémon Go had "trashed Milwaukee County parks, stayed after park hours, caused significant traffic congestion, and made excessive noise." Milwaukee County cited reports of inadequate bathrooms for parkgoers, unauthorized vendors in the park, parking violations, and significantly increased traffic congestion. According to the County, the impact of these activities had "ultimately cost the County thousands of dollars in increased police and park maintenance services." In response, the County adopted an ordinance which gave rise to the federal court opinion described herein. The challenged ordinance required those offering AR games to apply for event permits and secure garbage collection, security, and medical services, as well as insurance. Offering a game without a permit could result in a fine or jail time.

TEXAS ROPE 'EM

In March 2017, plaintiff Candy Lab announced the launch of "Texas Rope 'Em," a location-based AR application based on a traditional poker game. Although the storylines are quite different, Texas Rope 'Em has game play elements very similar to Pokémon Go. In particular, both games include location-based and AR elements that require players to travel to real-world locations to play the game. These locations included, at times, public parks owned and maintained by defendant Milwaukee County.

Like Pokémon Go, Candy Lab's mobile application game accesses a mobile phone's rear-facing camera during gameplay and overlays visual elements onto the image of the real world as seen through the camera, including playing cards, which the user can collect. Part of the game involves the user traveling to specific real-world locations to collect these cards, with the aid of the camera images and an in-game map.

Texas Rope 'Em players begin the game with two of the five required playing cards. To build their hands, players must carry their mobile device to game stops indicated on the game map to obtain a new card. Once the player has set his or her hand, the cards are played against the dealer. If the player loses, he or she can try again. Players who beat the dealer win points and, in future versions of the game, will be able to win in-app bonuses or prizes. Candy Lab reports that none of these prizes will be worth money.

POKÉMON GO DISCONTENT?

In response to perceived problems associated with AR game use in public parks, one Milwaukee County supervisor ("Wasserman") proposed Resolution 16-637, which became Section 47.03(3) of the Milwaukee County Code of General Ordinances, to regulate games like Pokémon Go by targeting the companies that publish them.

Multiple supervisors spoke against the ordinance during deliberations, disputing claims about the game's impact. These officials argued that the gamers were not causing disturbances and that it was a positive development to see a diverse new group of people using the parks. They perceived the true driving force behind residents' complaints to be fear of the unknown and umbrage at an unanticipated increase in use of the nearby public parks.

In response, Wasserman emphasized that the ordinance was not directed against Pokémon Go players, but instead sought to regulate the businesses that profit from them. Wasserman believed that the ordinance could help control the growing popularity of games like Pokémon Go and, perhaps more importantly, leverage that popularity to make money for the County, which was required to maintain the parks that were so heavily used during gameplay.

GAME PERMIT ORDINANCE

On February 2, 2017, the Milwaukee County Board adopted an AR game ordinance by a vote of 13-4. On February 20, the Ordinance was published and became effective. The ordinance read, in pertinent part as follows:

(3) Permits required for location-based augmented reality games. Virtual and location-based augmented reality games are not permitted in Milwaukee County Parks except in those areas designated with a permit for such use by the Director of the Department of Parks, Recreation, and Culture [the "DPRC"]. Permits shall be required before any company may introduce a location-based augmented reality game into the Parks, effective January 1, 2017...

Game activity shall only occur during standard park hours, unless otherwise authorized by the DPRC Director, who has the authority to designate special events and activities within the Parks outside of the standard operational hours.

The ordinance did not define the term "location-based augmented reality games," although it implied that Pokémon Go is such a game. The resolution adopting the ordinance (but not the codified language itself) defined "virtual gaming" as follows:

An activity during which a person can experience being in a three-dimensional environment and interact with that environment during a game, and the game typically consists of an artificial world of images and sounds created by a computer that is affected by the actions of a person who is experiencing it; and...[further provides that] Pokémon Go fits the characteristics defined by virtual gaming and is considered as such by the standards of the DPRC.

The park permit application process was described on DPRC's website for companies that create

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and promote such game, including plaintiff Candy Lab, Inc. That process included an internal review by the DPRC to determine the appropriateness of the application based on site selection, protection of rare flora and fauna, personal safety, and the intensity of game activities on park lands.

The DPRC website noted that the "Milwaukee County Parks 2017 Special Event Application" (the "Permit Application") was required for "virtual gaming." The 10-page Permit Application requested a large amount of information about a proposed event, such as estimated attendance, location within the park, event dates and times, a site map, and whether and how the event will be advertised. The Permit Application also required detailed plans for garbage collection, on-site security, and medical services, and warns that applicants will be responsible for these services.

In addition, the Permit Application required applicants to have liability insurance and make it available on-site for inspection. It also required payment of several fees, and reserved to the DPRC the discretion to demand more information. Further, the Permit Application cautions "[s]ubmittal of an application does not automatically grant [an applicant] a permit or confirmation to conduct your planned event." Specifically, the Permit Application warned: "Milwaukee County Parks in its sole discretion may grant, deny, revoke, or suspend any permit, at any time and for any reason."

The ordinance was codified at Section 47.03(3) of the County Municipal Code. Chapter 47 of the Code regulates County "Parks and Parkways." Section 47.29(1) specified the penalty for violation of a provision of that chapter was a fine of not less than \$10.00 nor more than \$200.00. A court could order up to ninety days of jail time if the fine was not paid. Additionally, police officers could arrest violators, and the DPRC could issue citations in addition to the penalties described in the municipal code.

GAME DEVELOPER CHALLENGE

Game Developer, plaintiff Candy Lab, wanted to offer Texas Rope 'Em to County residents to use in Milwaukee County parks, but it did not want to incur the fees associated with obtaining the services necessary to secure a permit. In late March 2017, Candy Lab's CEO, Andrew Couch contacted the County to explain Texas Rope 'Em and confirm whether Candy Lab was required to obtain a Special Event permit before releasing its game to the public. DPRC Special Events Coordinator Ryan Broderick responded: "You must complete the attached Special Event Application and submit with a map of all of the areas that you would like to add virtual gaming stops." Couch inquired a second time to confirm whether "Candy Lab requires a Special Events permit before releasing Texas Rope 'Em to the public." Broderick said: "Yes."

Candy Lab did not apply for a permit. Instead, Candy Lab challenged the ordinance in federal district court as a violation of Candy Lab's First Amendment right to freedom of speech. In so doing, Candy Lab filed a motion for a preliminary injunction to prohibit enforcement of the ordinance. In response, the County filed a motion to dismiss, claiming Candy Lab's complaint had failed to state a claim based on the First Amendment. Moreover, the County reported the ordinance was not currently being enforced against Candy Lab.

VIDEO GAMES PROTECTED SPEECH?

In determining whether the ordinance violated the First Amendment, the federal district court had to consider "whether Texas Rope 'Em counts as protectable speech and how protections for video games under the First Amendment interact with park permitting schemes like that enacted in the Ordinance."

As noted by the federal district court, "video games, like other forms of expression, are entitled to First Amendment protection." The County, however, claimed, "Candy Lab's game does not warrant protection because it does not have sufficient expressive elements such as plot, characters, or dialogue." As characterized by the County, Candy Lab's game was "no more than a pictorial overlay on the real world to facilitate a card game; it communicates no ideas or messages." Moreover, the County claimed no court had extended the First Amendment to AR games.

The federal district court rejected the County's argument that the game lacked expressive content. In so doing, the court quoted the U.S. Supreme Court regarding "the challenges of applying the Constitution to ever-advancing technology." According to the Supreme Court: "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears."

Based on the evidence submitted in this particular instance, the federal district court was "satisfied that Texas Rope 'Em has sufficient expressive content" to warrant First Amendment protection:

The game immerses a player in a Western-themed virtual environment, complete with a Texas-themed game title, color scheme, and graphics, allowing the player to corral favorable playing cards using an animated lasso. The game conveys ideas related to the Wild West and scavenger hunting to lend an air of excitement and novelty to a traditional card game.

Moreover, what Candy Lab's game lacks in compelling literary tropes, it makes up for by employing features distinctive to the medium (such as the player's interaction with the virtual world). These include displaying card locations on a map on the user's phone, which the user must then physically navigate to and "grab" using the phone's camera.

The federal district court, therefore, found "Texas Rope 'Em contains at least the minimum quantum of expression needed to constitute protectable speech."

Having determined that Texas Rope 'Em was entitled to First Amendment protection, the federal district court then considered Candy Lab's claim that the ordinance was an "invalid prior restraint on speech."

CONTENT NEUTRAL?

As noted by the federal district court: "The First Amendment accommodates reasonable restrictions on the time, place, and manner of speech, as long as they are (1) content-neutral, (2) narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels for communication of the information."

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Most significantly, in this particular instance, the court found the ordinance was content neutral because it did not place any restrictions on a particular viewpoint or subject matter. On the contrary, the court found the challenged ordinance could be "interpreted and applied without reference to the subject matter of Texas Rope 'Em—*i.e.*, a Texas-themed poker game." In so doing, the court rejected the notion that the ordinance was content based because a county employee would have to review the content of a game, like Texas Rope 'Em, to determine if a particular AR game fell within the scope of the ordinance.

As characterized by the court, the ordinance merely imposed restrictions on "functionalities" of AR games, specifically "the fact they are location-based." In so doing, the court found the ordinance "covers such games regardless of their content, be it poker, zombie-killing, or Pokémon-catching." As a result, the court concluded the ordinance was content neutral, *i.e.*, not applied "to one game or another because of the topic discussed or the idea or message expressed."

Moreover, in the opinion of the federal district court, "the history and purpose of the Ordinance do not reflect a content-based animus [*i.e.*, hostility] in the County officials who adopted it":

[The County's] aim was to prevent litter, vandalism, traffic, and other problems attendant upon AR games like Pokémon Go. There is no evidence that their decisions were premised on a dislike for Japanese art or culture any more than a desire to curb gambling or show distaste for Western aesthetics.

In short, nowhere in the Ordinance is there an indication that the County sought to agree, disagree, or otherwise express a view on the content of the AR games that might be played in its parks.

While acknowledging the ordinance treated AR games differently from other mobile applications, the court found this distinction was based on "the mode or channel of speech, not its content." As a result, the federal district court concluded the ordinance was content-neutral.

INADEQUATE PROCEDURAL SAFEGUARDS

Despite content-neutral time, place and manner restrictions in the ordinance, the federal district court found the challenged ordinance did not "employ sufficient procedural safeguards to ensure the protection of First Amendment rights." As noted by the court, a content-neutral regulation "may not condition speech on obtaining a license or permit from a government official in that official's boundless discretion":

An acceptable regulation must contain adequate standards to guide the official's decision and render it subject to effective judicial review. Such standards are critical because even in cases where a regulation is content-neutral on its face, placing unbridled discretion in the hands of a government official or agency may result in censorship.

In this particular instance, the court found "no such standards exist" in the challenged ordinance. While the ordinance directed all prospective game publishers to complete the Permit

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Application, it was left to the discretion of county officials to determine "the appropriateness of the application based on site selection, protection of rare flora and fauna, personal safety, and the intensity of game activities on park lands." Most troubling, the court found the Permit Application allowed the reviewing official unbridled discretion in determining the "appropriateness" of a given application. Specifically, the court was concerned by expressed language in the Permit Application which asserted: "Milwaukee County Parks in its sole discretion may grant, deny, revoke, or suspend any permit, at any time and for any reason."

Accordingly, the federal district court held the challenged ordinance was invalid because it vested "unbridled discretion in the hands of a County official." As noted by the court, an ordinance which vests the government with virtually unlimited authority to grant or deny a permit violates the First Amendment's guarantee of free speech.

In addition, the federal district court found the criteria in the ordinance were "too vague to afford adequate protection to free speech interests." While the ordinance mentioned "site selection" as an issue of concern, the court found "no guidance as to which sites within a park might be suitable for playing an AR game," nor what events presented an "unreasonable danger to the health or safety of park users."

Similarly, the court found the challenged ordinance lacked clear and specific standards to guide county officials when considering "protection of rare flora and fauna" or "the intensity of game activities on park lands" when reviewing a permit application. Further, while the ordinance listed "personal safety" as a relevant consideration, the court found "public safety" was too nebulous a concept to pass constitutional muster, as opposed to a "more robust criterion" like "unreasonable danger to the health and safety of park users."

Under these circumstances, the federal district court, therefore, concluded the ordinance had failed to provide "narrowly drawn, reasonable and definite standards to guide the County officials who must apply it."

UNSOPHISTICATED "EVENT" ORDINANCE

The federal district court also expressed serious doubts in determining whether the challenged ordinance was "narrowly tailored to serve the interests it purports to promote." As characterized by the court, the "strangeness and lack of sophistication" in the ordinance was evident in the fact that the ordinance treated "game developers like Candy Lab as though they are trying to hold an 'event' in a Milwaukee County park." As noted by the court, "Candy Lab's video game will not be played at a discrete time or location within a park." As a result, the court found it was "incongruent with how Texas Rope 'Em (or any other mobile game) is played" to require Candy Lab to "secure insurance, portable restrooms, security, clean-up, and provide a timeline for an event."

In the opinion of the federal district court, the County could better address the expressed concerns raised by AR games by "directly regulating the objectionable downstream conduct":

This might include aggressively penalizing gamers who violate park rules or limiting gamers to certain areas of the park. Such measures would assuage the alleged evils visited upon the parks by gamers while stifling less expression than

the Ordinance does.

Moreover, in the opinion of the court, the County's contention that the ordinance "solves the problems presented by AR games" was "irrelevant." While recognizing the government's interest in the "orderly use of its property," the federal district court acknowledged "the government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."

Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency.

In this particular instance, the federal district court found the County had failed to show that a less restrictive measure was insufficient to promote and protect the "orderly use of its property."

ORDINANCE BLOCKED

As a result, at this initial stage of the proceedings, the federal district court found "a reasonable likelihood that Candy Lab will succeed on its claim that the Ordinance violates the First Amendment on its face." The federal district court, therefore, granted Candy Lab's pretrial motion for a preliminary injunction, prohibiting enforcement of the challenged ordinance. The federal district court would then conduct further trial proceedings to determine whether a permanent injunction was warranted.

Given the "strangeness and lack of sophistication" in this unconstitutional ordinance, the County might be expected to avoid the cost of additional litigation and choose to heed the court's suggested alternative, i.e., "aggressively penalizing gamers who violate park rules or limiting gamers to certain areas of the park."

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